



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4060 OF 2024

Amol
Diliprao
Nawale

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Ms. Indira Jaising, Senior Advocate a/w. Adv. Chitra Phadke, Adv.
Atharva Dandekar, Adv. Hitendra Parab for the Petitioner.

Adv. Ashutosh Kulkarni a/w. Adv. Akshay Kulkarni for Respondent.

CORAM : RAJESH S. PATIL, J.

RESERVED ON : 12 APRIL 2024

PRONOUNCED ON 19 APRIL 2024

PC.:

1. This Writ Petition is filed by the Husband, challenging the judgment and order dated 27 February 2024, passed by the Judge of the Family Court, Mumbai, thereby dismissing the husband application (exhibit-147) in Divorce Petition filed by the husband (exhibit-147) was filed by the husband seeking temporary custody of minor daughter aged 9 years now.

2. The Petitioner (husband) and the respondent (wife) got married on 18 February 2010. For the convenience, the Petitioner is referred as “Husband” and Respondent is referred as “wife”. The husband is an I.T. profession and the wife is a doctor by profession. On 4 January 2015 daughter was born out of the wedlock of the petitioner and respondent.

3. On 7 December 2019 as per the case of wife, she was driven out of the matrimonial house and the custody of the daughter was not given to her. According to the husband, the wife on her own had left the matrimonial house.

4. A police complaint was lodged by the wife against the husband on 2 January 2020. Thereafter, as per the case of the wife, she and her father were assaulted by the husband, the minor daughter was snatched.

5. On 16 January 2020 the wife lodged F.I.R. 2020 against the husband and his family members, under Section 498-A, 377, 354, 323, 506, 504 read with Section 34 of the Indian Penal Code, 1860.

6. The wife on 22 January 2020 filed a complaint under Domestic Violence Act, before the JMFC, at Boriwali. So also, an application was filed for seeking interim custody of the minor daughter.

7. Subsequently, on 27 January 2020 the husband filed divorce petition under Section 13 (1) (ia) of the Hindu Marriage Act, 1955 before the Family Court at Mumbai, against the wife. In the month of March 2020 the pandemic started and virtually everything was closed down. The custody of minor daughter remained with the husband. On 1 September 2020 the police filed “B” summary in the police complaint filed by the wife. The said order of “B” summary was subsequently challenged via Protest Petition by the wife. On 9 November 2020 the wife filed her written statement as well as counter-claim in the divorce proceedings filed by the husband before the Family Court at Bandra Mumbai.

8. The wife thereafter made an application before the Family Court for granting interim custody of minor daughter during the pendency of the divorce petition filed by the husband. And a prayer of access to minor daughter was sought. By an order dated 12 February 2020 the Family Court, Bandra Mumbai granted access to wife, for four days of minor daughter from 1.00 p.m. to 6.00 p.m.

9. By further order dated 18 May 2020, the Family Court, Bandra Mumbai passed an order thereby granting virtual access of minor daughter, from 7.00 p.m. to 8.00 p.m. on alternate days.

10. On 4 August 2020 the Family Court, Bandra Mumbai did not grant physical access due to lock down, however, the virtual access has granted by the Court by an order dated 18 May 2020 continued, and it was directed that the said virtual access should be recorded.

11. The Family Court on 9 November 2020 granted physical access of minor daughter to wife, from 14 November 2020 to 17 November 2020. The said order was passed by consent, as it was Diwali Vacation.

12. Thereafter, on 19 December 2020 the Family Court passed an order, with regard to Christmas Vacation, allowing the wife to have physical vacation of minor daughter from 24 December 2020 to 1 June 2021. And so also access on 4 January 2021, on birthday of minor daughter.

13. On 6 February 2021 the Family Court Mumbai, passed an order thereby granting weekend access of minor daughter on 2nd and 4th Friday to Sunday, of every month to the wife, and the virtual access of alternate days, was cancelled as the husband had objected to it on the ground that the virtual access was stressful for the daughter.

14. Since the virtual access cancelled, the wife challenged the order dated 6 February 2021, passed by the Family Court, Mumbai by way of Writ Petition No.962 of 2021 before this Court. In the meanwhile, the wife filed an application (Exhibit 83) for grant of interim custody, before the Family Court Mumbai, Consequently, the wife withdrew the Writ Petition No.962 of 2021,

with liberty to persue the application (Exhibit-83) before the Family Court.

