



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2048 OF 2023
WITH
INTERIM APPLICATION NO. 4250 OF 2023
IN
WRIT PETITION NO.2048 OF 2023

[REDACTED]

... Petitioner/
Applicant

Versus

[REDACTED]

... Respondent

Mr. Rajiv Patil, Senior Advocate, i/b Mr. Atharva A. Dandekar for
the Petitioner/Applicant.

Mr. Ashutosh Kulkarni, Mr. Ranvir Shekhawat & Mr. Akshay
Kulkarni i/b M/s. Raj Legal , for the Respondent.

CORAM : SHARMILA U. DESHMUKH, J.
DATE : JULY 21, 2023

P.C. :

1. By the impugned interim Order dated 9th February, 2023
passed in Petition no A-250 of 2020, the Family Court at Bandra has
directed the Petitioner husband to hand over the custody of the
minor daughter to the Respondent wife. The impugned order also
gives certain directions as regards the access and visitation by the
Petitioner husband.

2. Shorn of unnecessary details, the facts of the case are as under:

The Petitioner and the Respondent got married as per Hindu vedic rights on 18th February, 2010. On 4th January, 2015, the minor child [REDACTED] was born. The Petitioner husband claims that in the month of November, 2019 he came across chats of the Respondent with her friend which revealed about the Respondent's sexual encounters with various men. It is alleged that the Respondent wife continued her extra marital sexual encounters and had met one of her paramours in a hotel room on 2nd December, 2019 and 5th December, 2019. It is stated that on 7th December, 2019 the Petitioner and his brother informed the parents of the Respondent about her alleged sexual encounters and as the Respondents parents wanted to hear her side of the story, they brought her to their house at Borivali and that since 7th December, 2019 the Respondent wife is staying at her parents house whereas the minor child continue to stay with the Petitioner in the matrimonial house where she has resided since birth. It is stated that there is a confession by the Respondent wife about her extra marital relations, which confession took place in the presence of the family members of the Petitioner and the

Respondent on 8th December, 2019. On 16th January, 2020 the Respondent lodged FIR bearing FIR No. 15 of 2020 with the Vile Parle East Police Station under section 498A, 377, 354, 323, 504 and 506 r/w section 34 of the Indian Penal Code against the Petitioner and his family members. On 22nd January, 2020 the Respondent filed a complaint No. 24/DV/2020 under the Protection of Women from Domestic Violence Act, 2005 (DV Act) along with an Application for interim custody of minor child. On 27th January, 2020 the Petitioner-husband filed Divorce petition No. A-250 of 2020 before the Family Court under section 13(1)(i) and 13(1)(i-a) of the Hindu Marriage Act, 1955 for divorce and permanent custody of minor child [REDACTED].

3. On 2nd January, 2021 the Metropolitan Magistrate in the DV proceedings rejected the Respondent's Interim Custody Application. On 1st February, 2021 the Respondent filed Criminal Appeal No. 17 of 2021 before the Sessions Court challenging the order of the Metropolitan Magistrate. On 19th July, 2021 the Respondent filed the Interim Custody Application below Exhibit-83 before the Family Court in the pending Divorce Petition. On 16th January, 2022 the

Vile Parle East Police Station filed B-summary report in the Respondent's FIR No. 15 of 2020. On 9th May, 2022 the Family Court rejected the Interim Custody Application at Exhibit-83 as against which the Respondent filed Civil Writ Petition No. 9434 of 2022 before this Court and this Court remanded the matter to the Family Court for fresh consideration. On 9th February, 2023 the Family Court passed the impugned Order granting interim custody of [REDACTED] to the Respondent with certain directions as regards the access and visitation right of the Petitioner father. On 16th February, 2023 the present petition had been filed.

3. Heard Mr. Rajiv Patil, learned senior counsel appearing for the Petitioner and Mr. Ashutosh Kulkarni, learned counsel appearing for the Respondent.

