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[2019] EWHC 3587 (Fam)
No. FD19P00097

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice,
Queens Building
Strand, London

Monday, 2 December 2019

Before:

THE HONOURABLE MR JUSTICE WILLIAMS

B E T W E E N :

ROHIT BHAYANA	Applicant
- and -	
TANVEER BHAYANA	Respondent

THE APPLICANT appeared in person.

THE RESPONDENT was absent and unrepresented.

J U D G M E N T

MR JUSTICE WILLIAMS:

1 This is my judgment in an application by Dr Rohit Bhayana for the committal of Dr Tanveer Bhayana. The application arises out of orders that have been made by this court for the return of a child "EB" who is now 10 years of age; who was taken to India in March of 2018 and subsequently has been retained there by his mother, the respondent, Dr Tanveer Bhayana.

2 This application is in open court. The applicant, Dr Rohit Bhayana, is here in person representing himself. The respondent, Dr Tanveer Bhayana, is neither present nor represented. When the case commenced this morning and was called on there was no response from Dr Tanveer Bhayana, and prior to commencing giving this judgment at quarter-past-two the case has been called on again outside Court 34 and again there has been no response from Dr Tanveer Bhayana. As I shall come to shortly, her absence does not really come as a surprise, given that she has not attended in person any of the hearings in this case since it commenced.

3 The principal hearing which has taken place was a trial before Mr Teertha Gupta QC sitting as a Deputy High Court Judge, which took place over a number of days in May of this year. At that point the applicant was representing himself; he is a general practitioner I believe, and is articulate. The respondent at that point was represented by solicitors and counsel, and although I don't believe that she attended in person she was represented and I believe gave evidence by video conferencing before Mr Gupta.

4 At the conclusion of that hearing Mr Gupta gave a judgment, in which he concluded that the child had remained habitually resident in England and Wales, notwithstanding his removal or retention in India, and thus when these proceedings commenced on 1 March 2019 he remained habitually resident in this country.

5 He also gave quite detailed consideration to the order which should follow on from that conclusion, and whether there should be an immediate return order or not, and in his judgment he set out the welfare reasons in support of the conclusion that he reached; which was that he ordered the mother to return, or cause the return of the child immediately. That, in due course, converted into the terms of an order which I shall turn to in a moment.

6 Since then the applicant says that the mother has not complied with that order, or indeed with subsequent orders, and so he commenced committal proceedings for her failure to comply with Mr Gupta's return order of May and other orders. Hence, those proceedings have ultimately come before me today, 2 December 2019.

7 The last order made in the proceedings was made by Mr Justice Moor on 22 October 2019. On that occasion he adjourned the application for the respondent's committal in order to make further provision for the service on the respondent of the application, and to make provision for an amended notice of committal to be drafted and served. He made a direction that the matter be listed for today for committal with a time estimate of half a day, and also directed that the issue of sequestration of the mother's assets, in particular a property she owns in Glasgow and the continuation of a freezing injunction, be listed to be determined as well.

8 As I have already said, the respondent is not present in court and the first issue I have to determine is whether I should proceed to hear and determine the committal in her absence. I have regard to the decision of Mr Justice Cobb in *Sanchez v Oboz and Oboz* [2015] EWHC 235 Fam where he set out a useful checklist of matters to consider when determining to proceed in the absence of a respondent, and I have those very much in mind in this case.

9 As I will turn to shortly, it seems to me that the respondent has been served with the relevant documents in sufficient time to prepare for this hearing. No communication as far as I can ascertain from the court file has been received from the respondent explaining her non-attendance. Events over the period since Mr Gupta gave his judgment suggest that she has disengaged from these proceedings and, thus, it is unlikely that an adjournment would secure her attendance at any future hearing. Clearly, as she is not represented it is some disadvantage to her, but on the other hand the applicant would be prejudiced by an adjournment, particularly an adjournment which would be unlikely to result in the respondent's attendance. So, I am satisfied that it is just to consider this committal application in the absence of the respondent.

10 In approaching the committal application, I remind myself that committal is, essentially, a criminal matter and that the burden of proof lies on the applicant and that the standard of proof is the criminal standard. So, in order to find the respondent guilty of contempt of court, I have to be satisfied so that I am sure that she is in wilful breach of an order made by this court in proper form and duly served. The legal principles relating to committal are

a) The contempt which has to be established lies in the disobedience to the order.

b) To have penal consequences, an order needs to be clear on its face as to precisely what it means and precisely what it prohibits or requires to be done. Contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a specified timeframe. The person or persons affected must know with complete precision what it is that they are required to do or abstain from doing. It is not possible to imply terms into an injunction. The first task for the judge hearing an application for committal for alleged breach of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that the order required the defendant to do. That is a question of construction and, thus, a question of law. Ideally the order should be contained in one document but where a subsequent order extends time for compliance it may be acceptable for the obligation to be contained in two orders; the obligation must be clear.