15. On 17 May 2021 the Family Court Mumbai granted summer vacation access of daughter, to wife for the period from 18 May 2021 to 31 May 2021.

16. Thereafter, on 9 May 2022 the Family Court Mumbai by its order rejected the interim custody application filed by the wife, however, the summer vacation access was handed over to the wife from 13 May 2022 to 27 May 2022. The said order passed by the Family Court challenged by way of a Writ petition NO. 9434 of 2022 filed by the wife. After hearing of both the parties, this Court by its order dated 16 December 2022, allowed the Writ Petition of the wife, thereby remanding the matter back to the Family Court, to decide the interim custody application (exhibit-83) afresh.

17. On remand, the Family Court Bandra Mumbai, heard both the parties and by its order dated 9 February 2023, granted interim custody of daughter, to the wife, and every weekend physical access to the husband, with alternate day virtual/telephonically access to the husband. The said order dated 9 February 2023 passed by the Family Court was challenged by the husband by way of Writ Petition No.2048 of 2023 filed on 16 February 2023. This Court thereafter did not pass any interim orders in Writ Petition No.2048 of 2023, and when the matter was called out on 17 February 2023 and on 24 February 2023, and the matter was adjourned to 27 March 2023.

18. Thereafter, the husband complied with the order

passed by the Family Court and handed over the custody of the minor daug on 24 February 2023, to the wife.

19. Thereafter, on 3 March 2023 on the submissions of advocate appearing for the husband, the papers and proceedings were moved in the chambers of this Court. So also, as request made to this Court for interviewing the minor daughter on the grounds that she might commit suicide was rejected by this Court.

20. Again on 28 March 2023 the oral application was made on behalf of the husband that the minor daughter should be interviewed. Again this Court rejected such an application made on behalf of the husband. The husband thereafter preferred an interim application for seeking a prayer that the minor daughter should be interviewed. Thereafter, on the weekend when minor daughter had meet the husband and was supposed to go back to the wife on 25 June 2023, she did not go back to the wife's home. On 26 June 2023 the Writ Petition No.2048 of 2023 was mentioned before this Court when minor daughter was present in the Court hall. This Court interviewed the minor daughter in chamber. Thereafter, the Writ Petition no.2048 of 2023 was taken up for hearing by this Court and by its order dated 21 July 2023, this Court dismissed the Writ Petition filed by the husband thereby confirming the order granting the custody of minor daughter, to the wife passed in Application (exhibit-83).

21. The custody of the minor daughter remained with the wife from 24 February 2023 till 9 February 2024, for a period of roughly one year.

On 9 February 2024 the minor daughter as per the earlier order passed went to residence of the husband for weekend access. As per the direction passed in the order, on 11 February 2024 being a Sunday she was supposed to go back to the residence of wife, however, did not return to home of the wife.

22. On 12 February 2024 an interim application No.1587 of 2024 was preferred by the husband seeking modification of order passed by this Court. The said interim application was moved before me. However, since interim application sought modification order passed by the earlier bench, the parties were directed to approach the bench of this Court which passed the earlier order dated 21 July 2023. By an order dated 16 February 2024 the interim application No.1587 of 2024 was disposed of, directing the parties to approach the Family Court. The husband thereafter approached the Family Court. The Family Court by its order dated 27 February 2024 rejected application (Exhibit-147) filed by the husband seeking modification.

23. Thereafter, an application was moved before this Court on 28 February 2024 seeking continuation of protection granted in interim application no.1587 of 2024. However, no orders were passed on the oral request made on behalf of the husband.

24. On 29 February 2024 the present writ petition filed by the husband and since the reasoned order passed by the Family Court was not available, a request was made that till the time the reasoned order is made available the interim protection be granted. Hence, I had granted protection to the husband since the

reasoned order was not available.

25. Ultimately the reasoned order was available on 13 March 2024. Thereafter, an amendment was made to the present writ petition by enclosing the copy of the reasoned order to the writ petition. Counsels shortly thereafter made their submissions.

