

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 9066 OF 2017**

|                            |   |            |
|----------------------------|---|------------|
| Mrs. Janhavi Gaurav Dhotre | ] | Petitioner |
| Vs.                        |   |            |
| Mr. Gaurav Shridhar Dhotre | ] | Respondent |

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Ms. Veena Kamble, for petitioner.

Mr. Pradip Chavan a/w Ms. Trupti Chavan, for respondent.

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**CORAM : R.G. KETKAR, J.**

**DATE : 10<sup>th</sup> AUGUST, 2017.**

**P.C.**

Heard Ms. Kamble, learned Counsel for the petitioner and Mr. Chavan, learned Counsel for the respondent at length. Rule. Mr. Chavan waives service. Having regard to the nature of the controversy raised in this Petition and at the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, the petitioner/wife has challenged the judgment and order dated 22<sup>nd</sup> June, 2017 passed by the learned District Judge-I, Raigad, Alibaug below Exhibit 5 in Civil Miscellaneous Petition No. 89 of 2017 to the extent of directing her to give interim custody of minor son Prashant on 27<sup>th</sup> June, 2017 to the respondent/husband

till disposal of the main Petition. The petitioner/wife is also restrained from removing minor Prashant from Sanjeevani International School, Kharghar [for short 'Sanjeevani School'] till decision of the main Petition. The relevant and material facts, giving rise to the present Petition, briefly stated, are as under.

3. Marriage between the parties was solemnized as per Hindu Rites on 1<sup>st</sup> March, 2013. Minor Prashant is born on 27<sup>th</sup> December, 2013. Minor daughter Sailee is born on 20<sup>th</sup> August, 2016. In December, 2016, minor Prashant was admitted in Sanjeevani School and the School started from 3<sup>rd</sup> April, 2017. He attended School till 30<sup>th</sup> April, 2017 and thereafter holiday commenced from 1<sup>st</sup> May, 2017. It is the case of the petitioner that on 3<sup>rd</sup> May, 2017, father of the respondent abused her in filthy language as the minor son Prashant was crying. He prevented the petitioner from taking lunch. In the morning of 4<sup>th</sup> May, 2017, respondent asked the petitioner to leave matrimonial home alongwith her children before his arrival at night. After the respondent left for Office work, respondent's parent mentally tortured her and forced her to leave matrimonial house.

4. As against this, it is the case of the respondent that he was not at home on 4<sup>th</sup> May, 2017 and was on duty. Petitioner's brother Kiran was arrested on 17<sup>th</sup> April, 2017 in connection with a very serious offence u/s 341, 363, 387, 397, 506 (2) Indian Penal Code, 1860 registered at Bhiwandi Police Station. It is the case of respondent that petitioner abruptly left the house along with minor

children without his knowledge. She never informed the respondent about involvement of her brother and his consequent arrest on 17<sup>th</sup> April, 2017. On 6<sup>th</sup> May, 2017, respondent filed complaint against the petitioner with Kharghar Police Station.

5. On 3<sup>rd</sup> June, 2017, respondent instituted Petition No. 89 of 2017 u/s 7,9,12 and 17 of the Guardian and Wards Act, 1890 for permanent custody of the children as also for perpetual injunction restraining the petitioner from removing minor son Prashant from Sanjeevani School. Pending this Petition, respondent filed application Exhibit 5, inter alia, praying for injunction;

- (a) restraining the petitioner from removing minor son Prashant from Sanjeevani School
- (b) restraining the petitioner from taking minor children out of jurisdiction of District Court at Alibaug, and
- (c) granting interim custody of children to him.

6. On 3<sup>rd</sup> June, 2017, respondent instituted proceedings for divorce in the Court Civil Judge, Sr. Division, Panvel. By the impugned order, learned District Judge partly allowed the application Exhibit 5. Learned District Judge declined to grant interim custody of minor daughter Sailee to the respondent and directed the petitioner to give interim custody of minor son Prashant to the respondent till decision of the main Petition. Learned District Judge also restrained the petitioner from removing minor Prashant from Sanjeevani School till decision of the main Petition.

7. It is the case of the petitioner that on 20<sup>th</sup> July, 2017, minor son Prashant is admitted in Wonder Kids School at Byculla [for short 'Wonder School'] and is presently studying in Play Home which is of a Nursery level.

8. In support of this Petition, Ms. Kamble strenuously contended that the learned District Judge has committed serious error in directing the petitioner to hand over interim custody of minor son Prashant to the respondent. She submitted that respondent has placed on record photographs of Sanjeevani School. However, respondent has not placed on record any material showing quality of education imparted in that School.