4. Mr. Patil, learned senior counsel for the Petitioner submits that considering the grounds on which divorce is sought, the interim custody of the girl child should not be given to the mother. He would submit that the minor child's comfort, safety and convenience is required to be taken into consideration and the minor child's interest would be best served if she remains with the father as his joint family will take care of her needs. He submits that his joint

family consists of his parents, brother, sister-in-law and his niece and that [REDACTED] is extremely attached to his family members. He would further submit that her school which is situated at Vile Parle is 10 minutes away from the matrimonial house and her extra curricular activities are in the vicinity of the matrimonial house. He would submit that after custody was directed to be handed over in the month of February, 2023 the minor child has been miserable and she has made the said fact known to the Petitioner father by writing notes to him mentioning about ill treatment in the Respondents house and that she is feeling miserable and that she wants to stay with the Petitioner. He would further submit that considering the state of mind of [REDACTED], the Petitioner had taken her to a psychiatrist who has concluded that the minor child is very dejected and expressed that either God kills her or she will have to kill herself if she is asked to live with her mother. He would urge that [REDACTED] is extremely comfortable in the Petitioner's house and the atmosphere in the Respondent's house is not conducive to the welfare of the minor child. He laid emphasis that it is the comfort of the child which is of utmost importance.

5. He would further submit that there is sufficient material on record to *prima facie* demonstrate that the Respondent wife has been indulged in extra marital sexual encounters and that she continues the same today also and as such, will have little regard for the welfare and upbringing of the minor child. He would further submit that the

Respondent has leveled false and baseless allegations against the Petitioner and his family members and the falsity is proved by the B summary report filed by the Police. He has pointed out that the Sessions Court on 11th April, 2023 has rejected the Respondent's Appeal seeking to challenge the order of the Metropolitan Magistrate rejecting the prayer for temporary custody of [REDACTED]. He has pointed out the findings of the Sessions Court that the allegations made by the Petitioner are *prima facie* supported by the documents placed on record. He would further contend that the Sessions Court has observed that considering the allegations made at this stage it would not just and proper to hand over the custody of daughter [REDACTED] to the Appellant.

6. In support of his submission he relied upon the following decisions.

1. *Sheila B. Das Vs. P. R. Sugaree [2006) 3 SCC 62]*
2. *Decision of High Court of Karnataka At Bengaluru [in M.F.A.No.2786/2022 (GW)]*
3. *Nil Ratan Kundu v. Abhijit Kundu [2008 (9) Scc 413]*

7. *Per contra*, Mr. Kulkarni, learned counsel appearing for the Respondent wife submits that the order of the Family Court is a well balanced order inasmuch as takes care of the access as well as visitation rights of the father. He pointed out from the directions in

the impugned order that during the week days the child is with the mother on which days the child is busy with her school classes and other extra curricular activities, whereas [REDACTED] is with her father from Friday evening till Sunday evening and in fact, the child spends quality time with the father over the week end. He would further submits that the allegations made in the Divorce Petition as regards her extra marital sexual encounters, at this stage are only allegations and the veracity of the allegations will be decided at the time of trial. He would further submit that [REDACTED] is at per-puberty stage and as such requires the care and attention of her mother who is also a doctor. He would further submit that during the week end access the Petitioner has poisoned the mind of the minor child against the mother and as such, he is indulging in parental alienation with the ulterior motive to alienate the daughter from her mother. He would further submit that during the pendency of the present Writ Petition, in the Criminal Appeal No. 17 of 2021 pending before the Sessions Court the Respondent wife had filed purshis stating that she was not pressing the relief as regards the custody of the child as the same has been granted to her by the Family Court and as such, the Appeal is now restricted only other claims, however the Sessions Court has decided the issue of child's custody by dismissing the Criminal Appeal as against which a review has been filed by the Respondent and the same is pending. He would further submit that the proper care is not being taken by the Petitioner and his family members during the week-end access and in fact, the minor child is being

taken care of by her Nanny. He would submit that the Petitioner's mother is a political figure and is barely available at home. As regards the psychiatrist report of Dr. Dave, he would contend that Dr. Dave is an adult psychiatrist and not a child psychiatrist and the observations of depression and suicidal tendency of the minor child who is just 8 years of old is highly improbable. He would further submit that the Petitioner has relied upon one more certificate issued by Doctor Ashish Deshpande who on his evaluation finds [REDACTED] fit and capable to take a decision in respect of her of place of habitation. He would submit that these two reports as regards the child are contrary and both are required to be discarded. He would further submit that the photographs which are placed on record would show that the child is extremely happy and comfortable with the mother.