c) Committal proceedings are essentially criminal in nature, even if not classified in our national law as such (see *Benham v United Kingdom* (1996) 22 EHRR 293 at [56], *Ravnsborg v. Sweden* (1994), Series A no. 283-B);

d) The burden of proof lies at all times on the applicant. The presumption of innocence applies (Article 6(2) ECHR)

e) Contempt of court involves a contumelious that is to say a deliberate, disobedience to the order. If it be the case that the accused cannot comply with order then he is not in contempt of court. It is not enough to suspect recalcitrance. It is for the applicant to establish that it was within the power of the defendant to do what the order required. It is not for the defendant to establish that it was not within his power to do it. That burden remains on the applicant throughout but it does not require the applicant to adduce evidence of a particular means of compliance which was available to the accused provided the applicant can satisfy the judge so that he is sure that compliance was possible.

f) Contempt of court must be proved to the criminal standard: that is to say, so that the judge is sure. The judge must determine whether he is sure that the defendant has not done what he was required to do and, if he has not, whether it was within his power to do it. Could he do it? Was he able to do it? These are questions of fact.

g) It is necessary that there be a clear finding to the criminal standard of proof of what it is that the alleged contemnor has done that he should not have done or in this case what it is that he has failed to do when he had the ability to do it. The judge must determine whether the defendant has done what he was required to do and, if he has not, whether it was within his power to do it.
h) If the judge finds the defendant guilty the judgment must set out plainly and clearly (a) the judge's finding of what it is that the defendant has failed to do and (b) the judge's finding that he had the ability to do

13 I also remind myself of the procedural requirements in relation to contempt which have been considered by the courts on a number of occasions, and the rules are set out in FPR 37 and the associated practice direction. The essential nature of the procedural requirements is one of natural justice; that proceedings for contempt must permit the respondent a fair hearing. It also requires that a person should know in advance of any act that they do, whether or not it has penal consequences.

14 It requires that there is complete clarity as to what precisely is the foundation of a breach. It requires that prior to the process commencing the alleged contempt is clearly set out in a document, an application notice which complies with the terms of the rules. It requires that the alleged contempt is properly evidenced. It requires that the respondent is given a proper opportunity, both to participate but to also secure legal representation if they so wish.

15 If there are failures to comply with the procedural requirements the court has discretion to waive defects in the process, provided that it is just so to do. Compliance with the rules, where the subject's liberty is involved, is to be taken seriously, but they are not mandatory and a failure to comply precisely does not render the process irredeemably invalid. The question for the court to ask itself is, whether the alleged contemnor would suffer an injustice or prejudice.

16 So, with that brief summary of the substantive and procedural requirements for committal in mind, I turn to the committal application itself. The notice was originally completed on 24 October 2019 and it alleges that the respondent is in breach of orders of 8 March 2019, 31 May 2019, 1 July 2019 and 4 July 2019.

17 The 8 March 2019 was the order that was originally made at the beginning of the proceedings, but the return obligation within that order was stayed pending the mother's/respondent's challenge to the jurisdiction and so that order itself falls away. It is the three orders of 31 May 2019, 1 July 2019 and 4 July 2019 with which I am concerned.

18 The first order of 31 May 2019 was made following the judgment by Mr Gupta. That order at para.18 provided as follows:

> "The mother shall return, or cause the return of the child "EB" to the jurisdiction of England and Wales within 14 days of the receipt of this order. For the avoidance of doubt, permission is granted to the father to serve the mother by way of a scanned sealed copy of this order by email to tanveerbhayana@hotmail.co.uk."

19 The father's case is that the mother failed to return the child within 14 days of receipt of the order; the date of the receipt being linked to the emailing of the sealed order to her on the 6th of June.

20 The second order is that of 1 July 2019, which provided at para.9 that:

> "The mother shall return, or cause the return of the child "EB" to the jurisdiction of England and Wales immediately and forthwith. For the avoidance doubt, permission is granted to the father to serve the mother by way of CAFCASS sending a copy of this order by email to tanveerbhayana@hotmail.co.uk which can be unsealed in the first instance, followed by a scanned copy of the sealed order when it is produced by the court."

21 The father's case is that this was served on the mother on 3 July in sealed form, and that she did not return the child immediately. Hence, on 4 July 2019 when a further hearing was convened, at which the mother was not present, albeit she had spoken to the CAFCASS officer by then who was appointed to represent the child, she had not returned "EB".

22 So at para.9 of the order of the 4th of July Mr Gupta made a further order that:

> "The mother shall return, or cause the return of the child "EB" to the jurisdiction of England and Wales immediately and forthwith. For the avoidance of doubt permission is granted to the father to serve the mother by way of CAFCASS sending a copy of this order by email to tanveerbhayana@hotmail.co.uk, which can be unsealed in the first instance, followed by a scanned copy of the sealed order when it is produced by the court."