SUBMISSIONS

26. Ms. Indira Jaising, learned Senior Advocate appeared on behalf of the husband, and made her submission :

(i) Ms. Indira Jaising, submitted that in the custody matter what has to be seen is the best interest of the child.

(ii) Ms. Indira Jaising, submitted that email was written in good faith by school authority to the paternal grandmother and the husband, regarding the behavior of the minor child.

(iii) Ms. Jaising submitted that her client had not challenged the order passed by this Court on 21 July 2023 passed by the High Court, as her client was open to the suggestion made by the Court, allowed to jell the child with mother. She submitted that even after one year the child did not jell with the mother which can be seen from the notes handed over by the child to the school and also to one her friend to be given to her father.

(iv) Ms. Jaising submitted that the minor daughter was suffering from dyslexia.

(v) Ms. Jaising submitted that in the impugned order there is no discussion about the emails written by the school.

(vi) Ms. Jaising submitted that safety of the child should be prime importance. She submitted that the order of custody is never final.

(vii) She submitted that the report of minor daughter, suggest the child is not comfortable in the custody of her mother. Ms. Jaising submitted that the wife had multiple affairs. She submitted that hence, the custody to be granted to the mother of minor daughter, would not be proper.

(viii) Ms. Jaising submitted that the respondent (wife) is taking advantage of the fact that the mother of the husband is a member of political party.

(ix) Ms. Jaising pointed out the provisions section 26 of the Hindu Marriage Act as regards the custody. She emphasized the words “consistently” with their wishes.

(x) Ms. Jaising submitted that from the month of December 2019 the husband and wife were staying separately and except for a year the custody of the minor daughter has remained with the husband.

(xi) Ms. Jaising referred to the Supreme Court Judgment of *Nil Ratan Kundu & Anr. V/s. Abhijit Kundu* reported in (2008) 9 SCC 413 .

(xii) Ms. Jaising submitted that the writ petition deserves to be allowed.

27. Mr. Kulkarni, learned counsel appeared on behalf of

the wife and made his submission :

(i) Mr. Kulkarni submitted that the husband has always tried to poison the minor daughter which can be seen by at least three documents vis a vis paragraph No.15 of the judgment and order passed by this Court on 21 July 2023, Paragraph Nos. 1 and 3 of order dated 16 October 2022 passed by the Family court and the Paragraph No.5 of order of the Family Court dated 6 February 2021.

(ii) Mr. Kulkarni submitted that the husband had gone to such a extent that the daughter started repeating the words as taught to her by husband that she has been escaped from the custody matter, as generally mentioned “*Shivaji Maharaj escaped from the Agra Fort*”.

(iii) Mr. Kulkarni also referred to paragraph No.51 of the order dated 27 February 2024 passed by the Family Court.

(iv) Mr. Kulkarni submitted that the mother of the husband is a big political figure in the State of Maharashtra, who was earlier a member of Legislative Council. He submitted that the school authorities have been influenced by the mother of the husband which can be seen from the emails addressed by the school authorities to the mother of the husband and further copy of the email being addressed to the husband. The said emails were addressed by the school authorities to ‘madam’. He submitted that there was no reason to school authorities to right any kind of email’s to the Mother of the husband when the husband, who is the father of the minor daughter was available to correspond with

the school.

(v) Mr. Kulkarni also pointed out that the emails of the husband written by a lady called as “Neha”. He submitted that the said lady “Neha” though according to the other side, is working as a staff of mother of the husband, had no reasons to write emails on behalf of the husband, at 9.00 p.m. on Sunday. He submitted this itself shows that the said emails addressed by the husband were actually prepared by somebody else.

(vi) Mr. Kulkarni submitted that there is no explanation as to how alleged notes were written by the daughter, came in the custody of the husband. He submitted that though the story is now put up on behalf of the husband that wrote notes and gave it to her friend and the said friend gave it to her mother who in turn gave it to the father of the minor daughter i.e., the husband herein. He submitted that it is highly unbelievable story, as the said story was never put up before the Family Court. He further submitted that who was the name of classmate of minor daughter to whom the note was submitted, has not been disclosed, neither name of the mother of the said classmate has been mentioned even today. He submitted that it is highly unbelievable that minor daughter when was granted access to the husband on weekend, during the week days she used to write the notes to her father petitioner herein.

