

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CONTEMPT PETITION NO.392 OF 2011
ALONG WITH
FAMILY COURT APPEAL NO.20 OF 2013

Mr.K.N.Krishnamurthy ...Petitioner
vs.
Ms Kavita Krishnamurthy ...Respondent

Mr.K.N.Krishnamurthy the Petitioner in the contempt
petition and the respondent in person in FCA
Mr.Mohan Dharmaraj for the respondent in CP and for
the Appellant in FCA

CORAM : A.S.OKA, &
C.V.BHADANG, JJ.
DATE : JANUARY 20, 2016

1 Heard the petitioner appearing in person and
the learned counsel for the contemnor. The breach
alleged in this petition is of the directions
contained in the paragraph 23 of the order dated 21st
October 2011 passed by the learned Single Judge in
Writ Petition No.8720 of 2011. As this contempt
petition is specially assigned to this Court, the
same is taken up for hearing.

2 The petitioner appearing in person has invited our attention to the material averments in the petition in paragraphs 6 to 10. He submitted that the averments show that there is a wilful and deliberate violation of the directions contained in the Judgment and Order dated 21st October 2011 and in particular paragraph 23 thereof. He submitted that

the directions issued by this Court have been completely breached. He invited our attention to the affidavit in reply filed by the respondent. He submitted that the stand taken by the respondent-contemnor that the minor child is not willing to go to the petitioner for vacation access is completely false. His submission is that his rights as a father cannot be allowed to be defeated and he cannot be without any remedy. His submission is that he has no remedy to enforce the order of this Court as the said order cannot be executed. His submission is that in every such case, a stand is bound to be taken by the rival spouse about the unwillingness on the part of the child. His submission is that once there is a direction issued by this Court, it is the duty of all concerned to ensure that the said order is implemented in its true letter and spirit. His submission is that if this Court does not take cognizance of the gross breach committed by the respondent, his rights would be completely defeated. The learned counsel for the respondent submits that there is no wilful breach on the part of the respondent.

3 We must note here that during the pendency of this petition, this Court made repeated efforts to bring about amicable settlement between the petitioner and the respondent. Certain arrangement was worked out so that the petitioner will be able to meet the minor child. Notwithstanding the efforts made by different Benches to which one of us (A.S.Oka,J.) is a party, amicable settlement could

not be brought about.

4 The breach alleged is of following directions contained in paragraph 23 :

"(23) Writ Petition is, therefore, disposed of in the following terms:

(a) The petitioner shall pick up the child on 28th October 2011 at 10.00 a.m from the respondent and shall return the child at 7.00 p.m on 31st October 2011.

(b) The petitioner will be given overnight access on 5th November 2011 and on 19th November 2011 so as to compensate his missed out access."

5 We have carefully perused the averments made in paragraphs 6 to 10 of the petition in which an allegation has been made that the respondent disobeyed the order. Paragraphs 7 to 10 read thus:

"7 The petitioner states that he went on 28th October 2011 at 9.45 a.m to the building compound of the respondent to pick up the child. He telephoned on the landline and the child picked up the phone. The petitioner told the child to come down and told him that he has come to take him for the vacation access. The child told the petitioner that he cannot come and kept the phone down. The petitioner again telephoned and once again

the child said that he cannot come with the petitioner. The petitioner explained to the child that he has taken leave from office and has also made arrangement for the holiday at Lonavala and further told him that he had bought firecrackers for him as it was the last day of Diwali. The child was very happy to know this but still said that he cannot come with the petitioner.

8 The petitioner states that he then telephoned his lawyer and informed her about the denial of the access to him inspite of the orders of the Court. A telephone call was made to the Lawyer of the respondent at about 9.50 a.m who represented the respondent in the Family Court as well as High Court. He did not pick up the phone. A text message was sent to him immediately and a request was made to inform the respondent to hand over the child. There was no reply from his side for an hour.

9. The petitioner states that he soon realized the ill intentions of the respondent that she would not be sending the child and would do everything possible to keep the child away from him. As a last resort he went to the Chembur police station to give a complaint that the respondent was not abiding by the orders of the Court. The copy of the order was shown to the police. The police

station thereafter sent a constable and a woman constable along with the petitioner to the building where the respondent resides. It was at around 10.25 a.m that the petitioner reached the building compound. As he got out of the auto rickshaw along with the constables he found the respondent her brother and the child in the building compound itself. The reason for standing of the respondent in the compound is not known when in fact earlier she had refused to send the child.

10 The petitioner states that he once again told the child to come along with him and even the woman constable spoke to the child. The child only said that he cannot come with the petitioner. The respondent and her brother were watching the entire happenings in a very sadistic manner as if the whole drama was being enacted as per her instructions. It was very apparent that the whole refusal by the child was orchestrated by the respondent with oblique motive to keep away the child from his father. During this time not even once did the respondent tell the child that he must go with the father for access as the Court has passed an order to that effect. The respondent on the contrary did not show any concern to abide by the order passed by this Hon'ble Court. It was quiet apparent that the respondent was the

force behind the curtains. This proves beyond any doubt that it is as per the tutoring of the respondent that the child refuses to go with the father. There is absolutely no other reason for the child to refuse to go with the father as the access has been going on for a long period of time both regular and overnight as also vacation access. It is only since July 2011 that the child is not been allowed to meet his father and he is refusing to go with the father."