23 All of those three orders contained the standard form warning notice on their face, which warned Dr Bhayana that if she disobeyed the order she may be held to be in contempt of court and may be imprisoned, fined or have her assets seized. As is evident from those orders, and the fact that the mother was not physically present, personal service of those orders was not possible; as is usually a requirement under the rules for committal.

24 The mother's physical whereabouts are unknown, but she has communicated with the applicant, but also with the court and with CAFCASS, from the email which I have read out. So, hence, the orders made provision for her to be served via. those emails, and to the extent that is not strict compliance with the rules on personal service I waive that defect, being satisfied from the communications which I have seen between the respondent and the court, and what is recorded in the court orders, that she has had those orders served upon her.

25 When the matter came before Mr Justice Moor, he heard evidence from three individuals linked to the mother; an old friend of hers, Mr Sandher, and the maternal aunt and uncle. On the basis of what he heard from them, he made provision for the service of the application for committal and the order that he made on the 22nd of October to be served on the mother by serving it on Mr Sandher, but also Mr Dhar and Mrs Kaur.

26 The applicant has produced copies of the photographs of the packets of documents which he sent to the mother, care of those individuals. They bear on the face of the envelope, the signed for delivery receipts and I have seen the printouts from the Royal Mail tracking service which confirms that those packages were signed for by Mr Sandher and signed for by Mrs Kaur.

27 In respect of the service on Mr Sandherin Cheshire, the proof of delivery shows that it was signed for on 26 October this year, having been posted on 25 October 2019. I note that the package weighed a little over a quarter o f a kilogram, which shows that the applicant served a number of documents; he says that included the previous orders and other papers, as well as the amended application notice and the order.

28 The signed for delivery receipt shows that the package to Mr Dhar and Mrs Kaur was signed for by Mrs Kaur at 10.15 on 28 October 2019. Mr Justice Moor had been told that she was in regular contact with the mother, and that the mother was using Mrs Kaur's address as a correspondence address for information in the UK, including correspondence with HMRC.

29 Having seen that evidence, I am satisfied that the committal application and associated documents have been served in accordance with the order of Mr Justice Moor, and that the mother has had the opportunity to have access to those documents; in particular via. Mrs Kaur, who has emailed Mr Bhayana to say that the documents have been forwarded to the mother.

30 In the course of this hearing the applicant has sworn an oath to tell truth, and has given evidence both as to the service of the various orders and the application and has given evidence that the child has not been returned to the UK in breach of those orders. He has also given evidence to me that the respondent is a qualified doctor, who practices as a gynaecologist, and that she has been employed in India as a doctor at times since she was there; that is the evidence that was put before Mr Gupta. She also gave evidence of her means, and it seems to me that on the basis of the evidence that I have heard that she would have available to her the means to buy the tickets which would enable the child and herself to return to this country.

31 The first order of Mr Gupta, as I said, is dated 31 May. That, as I say, had the standard form of warning on it and it was e-mailed to the mother. She clearly received an unsealed copy of it, because she sent an email to the court along with a lengthy statement which appears in the bundle of documents, and she refers in that at para.21 to having received a draft copy of the order on 3 June at 13.10 UK time. The documents which I have seen since record that a sealed copy of the order was sent to the respondent on 6 June 2019 by the father, and thus the obligation contained within para.18 of that order to return the child within 14 days of receipt of the order required a return by 20 June.

32 The father gave evidence that the child had not been returned to his knowledge, or to the knowledge of CAFCASS, by 20 June. I am satisfied, on the evidence that I have heard, that the mother was in a position to return the child to this country. The only reason she has given to the court for not returning is that which she gave to CAFCASS on 2 July, when she said that she could not return to this country as a result of the divorce proceedings she had initiated in India, stating that she has to be personally present for all of the Indian court hearings. That is recorded on the order of 4 July; she having spoken, as I say, with CAFCASS on 2 July.

33 The applicant says that he has never been served with Indian divorce proceedings and so he is unaware of whether, in fact, there are proceedings in India, but even supposing there are the mother's explanation that she is required to be personally present for all of the hearings would not prevent her returning to this country, temporarily, in order to comply with the court orders.

34 I am, therefore, satisfied that in respect of the order of 31 May that it has been properly served, or it has been served on the mother via. the mechanism which Mr Gupta provided for, that she was aware of the obligation to return "EB", that the obligation was clear as to what it required, and it was clear as to the consequences of noncompliance, and I am satisfied, so that I am sure, that the mother has wilfully failed to comply with that order. I, therefore, find her in contempt of court in failing to return "EB" by 20 June 2019.