(vii) Mr. Kulkarni submitted that as far as the allegations of the wife having multiple affairs the same have to be proved by the husband. He submitted that the generic statements made in the

Divorce Petition would not be enough to not allow the interim custody of minor daughter aged 9 years who is about to attain puberty.

(viii) Mr. Kulkarni submitted that there is no merits in the Writ Petition and the same should be dismissed with cost.

ANALYSIS AND CONCLUSION :

28. This writ petition has been filed under Article 227 of the Constitution of India, by the husband challenging an Order passed dismissing his application filed for seeking modification of order of interim custody of 9 year old daughter.

29. As per the order dated 9 February 2023, the Family Court had granted custody of 9 year old daughter to the wife, who is a doctor by profession. The said order passed by the Family Court was challenged by husband by way of writ petition bearing no. 2048 of 2023 in this Court. Initially after filing of the petition when the matter was moved for urgent orders by the husband, this Court refused to give any kind of relief to the husband.

30. Admittedly, on 24 February 2023 the custody of the minor daughter was handed over by the husband, to the wife. However, the husband was granted physical access of the minor daughter on weekends and video access of alternate days. The writ petition filed by the husband was ultimately dismissed by this

Court on 21 July, 2023. Admittedly, the said order dated 21 July, 2023 attained finality as the husband did not challenge the said order.

31. The custody of the minor daughter remained with the wife from 24 February 2023 till 9 February 2024, for a period of roughly one year.

32. On 9 February 2024 the minor daughter as per the earlier order passed went to residence of the husband for weekend access. As per the direction passed in the order, on 11 February 2024 being a Sunday she was supposed to go back to the residence of wife, however, daughter did not return to home of the wife.

33. Subsequently, on 12 February 2024 an interim application was filed by the husband in disposed of, Writ Petition No.2048 of 2023. The said interim application was disposed of by this Court on 18 February 2024, with a liberty to approach the Family Court for any kind of modification, however certain interim relief were granted by this Court.

34. The husband thereafter preferred interim application before the Family Court for modification of custody. The said interim application for modification was dismissed by the Family Court on 27 February 2024. The present writ petition challenges the order dated 27 February 2024. On account of non-availability

of reasoning of Order dated 27 February 2024, the earlier protection granted by this Court was continued.

35. By the impugned order dated 27 February 2024, the Family Court while dismissing the application for modification, came to the conclusion that the mother of the husband was a politician and due to her social work, she was unable to spend time/take care of the 9-year-old daughter. The petitioner himself was working in an I.T. Company. So also, his brother and brother's wife were working as chartered accountant in a private firm. Hence, a maid is supposed to take care of the 9 year old daughter. As far as the wife is concerned, she is a doctor by profession, and she has taken up a flat for residence on Leave and Licence basis near the school of the 9 year old daughter. The mother of the wife, who is a home-maker was available to take care of the minor daughter along with a maid. The Family Court also held that the academic record of the minor daughter for the last one year was good. So also, the Court doubted as to who had written the alleged Notes/chits. Since the 9 year old daughter was meeting the husband on every weekend, as also the wife had doubted the handwriting of the 9 year old daughter on the said Notes/chits. So also, the Court had commented on the e-mails written by a lady

called as 'Neha' on behalf of the Husband. The Court has also come to the conclusion that in the matter of a custody, the Court has to see the age, sex, and child emotional, physical and mental development along with educational development. Hence, based on these findings, the Family Court has rejected the application of modification of custody. Both the parties were directed by the Family Court to follow and adhere the order below Ex.83 dated 9 February, 2023.

36. I have considered the arguments made by both the sides. There is no doubt that both the parents are working. There is no dispute that the mother of the husband is a political figure, who was earlier M.L.C. As per the newspapers/magazine articles, the mother of the husband is an aspirant of contesting upcoming election of Lok Sabha.

37. It is a matter of record that the school authorities are communicating with the said mother of the husband (who is the grandmother of the 9 year old daughter) as regards the issues pertaining to the minor daughter, apart from the parents of the minor daughter. According to me, the school authorities have no reasons to inform about the issues relating to the minor daughter to the grandmother (who is a politician) when both the parents of

the minor daughter are available. So also, one cannot forget that both the parents are well-educated and in fact the mother of the minor daughter is a doctor by profession.

