

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 3558 OF 2015

Mukesh P. Gada	..	Petitioner
vs.		
Purvi M. Gada & ors.	..	Respondents

Ms Rushita Jain i/b Law Global Advocate for the Petitioner.
Ms Edith Dey for the Respondent No.1.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 10 February 2016.
Date of Pronouncing the Judgment : 17 February 2016.

JUDGMENT :-

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] The challenge in this petition is to the orders dated 1 July 2015 and 6 August 2015 made by the Addl. Chief Metropolitan Magistrate and the Sessions Judge, Mumbai declining to restore the custody of Tanay (15 years) and Varenya (11 years) respectively to the Petitioner-father, despite, two unchallenged orders dated 20 December 2014 and 4 March 2015 made by the Addl. Chief Metropolitan Magistrate, confirming the custody of the children with the Petitioner-father.

3] The Respondent-wife has instituted petition bearing C.C. No. 4/DV/2014 against the Petitioner-husband under the provisions of the Protection of Women from Domestic Violence Act, 2005 (said Act). Therein, apart from other reliefs, including compensation of Rs.5 Crores, the Respondent under the provisions of Section 21 of the said Act, has applied for custody of two minor children. In September 2014, the Respondent took out an interim application seeking interim custody of the two children, *inter alia*, on the ground that the continued custody of the minor children with the Petitioner-husband, was not, in the interests of the welfare of the children. Pending decision of the interim application, the Respondent-wife also applied for access during the Christmas Vacation in December 2014.

4] The Addl. Chief Metropolitan Magistrate, by order dated 20 December 2014, declined restoration of custody to the Respondent-wife, however, access was granted to the Respondent-wife during Christmas vacation, in one of the rooms in Petitioner's residence at Pune. The restrictions were imposed upon the Respondent-wife, in the matter of taking away the children from the residence of Petitioner-husband. This order was not challenged by the Respondent-wife either before the Sessions Court or this Court.

5] Thereafter, by order dated 4 March 2015, the Addl. Chief Metropolitan Magistrate, dismissed the Respondent's application for interim custody of the children. However, the Respondent was granted liberty to meet both the children in the school at Pune whenever she desires and the Petitioner-husband was restrained from obstructing such meetings with the children at Pune. The Petitioner was also directed to pay interim maintenance at the rate of Rs.30,000/- per month to the Respondent-wife till disposal of main petition. Again, the Respondent-wife did not challenge the order dated 4 March 2015 either before the Sessions Court or this Court.

6] On 30 March 2015 itself, the Respondent-wife, however, filed an application seeking custody of the minor children after conclusion of the academic year 2014-15. Even before, this application could be disposed of, the Respondent-wife by her application dated 27 May 2015, once again applied for vacation access during half the vacations, which were to commence on 13 June 2015 and conclude on 9 August 2015. In this application, the Respondent-wife stated that she was willing to let the Petitioner-husband avail the first half of the vacation and that she would be happy to have the children during second half of the vacation. In the said application, the

Respondent-wife also undertook to return the two minor children in time by reopening of the school As, no orders were passed upon the Respondent's applications dated 30 March 2015 and 27 May 2015 seeking custody and access after or during summer vacation 2015, it is the case of the Petitioner-husband that he, as a humanitarian gesture and without there being any legal obligations or Court directions, reached the two minor children to the Respondent-wife's residence at Mumbai on 17 June 2015, with the understanding that the Petitioner-husband would pick them up by 19 June 2015. There is no dispute with regard this fact, except that the learned counsel for the Respondent-wife, terms this act of the Petitioner-husband as "*the children were dumped or thrust upon the wife*". In effect therefore, there is no dispute that the Petitioner-husband did reach the two minor children to the Respondent-wife's place on 17 June 2015, despite there being no Court order or legal obligation to do so, but the dispute is whether this was not a humanitarian gesture on the part of the Petitioner-husband.