6 Reply to the said averments is found in the affidavit in reply and in particular paragraph 6. Paragraph 6 of the reply reads thus:

"6 With reference to paragraphs 7 to 10, I vehemently deny each and every allegation made therein and submit that the petitioner has yet again resorted to distortion of facts and made false and misleading statements. The facts regarding the incident of 28.10.2011 are that on that date, when the petitioner telephoned, I promptly handed over the phone to Siddharth. I say that when the petitioner asked Siddharth to go along with him Siddharth refused and said "he did not want to come". I deny that Siddharth said that "he cannot come". I deny that Siddharth was happy to know that the petitioner has purchased fire crackers and made arrangements for holiday. I further say that my advocate

very much replied to the SMS message sent by the petitioner's advocate within a short while, informing her of the correct state of affairs. I say that instead of coming to take the child, the petitioner went and called the police to intimidate and force the child to go with him. I say that in fact the petitioner ought not have involved the police, which resulted in the child being frightened and embarrassed. In any event, I say that with great difficulty, when I brought the child down to the building compound, I did not find the petitioner there and after a while was shocked to see him coming with police constables. I say that the petitioner and the police constables tried to persuade Siddharth and the lady police constables even spent 10-15 minutes alone with Siddharth but Siddharth refused to go with the petitioner. For half an hour, all this went on. I say that I co-operated all through out this process. I vehemently deny that I and my brother were watching this episode sadistically as if the whole alleged drama was orchestrated as per my instructions. I deny that the child refused to go with the petitioner at my instance and I had motive to keep the child away from father. I deny that I did not show concern for the order of the Court. It will not be out of place to state here that the child is a victim of abuse and assault at the hands of

the petitioner and therefore does not wish to go with him. I say that there have been various acts of violence by the petitioner over the years including the recent incident of 6th July 2011 when the petitioner assaulted me, my parents and the child Siddharth. I say that the petitioner's allegations that I tutored the child against him, are totally false and made with the intention of covering up his own wrongs. I say that even in the past, the child was not happy to go with the petitioner. I say that the petitioner has been nagging, imposing, torturing and tormenting the child. He uses abusive language, gets aggressive and violent and has created such atmosphere that the child is very scared and therefore does not want to be with him."

7 In paragraph 7, the respondent has stated thus:

"7 With reference to paragraphs 11 and 12, I deny all the allegations made therein. I deny that I have violated the order passed by the Hon'ble Court. I say that the petitioner himself has admitted that he was allowed to speak to Siddharth over the phone, further, I even brought the child down to the building compound and co-operated with the petitioner and the police. I say that the petitioner himself was unable to convince the child to go along with him. I say that it is true

that both, this Hon'ble Court and the Family Court had interviewed the child and found that he was not willing to go with the petitioner. I say that for this reason, the Family Court had in fact rejected the application for vacation access."

8 As it appears from the affidavit in reply, the stand of the respondent-contemnor is that the minor child is scared of the petitioner and therefore, the child is not ready to be in his company. The respondent has denied the allegations that the child was tutored by her. It is stated that the child is very scared and does not want to be with the petitioner.

9 The contention of the petitioner is that what is stated is not true and in any case, as the child is continuously in the custody of the respondent, the he has been tutored.

10 As stated earlier, the stand taken in substance in the reply is that for the various reasons which are alleged therein, the child is not willing to be in the company of the petitioner. It is not in dispute that even during the pendency of the petition, as per the arrangement made between the parties at the intervention of the Court, on few occasions, the petitioner has met the child. Perhaps, the duration and the quality of the access may not be to his satisfaction.

11 It is true that in a given case the Court will have to go into the allegation that the minor child has been tutored by the spouse in whose custody the minor is. In a given case, the Court can direct recording of evidence of the minor child to enable the Court to come to the conclusion whether there is any wilful breach on the part of the spouse in whose custody the minor is.

12 In the present case, the date of birth of the child is 15th January 2003. The proceedings are going on in the Family Court right from the year 2008. It cannot be disputed that the child has been interviewed by various Judges of this Court as well as the Family Court. The child has been sufficiently affected by the ongoing disputes between the parents. The dispute before the Court started when the child was 5 years old. The bitter disputes continue when today the child is 13 years of age. The child is the real victim of the disputes.

13 By directing recording of evidence of the child for testing the correctness of the contentions raised by the parties, we would be subjecting the child to further trauma and harassment. The ongoing disputes between parents are going on during the formative years of the child. He is compelled to attend the chambers of different Judges during the last few years. We do not desire that the child should undergo further trauma and harassment by directing recording of his evidence.

14 The role of the petitioner in the Contempt Petition ends by inviting the attention of the Court to the allegation of breaches committed by the respondent in the contempt petition. Thereafter, it is a matter between the Court and the contemnor. The contempt jurisdiction is always discretionary. It is not necessary that in case of every breach including a wilful breach that the Court should initiate action under the Contempt of Courts Act, 1971 or under Article 215 of the Constitution of India.

15 Considering the manner in which the litigation has proceeded, it is not possible for us to record a conclusion that there is any wilful or deliberate breach on the part of the respondent. Even during the pendency of this petition, the petitioner has met the child.

16 Considering the present age of the child, even assuming that a case is made out for penalising the respondent-mother, the said action on the part of the Court will adversely affect the child who has already suffered due to ongoing matrimonial dispute.

17 Therefore, in our view, no case is made out for taking action against the respondent either under the Contempt of Courts Act, 1971 or under Article 215 of the Constitution of India. While we say so, we make it clear that we have considered the rival contentions only for the limited purpose of dealing

with the allegations of the breach of the directions of this Court under the order dated 21st October 2011. There are various orders passed in this petition. We have not dealt with the implementation of the said orders. Subject to what is observed above, contempt petition is disposed of. Notice is discharged.

18 We make it clear that the observations made in this Judgment and order are only for a limited purposes of dealing with this petition. No observation shall be construed as any specific finding recorded by this Court on any disputed questions involved in the other pending proceedings. All contentions of the parties are kept open.

(C.V.BHADANG,J.)

(A.S.OKA,J.)