8. Considered the submissions and perused the papers and proceedings with the assistance of learned counsels for the parties.

9. Firstly, it needs to be noted that the impugned order is an interlocutory order passed under section 26 of the Hindu Marriage Act 1955 and does not conclusively decide the custody issue. At this stage the veracity of the rivals claims have not been adjudicated on the touchstone of evidence. The sensitive issue which this Court is called upon is to determine whether at the interim stage the access of the child should remain with the mother or the status quo ante is to be restored and the custody be given back to the Petitioner-father.

10. The record indicates that initially the respondent wife has sought modification of the physical access order and prayed for virtual access which was allowed by the Family Court vide order dated 6th February, 2021. Subsequently, an Interim Application for interim custody, regular access of the minor child and access during the festivals and vacations and every birthday was sought. In the Application it was stated that on 7th December, 2019 the Respondent-wife was driven out of her matrimonial house and the Petitioner had forcibly kept the custody of the daughter although the child was only 5 years of age. It was contended that it is only after the orders passed by the Court that the Petitioner started to give physical access of the minor daughter which is also breached on several occasions. It was contended that lot of harm and damages is being caused of the minor daughter by parental alienation and as such, apart from the grant of interim custody, regular week day access and vacation access was sought. The Petitioner has objected to the interim custody by reiterating the allegations of the extra marital sexual encounters. It was further stated in the reply that even during the subsistence of marriage when the child was not well in one or two occasions, the respondent did not return home early and gave priority to meeting her paramours instead of being with her ailing daughter. The application was objected on the ground that even during the vacation access which was granted, the minor child was miserable after she came back and that she was not properly taken

care and that her studies also suffers during the period when she is with the mother.

11. The Family court has taken into consideration the fact that the Petitioner is working as an IT Engineer and admittedly the mother of the Petitioner is politically connected and public figure and as such, it cannot be expected that the grand mother would give sufficient time to the minor daughter. The Family Court considered that the Respondent is now residing in the vicinity of the school of the minor daughter and doing a part time job and during her absence, due to her part time job, her Nanny or her parents can take care of the minor daughter. Considering the age of the child it was observed that she is on the threshold of puberty and undergoing hormonal and physical changes and at this stage of her life it is essential that the child being a girl child remains with her mother who is also doctor and well equipped to take care of the needs of the female child. As regard the allegations made, the Family Court has held that the women may not be a good wife it cannot be said that she could not be a good mother. The Family Court taking into consideration the welfare of the child allowed the application and gave certain direction as regards the access as well as the visitation rights which reads thus:

“1. Application Exh. 83 is partly allowed.

2. The petitioner is directed to handover the interim custody of minor daughter to the respondent immediately; before Marriage Counselor.
3. All other previous orders passed by this Court, in regard to the visitation and access shall be merged in this order and this order shall prevail over all the previous orders of this Court.
4. The interim custody of minor daughter [REDACTED] is kept with the respondent-mother till further order; subject to grant of visitation rights to the petitioner-father.
5. The petitioner father shall have physical access or visitation right of minor child [REDACTED]
6. The respondent mother is directed to give overnight access of minor child [REDACTED] to the petitioner.
7. The petitioner shall pick up the minor child [REDACTED] from the gate of the house of the respondent, on every Friday at about 8.00 p.m. and he shall drop back the minor child on coming Sunday at about 7.00 p.m. at the house of the respondent mother, with prior intimation to the respondent.

8. The respondent is directed to not to remove the minor child from the current school and shall not take admission in any other school without prior permission of this Court.

9. Neither petitioner nor respondent shall remove the child out of jurisdiction of this Court or shall not go abroad with the minor child without prior permission of this Court.

10. Parties have to deposit original passport of the child [REDACTED] if any, in the Court immediately and in that event Nazir to keep the original passport in safe custody, till further order.

11. The petitioner and respondent are at liberty to decide the birthday plan of minor child with the help of marriage counselor.

12. In the event of birthday of minor child the petitioner shall make arrangement in agreed place by both the parties, or at the home of common relative maintaining decorum and without the disturbing the others.