7] It is the case of the Petitioner-husband that on 19 June 2015, the Respondent-wife, refused to restore the custody of the two children to the Petitioner. The Petitioner, therefore, made an application to the Addl. Chief Metropolitan Magistrate on 26 June

2015, seeking restoration of the custody. By order dated 1 July 2015, the Addl. Chief Metropolitan Magistrate rejected the Petitioner's application. The rejection is mainly on the ground that the children were in boarding school, when in the custody of the Petitioner and now the children would stay with the Respondent-mother and attend a day school, which would be conducive to welfare of the children. The Petitioner's appeal to the Sessions Judge, was turned down on 6 August 2015, again on the ground that the children, by now, have been admitted in a new school in Mumbai and it might not be in the interests of children, to be shifted to the school in Pune. This petition is accordingly, instituted by the Petitioner-husband challenging the orders dated 1 July 2015 and 6 August 2015.

8] In this petition, the interim reliefs were applied for restoration of the custody. However, as the children's education in the new school at Mumbai had already commenced, no interim relief was formally granted. The learned counsel for the Respondent- wife herself submitted that the the children are no longer willing to return to the Petitioner-father and if necessary, this fact may be ascertained by interviewing the children.

9] On 17 November 2015, this Court, upon hearing the learned counsel for the parties, did record that in the facts and circumstances of this case, it would be appropriate if the children are interviewed. However, since the children have been in the custody of the Respondent-mother since June 2015, it was observed that it would be appropriate if the Petitioner-father is also granted weekend access, before, the children are actually interviewed. Accordingly, directions were issued for access between 20 and 22 November 2015 and 28 and 29 November 2015. It was made clear that further directions with regard to interview can be made, depending upon the manner in which the arrangements of access work out.

10] The Respondent-wife, however, refused to comply with the directions in the matter of weekend access, by stating that though she was willing, the children were not. It is to be noted that until 17 June 2015, the children were in the custody of the Petitioner-father. On 19 June 2015, the Respondent-wife refused to restore the custody to the Petitioner-father. On 1 July 2015, the Addl. Chief Metropolitan Magistrate declined restoration of custody, *inter alia* by observing that the children are unwilling to return to the father. All this, at least *prima-facie*, indicates that extent of influence exerted by the Respondent-mother upon the minor children.

11] Therefore, on 23 November 2015, this Court was constrained to make the following order, so that even the eventual interview with the children might be meaningful.

1] *It appears prima-facie that the Respondent is not inclined to obey the orders of this Court. The reason given is that the children are not willing to avail the access with the father.*

2] *In this case, the custody of the children was with the Petitioner-father until June 2015. The applications for custody made by the Respondents earlier, were in fact rejected by the Trial Court. It is the case of the Petitioner that the Petitioner, without there being any orders from the Trial Court granted access to the Respondent-mother, on the understanding that the custody would be restored, no sooner the period of three days concludes. However, the Respondent refused to hand over the custody and the Petitioner was constrained to apply to the Trial Court for restoration of the custody.*

3] *In this case, the order for access was made on 17 November 2015. The same was for only two weekends, out of which one of the week end is yet to expire.*

4] *The learned counsel for the Petitioner submits that on 20 November 2015, when the Petitioner went to the Respondent's house to avail access, the children refused to come with him. Today, the Respondent states that she is not in a position to make any statement with regard to access already granted for 28 November 2015. One of the reasons stated by the Respondent is that on 29 November 2015, their son has an Inter School Competition to attend. This was not the reason stated when the order dated 17 November 2015 was made. The Respondent now says that she is willing to honour the orders made by this Court, however, puts the entire onus upon the children. At least prima-facie, this kind of defence is unacceptable.*

5] *The Respondent is once again directed to honour the access arrangement for 28 and 29 November 2015. If however, the Petitioner's son indeed has to attend the Inter School Competition on 29 November 2015, the Petitioner to ensure that this is made possible, because*

under no circumstances the scheduled activities of the children need to suffer.

6] *Accordingly, the Petitioner is granted liberty to pick up the children on 28 November 2015 at 10.00 a.m. and to reach the children to the mother's home on 29 November 2015 latest by 6.00 p.m. The Respondent is directed to cooperate in the matter, so that the orders of this Court are not frustrated.*

7] *This order is made in presence of both the Petitioner and the Respondent, who has today chosen to appear in person.*

8] *All concerned to act on the basis of authenticated copy of this order.*

12] Despite the order dated 23 November 2015, the Respondent-wife, once again, denied even weekend access to the Petitioner-father, again, shifting onus upon the minor children. Therefore, on 11 December 2015, this Court was constrained to make the following order:

1] *On 17 November 2015, the orders were made with regard to access.*

2] *Since the orders were not complied with, the same was recorded and further order was made on 23 November 2015 with a view to afford yet another opportunity to the Respondent No.1-Purvi. On 27 November 2015, the Respondent No.1- Purvi appeared in person at the stage of production and stated that since the children are not willing to have an access with the Petitioner-Mukesh, some directions be issued varying access order. On the said date also, it was made clear to Respondent No.1-Purvi, who appeared in person, that there is no question of varying the order for access and that the previous orders will have to be complied with.*

3] *Today, when the matter is taken up at the production stage, it transpires that the access orders have not*

been complied with. This virtually amounts to defiance of the orders made by this Court.

4] The learned counsel for Respondent No.1-Purvi, however, states that the children are scared to go with her father and that this Court should interview the children. Similar request was made when the order dated 17 November 2015 was made by this Court. The interview of the children was deferred, as the children who are in the custody of the mother since June 2015. Also from the tenor of the submissions made on behalf of Respondent No.1-Purvi, it was quite clear that Respondent No.1 – Purvi was influencing the children. In such circumstances, no useful purpose would be served by interviewing the children, rather such interview might have caused further trauma to the children.

5] As recorded in the order dated 23 November 2015, the custody of the children was with the Petitioner – father until June 2015. This custody was for considerable length of time. In these circumstances, at least prima-facie, it is not acceptable that the children, by themselves, scared to have access with the father. If the position as portrayed by the learned counsel for Respondent No.1, has changed so drastically between July 2015 and November 2015, then it is obvious that Respondent No.1 is responsible for such drastic change. Such drastic change is by no means in the interest of welfare of the children themselves. Neither of the parents can be permitted to play the children against one another in furtherance of unfortunate acrimony that has developed between them.

6] From the circumstances, which Respondent No.1 makes out, it is apparent that the children need to spend substantial period with the Petitioner-father, so that, the children can have the company of both the parents, if not together, at least on a shared basis. Insofar as defaults on the part of the Respondent No.1 are concerned, same can be addressed at later date. However, now it is directed that the Petitioner will have access to the children for one week during the Christmas vacation. The learned counsel for Respondent No.1 states that she is not aware as to when Christmas Vacation commence or end. Accordingly, from the date of Christmas Vacation begins and for a period of seven days thereafter, the Petitioner will have access with the children.

The Petitioner will be permitted to take the children with him to Pune during the said period. In case, there is any difficulty in the enforcement of this order, the Petitioner is granted liberty to approach the Learned Metropolitan Magistrate, 38th Court at Ballard Estate, Mumbai. The Magistrate, to depute Family Councilors and ensure that the orders are complied with.

7] *In terms of the order made by the Trial Court, the Petitioner is required to pay maintenance of Rs.30,000/- to Respondent No.1-Purvi. The Petitioner states that the maintenance upto the month of November 2015 has been paid and maintenance for the month of December 2015 is only due. He says that this amount of maintenance towards December 2015 will be paid to Respondent No.1-Purvi within a period of one week from today. The learned counsel for Respondent No.1 states that the maintenance for the month of November 2015 has also not been paid. If that be so, the Petitioner is directed to pay the maintenance of November 2015 as well, within a period of one week from today.*

8] *The parties are permitted file additional affidavits/replies before the next date. The advance copies to be given to one another.*

9] *Place the matter on 8 January 2016, on the supplementary board.*

10] *All concerned to act on the basis of authenticated copy of this order.*

13] Despite, the order dated 11 December 2015, once again, access was denied.

14] Ms Rushita Jain, the learned counsel for the Petitioner-husband has submitted that the impugned orders warrant interference. She submitted that the Respondent-wife has virtually taken law in her own hands and seeks to derive a premium based

upon the same. She submits that the Respondent-wife is tutoring and influencing the minor children and this is not in the interests of welfare of the children. She submits that the Respondent-wife is mainly interested in her claim for Rs.5 Crores as also maintenance at the rate of Rs.30,000/- per month and the minor children are used as bargaining points for this purpose. She pointed out that there was no variation in circumstances and in any case, the Respondent's applications for restoration of custody were pending and could always have been considered by the Addl. Chief Metropolitan Magistrate, in accordance with law. However, based upon some unlawful variation brought about by the Respondent-wife herself, the Respondent-wife, cannot be permitted to flout judicial orders, which continue to operate even till date. Ms Jain also pointed out that the conduct of the Respondent-wife in defying consistently, orders made by this Court, render her quite unfit to retain the custody of the minor children, which, in any case, she has illegally and surreptitiously retained. Ms Jain has submitted that the impugned orders, to the extent they do not appreciate all these aspects, are required to be interfered with.