9. External appearance of Sanjeevani School will not depict quality of education imparted by that School. She has invited my attention to activities of Wonder School as also submitted that after completing Nursery from Wonder School, minor son Prashant can secure admission in any elite School located in the surrounding area. She submitted that in Ward No. E of Municipal Corporation of Greater Mumbai, maximum Schools are located. She submitted that the said School is ideal for all round development of minor son Prashant where the children can be taken to various places such as Museum, Fire Station, Bank, Macdonald etc. She submitted that basically minor son Prashant is attached to the mother and he cannot live without her. If at this stage, interim custody is handed over to the respondent/father, it will cause disastrous effect on all round development of minor son

Prashant. While passing the impugned order, learned District Judge has also not considered whether handing over interim custody of minor Prashant to the respondent/father is in the interest of the child. She further submitted that impugned order to the extent of handing over interim custody of minor son Prashant to the respondent deserves to be set aside.

10. On the other hand, Mr. Chavan supported the impugned order. He submitted that conduct of the petitioner dis-entitles her from grant of any relief. He submitted that minor son Prashant born on 27<sup>th</sup> December, 2013. Till the petitioner left matrimonial home on 4<sup>th</sup> May, 2017, she was residing with the respondent and his parents at Kharghar. Minor son Prashant was admitted in Sanjeevani School in December, 2016 and the said School started from 3<sup>rd</sup> April, 2017. There was summer vacation from 1<sup>st</sup> May, 2017 till 4<sup>th</sup> June, 2017. He attended the School up to 30<sup>th</sup> April, 2017. In other words, he submitted that contention advanced on behalf of the petitioner that if the custody of minor son Prashant is handed over to the respondent, it will change environment and also will have disastrous effect is without any substance.

11. Mr. Chavan further submitted that petitioner's brother is involved in serious offence which he committed on 25<sup>th</sup> March, 2017. He was arrested on 17<sup>th</sup> April, 2017. Petitioner deliberately picked up quarrels with a view to supporting her brother and helping her family. She left matrimonial home by saying that she wants divorce from the respondent. He further submitted that the

petitioner is taking minor children to the Police lock up as well as Judicial Magistrate's Court and Sessions Court to meet her brother amongst the other criminals. It is very harmful to the minor children to visit such places. This conduct of the petitioner is totally irresponsible, careless and lackadaisical. He invited my attention to the reply filed by the Police opposing bail application filed by the petitioner's brother and in particular paragraph 16 thereof, where address of her brother is shown Chawl No.3, Second Floor, Room No. 324, M.T.N.L, Near Telephone Exchange, Mumbai. The petitioner is staying along with her parents at the same address. The same address is shown in the cause title of the present proceedings. In paragraph 16, it is stated that extortion amount of Rs. 5,00,000/- is to be paid at the said place. He, therefore, submitted it will be harmful and dangerous for the life of the minor children if their custody is given to the petitioner.

12. Mr. Chavan further submitted that Sanjeevani School is up to 12<sup>th</sup> Standard. As the admission is already taken in December, 2016, it is not necessary for the respondent to take admission elsewhere. He has further taken me through the compilation of documents such as photographs, School record of Sanjeevani School as also activities of the said School to contend that minor son Prashant will grow in a better environment if custody is given to the respondent. Minor son Prashant is comfortable with him and his parents. He, therefore, submitted that no case is made out for interfering with the impugned order.

13. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. Matter was heard on 8<sup>th</sup> August, 2017 and at the request of learned Counsel for the parties was adjourned to 9<sup>th</sup> August, 2017. On 9<sup>th</sup> August, 2017, I have interacted with the parties as also their Advocates for the purpose of finding out whether there is any possibility of reconciliation and the parties can stay together at the matrimonial home of the petitioner. After interacting with the parties and their Advocates, *prima facie*, at this stage, it seems that there is no possibility of reconciliation. The petitioner is ready and willing to co-habit with the respondent at the matrimonial home. Matrimonial home is a row house consisting of ground plus two floors. Ground floor consists of Hall and Water Closet, first floor consists of one Bedroom, Kitchen and Water Closet, second floor also consists of one Bedroom, Kitchen and Water Closet. Respondent is not willing to take back the petitioner and he intends to prosecute Divorce Petition instituted by him. In view thereof, I adjourned the proceedings till today and in the morning, I have interacted with minor son Prashant. It is no doubt true that he is about 3 years and 7 months. In my opinion, before passing the impugned order, learned District Judge should have made attempt to interact with the child for the purpose of ascertaining his wishes. Unfortunately, learned District Judge did not undertake this exercise which necessitated this Court to interact with the child. After interacting with the child for quite some time, *prima facie*, at this stage, I find that it would be difficult for him to stay away from mother. Considering his age, he is not mature enough to exercise

option whether he should stay with father or mother. He can't be judgmental.

14. During the course of interaction with the parties, it also transpired that brother of the petitioner had earlier filed criminal cases against the complainant Aslam Abdul Qureshi who is having business of meat Shop. Learned District Judge while passing the impugned order, has rightly held in paragraph 10 that the petitioner cannot be blamed nor she can be held responsible for the alleged criminal act done by her brother. Moreover, at this stage, one cannot presume that the brother of the petitioner is guilty of the said offence.