38. It is also come on record that while the Family Court granted interim custody of the minor daughter, to the wife on 9 February, 2023, and weekend access to the husband; on 11 February, 2024, i.e. after a span of one year, the husband, was not able to deliver back the custody of daughter to the wife. The said act of the husband continued for a period of around seven days. In the said seven days, the minor daughter did not attend school.

39. The academic record of the minor daughter during her custody with her mother, was 'good'. The school report shows that the progress of the minor daughter was quite good during the said period. So also, she was doing good in extracurricular activities.

40. One cannot forget that the minor daughter is only 9 year old which can be called as a pre-puberty age. The fact that one lady called as 'Neha' has written letters to the wife on behalf of Husband, submitting therein that the minor daughter is safe in her custody, also raises an eyebrow.

41. The Family Court has doubted the handwriting on the alleged chits written by the minor daughter. According to me, it

becomes a matter of concern when the husband has brought on record certain chits which according to him was written by the minor daughter on week days and which came in his custody through a friend of the minor daughter. According to me, it is pertinent to note that though in the week days, the daughter was in the custody of the wife, and on weekends i.e. from Friday to Sunday night, the daughter was granted access to the husband. There is no explanation from the husband as to the name of the minor daughter's friend to whom the said alleged Notes/chits were given by minor daughter and how her friend managed to come in contact with the husband. It is highly unbelievable that minor daughter used to be with her father from Friday evening to Sunday evening, and on week-days she used to write Notes/Chits to her father.

42. A reference was made by Ms.Jaising, learned senior counsel to the judgment of Supreme Court in the matter of **Kundu** (supra). The fact in the judgment of the **Kundu** (supra) was that the matter pertains to the Guardians and Wards Act, 1890. In the said proceedings, the mother of the minor had already died. According to me, the custody of the minor in a Guardians and Wards Act is on complete different footing than under the Hindu

Marriage Act. Even in *Kundu (Supra)*, Supreme Court has laid down principles of law that while determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child' and not rights of the parents under a statute for the time being in force.

43. In the present proceedings, the application for custody was initially filed by the wife under section 26 of the Hindu Marriage Act. The Family Court considering the welfare of the child granted custody to the wife and this Court confirmed the said judgment and order passed by the Family Court by its order dated 21 July, 2023. After a period of one year, modification to the said order passed by the Family Court was made by the husband. The Family Court has rejected the said application filed by the husband with a reasoned Order. Therefore, the fact in the judgment of *Kundu (supra)* are quite different than the present proceedings.

44. In any custody matter, what Court has to see is the welfare of the child. In the present proceedings, the child is a 'girl' and aged only of 9 years which is pre-puberty age. The mother of the child is a doctor by profession who is now staying in a flat within the close vicinity nearby the daughter's school. The mother of the wife who is a home-maker and is residing with the wife. The

academic record of the minor daughter during her custody with the wife is also good. Therefore, according to me, there is no reason or change in the circumstances that the custody should be changed from the Wife to the Husband.

45. The submission made on behalf of the petitioner/husband as regards the adulterous behavior of the respondent/wife, according to me, these are the allegations which are made in the marriage petition by Husband before Family Court, filed in the year 2020. The said allegation has to be proved by leading evidence before the Family Court. Therefore, based on the allegations, the doubt as to whether the custody can be given to the wife will have no bearing. There is no doubt as held by the various judgments that not a good wife is not necessarily that she is not a good mother.

46. In the present case as regards, the allegations made by Husband are still to be proved. In the judgment of *Vineet Gupta Vs. Mukta Aggarwal* reported in *2024 SCC Online Del 678*, it has been held that even though the allegations are proved as regards the wife's extra martial affair, still as far as the custody of the minor children is concerned, in a given case, the same can be granted to the wife.

47. Adultery is in any case a *ground for divorce*, however the same can't be a ground for not granting custody.

48. Hence, this writ petition fails. No costs.

49. The petitioner is directed to hand over the custody of the minor daughter to the respondent wife by 21 April, 2024.

(RAJESH S. PATIL, J.)