15] Ms Edith Dey, the learned counsel for the Respondent-wife (Purvi), at the outset, submitted that the Respondent-wife has not

defied the orders relating to custody. As the Petitioner, who was unable to cope up with the academic issues concerning the children, the Petitioner virtually dumped or thrust the minor children upon the Respondent-wife. The Petitioner, therefore, cannot masquerade his act as some humanitarian gesture. Ms Dey submitted that the children were unhappy in the boarding school and their grades were drastically falling. The Respondent-wife had already applied to the Addl. Chief Metropolitan Magistrate for variation in custody orders. The impugned orders, upon taking into consideration the subsequent developments and the change in circumstances, vary the custody orders, which, by their very nature, are variable. The Addl. Chief Metropolitan Magistrate and the Sessions Judge have interviewed the children and the wishes of the children are paramount in matters of such nature. Ms Dey submitted that even the custody of the children was with the Petitioner, when the children were staying in boarding school. Instead, presently, the children reside with the Respondent-wife, who is well qualified and has all the time to take care of their educational and emotional needs. Upon due consideration of all such aspects, the two Courts have declined to restore the custody of the Petitioner-husband and there is no jurisdictional error in the making of the impugned orders. Ms Dey relied upon decisions of the the Hon'ble Apex Court in the cases of

Vikram Vir Vohra Vs. Shalini Bhalla¹ and Gayatri Bajaj Vs. Jiten Bhalla².

16] The rival contentions now fall for determination.

17] There are at least two detailed orders dated 20 December 2014 and 4 March 2015 made by the Addl. Chief Metropolitan Magistrate declining custody of the minor children to the Respondent-wife and thereby retaining the custody of the minor children with the Petitioner-husband. The two orders were neither challenged by the Respondent-wife before this Court, nor have the two orders being set aside or formally varied till date. In fact, the application was made by the Respondent-wife for variation of the said orders, is pending consideration before the Addl. Chief Metropolitan Magistrate. In these circumstances, even though the impugned orders, purport to regularise the acts of the Respondent-wife, in refusing to return the minor children to the Petitioner-husband, there is no scope to style the impugned orders, as orders varying the two orders dated 20 December 2014 and 4 March 2015 made by the Addl. Chief Metropolitan Magistrate. If the impugned orders are perused, there is really no application of mind upon the

1 2010(4) SCC 409

2 (2012) 12 SCC 47

variation in circumstances alleged by the Respondent-wife in her applications dated 30 March 2015 or 27 May 2015, seeking variation. The situation, brought about by the Respondent-wife herself, by refusing to hand over the minor children to the Petitioner-husband, when the Petitioner-husband, of his own accord, permitted the minor children to spend three days with the Respondent-wife, even though, there was no legal obligation or the Court order requiring him to do so, is hardly a variation in circumstance, upon which, the Respondent-wife can place so much reliance, to defend the impugned orders. The Respondent-wife, on basis of herself serving conduct, which, is in defiance of the orders dated 20 December 2014 and 4 March 2015, which till date, have neither been set aside nor varied, cannot, urge that the impugned orders themselves constitute variation of the earlier orders, on account of variation in circumstances. If this is permitted, then it would be awarding a premium to the Respondent-wife for herself serving acts undertaken in disregard of judicial orders.

18] The time line in this matter is also quite significant. After the orders dated 20 December 2014 and 4 March 2015, by which, the custody of the minor children was retained with the Petitioner-husband, the Respondent-wife, by her application dated 30 March

2015, applied for custody of the minor children after conclusion of the academic year 2014-15. Even before, this application could be decided, on 27 May 2015 the Respondent-wife applied for custody/access during half summer vacations, which were to commence on 13 June 2015. In this application, the Respondent-wife even furnished an undertaking that she would restore the custody of the children to the Petitioner-husband, when the schools reopen on 9 August 2015. In this application, the Respondent-wife also made a statement that the Petitioner-husband could retain the custody, during the first half of the vacations and that she would be happy to have the custody during the second half of the vacations. Admittedly, no orders were made on the applications dated 30 March 2015 and 27 May 2015. Therefore, as the position stood, the Respondent-wife, had not even been awarded any vacation access, much less, custody during vacations.