13. The respondent shall give birthday access of the minor child to the petitioner since 9.00 a.m. till 4.00

p.m. and petitioner shall hand over the custody of minor child [REDACTED] to the respondent after 4.00 p.m. by dropping the child at the gate of house of respondent.

14. The respondent is directed to give interim physical custody of minor child to the petitioner during the half of the vacations of the school (50% of vacations i.e. Diwali Vacation, Summer Vacation and Christmas vacation) and petitioner shall hand over the custody of the minor child after said 50% vacation access to the respondent scrupulously.

15. Both the parties shall decide the above 50% vacation access period mutually or with the help of marriage counselor without dragging the child in the dispute.

16. Both the parties are at liberty to draw parental plan with the help of Marriage Counselor.

17. Respondent shall make sure that the child should be available and present for the access to the petitioner as directed above.

18. The respondent shall give telephonic or video call access of the minor child to the petitioner on every

alternate day from Monday to Thursday in between 7.30 p.m. to 8.30 p.m. IST.

19. The respondent shall give compensatory access of the child to the petitioner on the next day, in case of any access missed or denied, without fault of petitioner.

20. The parties are directed to see that their conduct shall not affect on the minor during the access period, in any manner.

21. Both the parties have to decide the pick and drop of the child during the above access period with prior intimation to each other.

22. No order as to costs.”

12. I have interacted with [REDACTED] in chambers and found her to be bright. She has expressed her desire to be with her father. Mr. Patil, learned senior counsel for Petitioner has stressed that the comfort and wishes of the child are required to be taken into consideration. In my view, the comfort of the child is one of the factors to be taken into consideration while considering the welfare of the child. As regards the wishes of the child, it needs to be noted that the child is about 8 years of age. Although I found her to be bright and she has answered all questions put to her, the question is

whether at this tender age the child is blessed with mature thinking so as to make an intelligent preference as regards her welfare. In my view, the answer is in the negative as at this age, the child would normally be driven by her immediate comfort. Her wishes are one of the factors which will be required to be taken into consideration while deciding the present issue.

13. If we compare the family positions of the Petitioner and the Respondent, it appears that the Petitioner is residing in a joint family with his parents, his brother, sister in law and niece, whereas the Respondent is residing with her parents and also has domestic help. It is contended by the Petitioner that his joint family will take care of the needs of the child in a better manner. In this regard if we consider the averments in paragraph 80 of Petition No A-250 of 2020 giving details of the routine of the child, it indicates that in the morning it is the Petitioner father who gives her bath, breakfast and dresses her for school. Thereafter her nanny picks [REDACTED] from school and after having her lunch, she plays with her cousin or her friends. In the evening [REDACTED] is playing in the compound of the building or nanny takes her to the park. The nanny escorts her to her classes and after the Petitioner returns from work, he plays with [REDACTED], feeds her dinner and tucks her in bed around 9 pm and on some days when he returns early the Petitioner takes [REDACTED] to parks or play areas. This narration does not disclose that any of the family members of the joint family of the Petitioner actively participates in taking care of the

day to day needs of [REDACTED]. On the contrary it indicates that the child is with the nanny throughout the day. It is the Petitioner who ensures that the child gets ready and drops her to school and after he returns in the evening it is the Petitioner who feeds her dinner and puts her to bed. On the other hand it is an admitted position that the Respondent is employed part time and as such her presence is assured to take care of not only the day to day needs of [REDACTED] but to ensure that her academic pursuits are not compromised.

14. In his reply to the application seeking interim custody, the objection of the Petitioner is that [REDACTED] is unhappy and resists going for access and that in order to safeguard the moral and ethical welfare of [REDACTED], she should be spending minimum possible time with the Respondent. It is not the case of the Petitioner that during the subsistence of marriage, [REDACTED] was being single handedly looked after by the Petitioner and was neglected by the Respondent. The Petitioner narrates a stray incident of 12th August, 2019 to show that the Respondent did not return from work early when [REDACTED] was not well and alleges that the Respondent was spending time with her paramour. The Petitioner has reiterated the allegations of adultery to drive home the point that the moral and ethical welfare of the child cannot be safeguarded if the custody is handed to the Respondent. It may be borne in mind that at present the issue is as regards the interim custody and the allegations of adultery are not conclusively established. At this stage the Petitioner is not able to demonstrate

that custody of [REDACTED] with her mother has been detrimental to the moral and ethical welfare of the child. The minor child is with the Petitioner during weekends since February, 2023 and no submissions have been advanced as regards negative moral impact on the child during the subsistence of the custody with the mother. On the other hand during interaction I found the child to be well behaved. It is not anybody's case that the educational progress of the minor child is hampered or that the Respondent has been negligent in taking care of [REDACTED]