15. A perusal of paragraph 10 of the impugned order shows that the learned District Judge has rightly observed that the Court has to give sole consideration for welfare of the daughter Sailiee. In that context, he observed that minor daughter Sailee is of eight months only [as on date 11 months]. She is breast feed child. Petitioner is not a working woman. The love and affection which requires for eight months child can be given by the mother only. The eight months child cannot be deprived from the love and affection of her mother. To this extent, I do not find that learned District Judge has committed any error.

16. As noted earlier, minor son Prashant is studying in the class of play home which is equivalent to Nursery. There children are prepared for joining Junior K.G. In my opinion, learned District

Judge given undue importance to the fact that it is necessary for the minor son Prashant to attend School. This has to be appreciated in the background that Prashant is now admitted in Wonder School. In other words, reason which weighed with the learned District Judge no longer survives as on date. It is also material to note that there are several Schools in the locality of Mazgaon where after completing Nursery Education Prashant can secure admission in any one of the elite Schools.

17. In paragraph 15 of **Rosy Jacob Vs. Jacob A. Chakramakkal, (1973) 1 SCC 840**, the Apex Court has observed thus:

“15....The children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society...”

18. In the case of **Gaurav Nagpal vs. Sumedha Nagpal, AIR 2009 SC 557**, the Apex Court considered the English law in paragraph No. 20 of the judgment, in the following words:-

“English Law – In Halsbury's Laws of England, Fourth Edition, Vol. 24, para 511 at page 217 it has been stated:- Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father.”

The Apex Court also considered the American law in paragraph No. 25 of the judgment, in the following words:

“American Law – Law in the United States is also not different. In American Jurisprudence, Second Edition, Vol. 39; para 31; page 34, it is stated;-

As a rule, the selection of a guardian of a minor, the best interest of the child is the paramount consideration, to which even the rights of parents must sometimes yield”.

19. In the case of **Vivek Singh Vs. Romani Singh, (2017) 3 Supreme Court Cases 231**, the Apex Court was considering custody of daughter Saesha who was 8 years old. In paragraph 17, the Apex Court reproduced paragraph 31 of the High Courts order. In paragraph 31, Delhi High Court observed that the role of the mother in the development of a child's personality can never be doubted. A child gets the best protection through the mother. It is a most natural thing for any child to grow up in the company of one's mother. The company of the mother is the most natural thing for a child. Neither the father nor any other person can give the same kind of love, affection, care and sympathies to a child as that of a mother. Psychologically child-mother bonding is regarded as best for child's wholesome development though this presumption is rebuttable. The stage of rebutting the presumption is yet to come. Though, it was a case of female child, in my opinion, this equally applies to the present case as minor son is aged about 3 years and 7 months.

20. In para 19, the Apex Court has observed thus:

“19. The aforesaid discussion leads us to feel that

continuous company of the mother with Saesha, for some time, is absolutely essential. It may also be underlying that the notion that a child's primary need is for the care and love of its mother, where she has been its primary care giving parent, is supported by a vast body of psychological literature. Empirical studies show that mother-infant "bonding" begins at the child's birth and that infants as young as two months old frequently show signs of distress when the mother is replaced by a substitute caregiver. An infant typically responds preferentially to the sound of its mother's voice by four weeks, actively demands her presence and protests her absence by eight months, and within the first year has formed a profound and enduring attachment to her. Psychological theory hypothesises that the mother is the centre of an infant's small world, his psychological homebase, and that she "must continue to be so for some years to come". Developmental psychologists believe that the quality and strength of this original bond largely determines the child's capacity to fulfil her individual potential and to form attachments to other individuals and to the human community".

Having regard to the fact that minor son is aged about 3 years and 7 months, observations extracted hereinabove apply with equal force to the present case.

21. In the light of the above discussion, at this stage, I do not find that any case is made out for handing over custody of minor son Prashant to the respondent/father. In my opinion, minor son Prashant will not be in a position to live away from his mother considering his tender age. In my opinion, instead of granting interim custody of minor son Prashant to the respondent, respondent and his parents should be given visitation rights to meet the children, pending main Petition. Parties agree that the

petitioner will permit the respondent and his parents to meet minor children on every Saturday and Sunday for two hours at Victoria Garden, Byculla between 4 p.m and 6 p.m. Impugned order accordingly deserves to be modified. Hence, the following order.

**: ORDER :**

Clauses (2) and (3) of the impugned order which read thus:

- [1] The respondent is restrained from removing minor Prashant from the international school till decision of the main petition.
- [2] The respondent is directed to give the interim custody of minor Prashant to the petitioner till the decision of the main petition on 27/6/2017.  
**are modified.**
- [2] Application Exhibit 5 is partly allowed as under:  
The petitioner shall permit the respondent and his parents to visit minor children on every Saturday and Sunday for two hours at Victoria Garden, Byculla between 4 p.m and 6 p.m.
- [4] It is expected that the parties will fully implement this order of giving visitation rights and will not give any excuses for non implementation of the order.
- [5] Rule is made absolute in the aforesaid terms with no order as to costs.

**[R.G. KETKAR, J.]**