19] There is material on record and further, the balance of probability supports that the Petitioner-husband even without, there being any orders or legal obligations to do so, reached the children at Mumbai to spend a couple of days with the Respondent-wife, on clear understanding that the children would return by 19 June 2015. On 19 June 2015, there is no dispute that the custody of the children

was not restored by the Respondent-wife to the Petitioner-husband. It is the case of the Respondent-wife that the children refused to return to the Petitioner-husband. It is to be noted that the children were with the Petitioner-father all this while, until, they were reached by the Petitioner-father to the Respondent-mother to spend about three days. In these circumstances, it is quite difficult to accept that soon after this three days period, the children were reluctant to return to the father. Nevertheless, left with no alternative, the Petitioner, applied to the Addl. Chief Metropolitan Magistrate on 26 June 2015, i.e., within a week, seeking restoration of custody. This application was dismissed by the Addl. Chief Metropolitan Magistrate, again within a week, i.e., by order dated 1 July 2015. The Petitioner's appeal to the Sessions Court was dismissed on 6 August 2015.

20] If the order of the Addl. Chief Metropolitan Magistrate is perused, then, it is apparent that the Addl. Chief Metropolitan Magistrate has failed to appreciate both, the factual as well as the legal position. The Addl. Chief Metropolitan Magistrate has failed to appreciate that the two orders dated 20 December 2014 and 4 March 2015, were very much in operation. The Addl. Chief Metropolitan Magistrate has failed to appreciate the conduct of the

Respondent-wife, in virtually amounted to defying the Court orders and thereafter, seeking to derive a premium for such defiance. The Addl. Chief Metropolitan Magistrate also failed to appreciate that even whilst the Petitioner and the Respondent-wife were living together, the children, in any case, were studying in boarding school. The Addl. Chief Metropolitan Magistrate has failed to appreciate that the Respondent-wife's applications seeking variation access were pending and that at the highest, the same would have been considered, rather than permit the Respondent-wife to retain custody, which she had obtained in the teeth of two earlier orders, still in operation. By the time, the Addl. Chief Metropolitan Magistrate made the order dated 1 July 2015, the children had not been admitted to the new school in Mumbai or in any case, hardly two or three days might have elapsed, since such admissions. Further, although, Tanay was studying in standard 9th and could have secured admission in standard 10th in his original school, the Respondent-wife once again, took admission for Tanay in standard 9th, thereby requiring him to repeat a year, though, the record indicates that this was strictly speaking not necessary. The Addl. Chief Metropolitan Magistrate, failed to take into consideration all such relevant circumstances and therefore, the order made by the Addl. Chief Metropolitan Magistrate was really not sustainable.

21] However, by the time, the matter reached the Sessions Court, it is possible to sustain the view that the situation had not undergone some change, because by now, the children had already been admitted to the new school and about five to six weeks may have elapsed since such admission. At that stage, the Sessions Judge, cannot perhaps be faulted for not disturbing the *status quo* in the academic interest of the children. Any order, at that stage, might have perhaps entailed disturbance to the academic schedule. The Sessions Judge cannot be faulted for taking the view that disturbance of the academic schedule, when, the studies in the new school had already commenced, may not be in the best interest of the children.

22] When the present petition was instituted, even this Court, did not deem it appropriate to disturb the education schedule in the mid academic year. This Court, had also appreciated the submission of Ms Dey with regard to interviewing the children in order to ascertain their wishes. However, it was felt that there is necessity to have some level playing field, before the children are interviewed. From the conduct of the Respondent-wife, it was quite apparent that the Respondent-wife was exerting considerable influence upon the children and in these circumstances any personal interview, might

not have been really useful in ascertaining the true and uninfluenced wishes of the children. For this purpose, from time to time, the orders were made granting access to the Petitioner, at least, on weekends. However, the Respondent-wife defied all such orders and brought about a situation, where, the Petitioner-father was denied access even on two or three weekends in respect of which orders were made. In these circumstances, no useful purpose would have really been served by personally interviewing the children. Besides, Ms Dey is obviously not right in her submission that the '*wishes of the children*' constitute paramount consideration in such matters.