15. Much emphasis has been laid on the child being miserable and desiring to be with the father and complaints as regards the ill-treatment being made by the child. It needs to be noted that the child was with the Petitioner since December, 2019 and the custody has been handed over to the mother in February, 2023. It will require some time for the connectivity to be established between the mother and child and in my opinion, it is necessary to restore the bond between the child and the mother to ensure that there is no parental alienation. The child has been shifted from her father's house, where she was residing since her birth to her mothers house and it will take some time for the child to adapt to the new surroundings. During my interaction with [REDACTED], one or two incidents were narrated by her for not wanting to reside with her mother. From the point of view of the child, the said incidents are major incidents and as such it appears that the notes may have been

written to the father. However the said incidents can be termed as act of disciplining the child. It is but obvious that at the tender age of 8 years, any act of discipline would be resisted and complaints would be made. This a normal behavior of a child even in those household where the parents are living together. A complaint by the child against one of the parents to the other parent is a normal conduct of children and the same cannot be elevated to such an extent as to restore the status quo ante.

16. In so far as the rejection of the interim custody in DV proceedings and dismissal of the Appeal is concerned, it will be worthwhile to note that this Court vide order dated 16th December, 2022 passed in Writ Petition No 9434 of 2022 filed against the first order of the Family Court rejecting the application filed for interim custody has observed that in the DV proceedings no application was filed for interim custody of the child and based on the letter given by protection officer, the issue of custody was decided. This Court held that the Family Court has vast jurisdiction to decide the issue of custody of child and order passed by Family Court would prevail.

17. As regards the reliance which has been placed on the psychiatrist report, there are two conflicting reports, apart from the fact that the same was done at the instance of the Petitioner father with private doctors and not with the joint consent of the parties and by Government psychiatrist and counseling center and at this stage I am not inclined to consider the said reports.

18. It is now well settled position in law that while considering the issue of custody of the minor, the paramount consideration is the welfare of the minor. Viewed from that aspect, considering the age and gender of the child and taking into consideration the facts of the case, in my view, at this stage, it is in the welfare of the child that the interim custody is granted to the mother. As indicated above the comfort of the child is one aspect of the welfare of the child. The word “Welfare” is to be understood in the widest sense taking within its fold the physical and mental well being, health, comfort and overall social and moral development of the child. All that is essential for a well balanced upbringing of the child amounts to welfare of the child.

19. It needs to be borne in mind that the girl child aged about 8 years would be undergoing hormonal changes and also physical changes and as such much care has to be taken during this phase of growth of the girl child and the paternal grand mother or the paternal aunt cannot be a substitute to the mother who is also a qualified doctor. During this phase of life, the girl child requires care and attention of a women who would be better equipped to understand the process of transformation which the girl child will undergo and as such, the mother at this stage is preferred against the father.

20. It is no doubt that in the present case, both the parents are extremely attached to the child and wants her well-being and therefore, it is expected of both the parents that they work towards providing an amiable environment for [REDACTED] so that she grows up into a well balanced and healthy child.

21. Apart from the allegations as regards the mood swings of the child and reluctance to meet the mother there is no reason which has been brought to fore so as to set aside the order of interim custody which has been handed over to the mother. The only serious allegations are about her adulterous relationship which at this stage are only allegations and is to be proved during the evidence. In that context if the Respondent can be provided with weekend overnight access and visitation rights, then it does not appeal to reason that the same person cannot be granted interim custody of the child.