35 The order of 1 July required the mother to return the child immediately and forthwith. It was served on the mother at 14.34 on 3 July 2019, following it being emailed by the court to the mother at the address provided on 3 July. So, I am satisfied that that order provided a clear obligation to return the child immediately and forthwith. I am satisfied that the order was in proper form and contained the penal notice. I am satisfied that it was served on the mother so as to notify her of the order, and that obligation to return him immediately. I am satisfied so that I am sure that he has not been returned immediately in compliance with that order, and that it was possible, and within the power of the mother, to return him immediately had she chosen to do so. I, therefore, find that she is in contempt of court in respect of her failure to return "EB" immediately following service of that order on her.

36 The 4 July order also placed the mother under an immediate obligation to return the child to the jurisdiction of this court following the service of the order upon her. The mother, of course, had been in contact with CAFCASS on 2 July and had been informed, both of the hearing and was aware of the earlier order. She, in fact, as is recorded on that day told CAFCASS that she had no intention of returning to England with the child, as well as saying that she could not return because of her commitment to attending each hearing in India.

37 The order was, as I say, in proper form with the appropriate penal notice. It was sent to her by CAFCASS on 10 July according to the evidence of the applicant, which I accept. It placed her under an obligation to immediately return the child after receipt on 10 July, and on the applicant's evidence she has failed to come back. I am satisfied, so that I am sure, that she could have come back and that she has not come back. I, therefore, find that she is in contempt court in respect of her failure to immediately return the child to the court, following service of the order of 4 July 2019.

38 That being so, she is in contempt of court in respect of three individual orders of this court. The applicant tells me that his real desire, of course, is for his son to be returned to this country so that he can resume a role parenting him. That he has no wish to see the child's mother incarcerated, but would rather seek to engage in a process by which the child's best interests are put first, with both of them being involved in his life if that is possible. So, he is not of a wish to see the mother incarcerated.

39 The mother clearly is in deliberate breach of three orders of this court. The removal of a child, and the breaking of a relationship between a child and a parent, is a serious and cruel act to inflict on the child, and indeed on the left behind parent. These courts have, historically, viewed such acts as serious contempt of court with serious welfare consequences for the child, but ultimately the court wants to secure the return of the child rather than punishment being at the forefront of its mind.

40 In those circumstances, it seems to me that it is right that the mother should be given a last opportunity to bring "EB" back. So, the sentence that I will impose in respect of these contempts of court will be suspended for a period of 28 days until 30 December 2019, on condition that the mother return the child to the jurisdiction of England and Wales and notify CAFCASS and the father of the date and whereabouts of where the child will return.

41 If the mother fails to comply, the sentence that I will impose in respect of each of the committals, or each of the counts of contempt, is six months imprisonment to run concurrently with each other. They, essentially, amounting to repeated acts of retention, and it seems to me that six months imprisonment is the appropriate sentence, supported both by the principles of punishment and deterrence but also rehabilitation of the mother.

42 So that is the order that I will make; six months imprisonment on each of the three contempts found, to run concurrently and suspended until 30 December on condition that the mother return the child to the jurisdiction.

43 In relation to the other matters before me, having found the mother in contempt of court sequestration is a remedy that is open to the applicant to pursue. However, in order to seek sequestration of the property that the mother owns in Glasgow a statement will need to be filed by the applicant setting out the process by which such a sequestration would be undertaken, naming the proposed sequestrators and the other matters which need to be looked at in terms of sequestration. So I will adjourn the application for a sequestration order until a date to be fixed in 2020, and I will direct that the applicant file a statement in support of that application if he intends to pursue it. The fact that the property itself is in Scotland – a separate jurisdiction will require consideration of how an order of this court could be enforced in Scotland.

44 The freezing injunction which is in place in respect of the property owned by the respondent, the life insurance policies and other matters, I will extend until further order. I will extend the freezing order to provide that if the property of the mother's is sold as a result of repossession action taken by the bank, that the proceeds of sale are subject to the freezing order and are not to be distributed to the mother by the mortgagor upon sale. I will provide that the order may be served upon the bank so that they are aware of it, and it may be served upon the Land Registry.

45 I will also make provision that the freezing order can be served upon any other financial institution in respect of which the mother holds any assets which might be subject to the freezing injunction, to ensure this they are aware of the obligations which prevent the mother dealing with those assets and so that they are able to take whatever steps they need to in order to not place themselves in breach of the order by them taking steps, inadvertently, which allows the mother to breach that injunction

46 So, the matter will need to come back before this court at some point in January. In the event that the child is returned by 30 December, the matter will need to come back at the beginning of the new court sitting in January next year.

47 If the child has not been returned, then the applicant will need to notify the court that the child has not been returned. I will then consider whether the suspension has not been complied with, and that the sentence then falls to be imposed and the committal warrant and other necessary documentation will then be prepared. That is my judgment.

CERTIFICATE

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