23] The '*wishes of the children*', is no doubt, one of the important inputs in a matter of this nature. However, the '*welfare of the children*' or the '*welfare principle*' remains paramount consideration in jurisdiction of this nature. The '*wishes of the children*' is no doubt, one of the relevant parameters to be taken into consideration. However, this is neither the only parameter nor the paramount consideration. Besides, '*wishes of the children*' are not to be confused with some pre-prepared statements of the minor children, as a result of tutoring and excessive influence of the custodial parent. Before, a decision based upon '*wishes of the children*' is arrived at, regard must be had to the age and maturity levels of the children, the

circumstances in which the children are placed, the children's perception as to their own welfare, possibility of tutoring, dominant position of the custodial parent and other such considerations. Unless, as far as possible, circumstances conducive to the exercise of intelligent preference by the children are brought about, it is not always safe to place any excessive emphasis upon the otherwise important parameter '*wishes of the children*'.

24] The fact situation in case of *Gaytri Bajaj (supra)*, offers no parallel to the fact situation in the present case. The children, in the said case, were aged 17 and 11 years. For considerable period, they had lived away from their mother. The mother had filed terms, in the matter of divorce by mutual consent and had given up custody but retained only visitation rights. After period of three years, the mother instituted a suit for setting aside the consent decree and demanding custody of the children. Even the Hon'ble Apex Court, did not outright reject the claim for custody. As is recorded in paragraph '9' of the judgment and order, the Hon'ble Apex Court, keeping in mind the position of the mother allowed her to make initial contact with the children and gradually built up a relationship, if possible, so as to arrive at a satisfactory solution to the impasse. Interim arrangements were directed, which included

overnight custody with the children. Even the Hon'ble Apex Court, by means of personal interaction with the children, made attempts to bring the issue with regard to custody and visitation rights to the satisfactory conclusion. Only after due consideration of the results of all this, the Hon'ble Apex Court, on the basis of materials on record, came to the conclusion that the children one of whom was on the verge of attaining majority did not want to go with the mother. It is in these circumstances that the Hon'ble Apex Court observed that the children having expressed their reluctance to go with the mother, even for a short duration of time, there is no option left but to hold that any visitation rights to the mother would be adverse to the interests of the children. Therefore, *Gaytri Bajaj (supra)*, is not an authority for the proposition that '*wishes of the children*' is the only consideration or the paramount consideration. The paramount consideration, in terms of the statute as well as numerous authorities of the Hon'ble Apex Court, including *Gaytri Bajaj (supra)* remains '*welfare of the children*'.

25] Besides, in the matter of custody and access, fact situation is what matters the most and consequently, reliance upon precedents can be mainly for culling out the principles involved. To that extent, the utility of precedents in such jurisdiction is quite limited. Much

depends upon the facts and assessment, having regard to a host of parameters in determining where the welfare of the children lies. In *Gaytri Bajaj (supra)* itself, the Hon'ble Apex Court after taking special notice of its earlier decisions in the cases of ***Mousami Moitra Ganguli Vs. Jayant Ganguli***³ and ***Shiela B. Das Vs. P.R. Sugasree***⁴ has held that cases of custody have to be considered in the facts of each case and the decided cases on the issue may not be appropriate to be considered as binding precedents.

26] The decision in case of *Vikram V. Vohra (supra)*, is an authority for the proposition that all the custody and access orders are inherently temporary orders and can always be varied upon satisfaction with regard to variation in circumstances. This is undoubtedly correct. However, *Vikram V. Vohra (supra)*, is not an authority for the proposition that any parent can take any undue advantage of any self serving circumstances brought about by such parent of his own accord, in order to plead that such self serving acts constitute variation in circumstances. The position, in the present case, might have been entirely different, if the the Respondent- wife were to press for and await for proper orders upon her application seeking variation in the custody orders made on 20 December 2014

3 2008 (7) SCC 673

4 2006(3) SCC 62

and 4 March 2015. Even now, the Respondent is not precluded from adopting such course of action.