22. Before considering the decisions relied upon by the parties, it may be noted that the common thread that runs through all these decisions is that it is the welfare of the child which is of paramount consideration. In my opinion, in matters regarding custody of the child, each case is required to be decided on its own merits as little change in facts may make a sea of difference. Turning to the decision of the Apex Court in the case *of Sheila B. Das Vs. P. R. Sugasree*, in that case the Family Court had directed to the mother to hand over the custody of the child, who was at per-puberty stage, to the father which was upheld by the High Court. In that case an application

came to be filed by the mother of the child under section 7 and 25 of the Guardians and Ward Act which came to be dismissed as against which the SLP was filed before the Apex Court. In that case, the contention was that the minor girl was of tender age and the appellant there in who was also a doctor would be better equipped to take care of the child. The Apex Court reiterated the well settled principle that the paramount consideration in such cases was the interest and well-being of the minor child. The Apex Court in facts of that case observed that after obtaining the custody of the minor child the respondent does not appear to have neglected the minor and to look after her needs and the child will happy in the respondents company. The Apex court also considered that no allegation other than the fathers purported apathy toward the minor has been leveled against the respondent. In that facts of the case, the Apex court held that the interest of the minor child would be best served if she remains with the father with the sufficient access to the respondent mother. In my reading of the said decision, the child was given in the custody of the father as there was no allegations as against the father that he was ineligible to look after the minor child and as regards the girl child attaining age of puberty the respondent father there in had arranged for his elder sister to come and stay with her and to attend the minor child during her. In the facts of the present case, apart from the allegations of adultery which has been made there is no allegation that the respondent mother has been negligent in taking care of the child after the custody was handed

over. In my opinion, the issue has to be decided in facts of each case and there cannot be in strait jacket formula as regards the custody of the child.

23. As regards the decision in the case of Karnataka High Court the guardianship of the minor child was given to the father, after coming to a finding, that the mother appears to have given more priorities to an illicit relationship. As indicated above it is only in the facts and circumstances of each case that the issue as regards the custody of the child can be decided. In the present case, apart from one or two stay incidents which took place during the subsistence of the marriage there is no material produced on record to demonstrate that even after the custody was shifted from the petitioner father to the respondent mother, the respondent mother has neglected the child and priority was given to her alleged illicit relationship.

24. As regards the decision in the case of *Nil Ratan Kundu v. Abhijit Kundu* the said decision has been pressed in service to support the proposition that if the minor is old enough to form an intelligent preference the Court may consider that preference. In that case the Apex Court was considering and Appeal Filed against the Judgment and order passed against the guardianship petition and as such the entire evidence was before the Court. The Apex Court has considered the various provisions of the guardianship Act and the decisions on the subject and has held on overall considerations that the courts were not justified in granting the custody of the child

to the respondent father without applying relevant well settled principles. However, in my view, the wishes of the child can be taken into consideration but cannot form the solitary reason for grant of custody.

25. The Family Court while granting the interim custody to the minor daughter has taken care to ensure that the visitation and access rights of the Petitioner-father are well protected inasmuch as on every Friday at about 8.00 p.m. the Petitioner father picks up the child and drops the child on Sunday at 7.00 p.m. The Family Court has also given well directions as regards the per day access and 50% of the vacation access of the child as also virtual access on every alternate day from Monday to Thursday between 7.30 p.m. to 8.30 p.m. Considering the above directions the Family Court has balanced the rights of both the parties and have also ensured that the directions are in-consonance with the overall welfare of the child. It needs to be borne in mind that the present arrangement is by way of an interim arrangement during the pendency of the proceeding and the family Court after consideration of the evidence on record may make appropriate modification as deems fit as regards the custody of the child considering the welfare of the child. A word of caution may be sounded to the Respondent mother that it is expected that the Respondent mother will go that extra mile to ensure that the bond between the child and mother is strengthened.

26. In view there of there is no merit in the Writ Petition. The Writ Petition stands dismissed. Needless to clarify that the observations made herein are only for the purpose of deciding the present Petition and the Family Court is required to adjudicate the issues on its own merits and uninfluenced by the observations made in the present order.

27. The Interim application was preferred seeking the relief of interaction with the child so as to ascertain her wishes. As the same was done in the present case, nothing survives for further consideration and is disposed of.

(SHARMILA U. DESHMUKH, J.)