27] The circumstance that the children were studying in boarding school, was a circumstance, which was judicially considered by the Addl. Chief Metropolitan Magistrate whilst making the orders dated 20 December 2014 and 4 March 2015. In fact, the material on record, establishes that even whilst the Petitioner and the Respondent-wife were staying together, the children, were always in boarding school. Therefore, the Addl. Chief Metropolitan Magistrate was obviously not right in treating this circumstance against the Petitioner. Similarly, all the contentions, which the Respondent-wife, now seeks to raise, except perhaps the contentions based upon the wishes of the children, had been raised by the Respondent-wife at the time when the orders dated 20 December 2014 and 4 March 2015 came to be made. At that stage, also, necessary credence, must have been given to the wishes of the children. In fact, even the Respondent-wife in her application dated 27 May 2015 had undertaken to restore the custody of the children to the Petitioner, in case, the Respondent-wife were to be granted summer vacations access for the half term. All such relevant considerations were not

really taken into consideration by the Addl. Chief Metropolitan Magistrate in making the impugned order.

28] Ms Dey had made reference to certain E-mails as well as progress card (results) concerning the minor children. She submitted that the children, whilst in the custody of the Petitioner, were not faring well in their academics. In the first place, these were matters taken into consideration whilst retaining the custody with the Petitioner. Secondly, on basis of such material, it is not possible to put the entire blame upon the Petitioner. Perhaps, as a result of disputes between the parents, the children's studies are affected. Thus, both, the Petitioner-husband as well as the Respondent-wife, are responsible for the academic progress of the minor children.

29] Ms Jain, learned counsel for the Petitioner, has rightly placed reliance upon the decision of the Hon'ble Apex Court in case of **Gaurav Nagpal Vs. Sumedha Nagpal**⁵. The Hon'ble Apex Court, in para 52, has observed thus:

52. The trump card in the applicant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments.

5 (2009) 1 SCC 42

30] The children, conclude their academic term in April or May 2016. At this stage, it will not be in the interests of children themselves that their custody is restored to the Petitioner. Based upon this consideration, it is not possible to restore the custody of the minor children to the Petitioner forthwith, even though, the conduct of the Respondent-wife warrants making of such orders. In a jurisdiction of this nature, the question really is not as to whether the Petitioner-husband or the Respondent-wife is at fault or more at fault. Even though, the Respondent in the present case, is certainly at fault, that by itself, is not a ground to order the immediate restoration of the custody of the minor children to the Petitioner. The interests of children and their welfare, is and remains, the paramount consideration. Therefore, it is not possible to accede to the request of the Petitioner for immediate restoration of custody of the minor children to him.

31] Rather, in the interest of the children, it will be appropriate if their custody is restored to the Petitioner, no sooner, the academic term ends in April or May 2016. The children can then take admissions, either in their erstwhile school or in some other suitable school at Pune, where the Petitioner resides alongwith his family members. Accordingly, the impugned orders are set aside. The

Respondent-wife is directed to restore the custody of the minor children to the Petitioner-husband at the end of the academic year in April – May 2016. The Respondent-wife is also directed to cooperate with the Petitioner-husband, in order to facilitate admissions for the minor children in their erstwhile school or other schools in Pune.

32] It is however, made clear that nothing in this order, shall preclude, the Petitioner-husband and the Respondent-wife, from amicably, sorting out the issue of future education of the minor children. In fact, as good parents, they must do so. However, since, the custody is restored to the Petitioner-husband, in case, any amicable settlement is impossible, the Petitioner-husband to take the decision in this matter, keeping in mind the paramount interests of the children.

33] Notwithstanding the present order, once, the Respondent-wife has restored the custody of the minor children to the Petitioner-husband, the Respondent-wife shall be entitled to file appropriate application seeking variation of the earlier orders dated 20 December 2014 and 4 March 2015, in the matter of custody of minor children. For this purpose, the Respondent-wife is at liberty to pursue the applications already made by her, or she may file further

applications. All such applications to be decided on their own merits and in accordance with law.

34] Rule is accordingly, made absolute in this petition. Subject to liberty as aforesaid, the Respondent-wife is directed to restore the custody of the minor children to the Petitioner-husband, within a period of one week from the date of conclusion of final exams of the minor children for the academic year ending in April-May 2016. Further, the Respondent is directed to cooperate with the Petitioner-husband, in the matter of securing admissions for the children in the erstwhile school or any other schools at Pune.

35] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)