

where son Yajat is studying. He submitted that the first term is commencing from Monday, the 24th September, 2018 and examination will be over on Friday, the 5th October, 2018. He, therefore, submitted that hearing of this Petition may be deferred till 8th October, 2018. I inquired from Mr. Deshmukh whether the respondent is agreeable for adjournment of this Petition. Mr. Deshmukh strongly opposed and submitted that in the facts and circumstances of the present case, no such indulgence can be shown to the petitioner. Though the impugned order was passed on 24th July, 2018 and is not stayed, till date such order is not implemented. In view thereof, I have heard learned Counsel for the parties at length.

4. In support of this Petition, Mr. Warunjikar submitted that the respondent has instituted proceedings, inter alia, praying for dissolution of marriage between the parties by a decree of divorce under section 13 (1) (i) of the Hindu Marriage Act, 1955 (for short 'Act'). The respondent has also claimed permanent custody of children. During pendency of this Petition, the respondent filed application Exhibit 5 on 26th March, 2018, inter alia, praying for injunction restraining the petitioner herein and respondent No.2 in the main Petition from disseminating or distributing or broadcasting or selling or publishing or telecasting in any form or any manner the videos of sexual intercourse recorded by them through any medium and for handing over interim custody of minor children Yajat and Yana to him. During pendency of application Exhibit 5, the respondent filed application Exhibit 18 for ad-interim custody on 20th April, 2018 on the ground that yearly exam of son Yajat is scheduled at Goldcrest High School Vashi on 23rd April, 2018.

5. Mr. Warunjikar submitted that the respondent filed application Exhibit 17 on 20th April, 2018 in the trial Court for taking the matter on board on the ground that the petitioner without his knowledge and consent had

taken away the children on 19th April, 2018. The yearly examination of son Yajat is scheduled on 23rd April, 2018. On the same date i.e on 20th April, 2018, the respondent filed application Exhibit 18 for directing the petitioner to hand over custody of two children to him so that he can bring back the children to his house at Vashi to enable them to appear for final school examination. By order dated 20th April, 2018, the learned trial Judge directed the petitioner to hand over interim custody of the children to the respondent till further orders on the application, among other directions. Aggrieved by this decision, the petitioner instituted Writ Petition No.6226 of 2018 in this Court. By order dated 12th June, 2018, the Petition was disposed of. Mr. Warunjikar invited my attention to paragraph 8 of that order where it is observed that during the course of the hearing of that Petition it transpired that son Yajat who was studying in Grade-3 is promoted to next standard and, therefore, exigency and/or urgency is not in existence.

6. Mr. Warunjikar invited my attention to clause (1) of the operative part of the impugned order. By that clause, the learned trial Judge directed the petitioner to hand over interim custody of the children to the respondent **until further orders**. In the first place, he submitted that application Exhibit 18 is rendered infructuous by the passage of time as exigency and/or urgency is not in existence. Secondly, clause (1) of the operative part of the impugned order is vague inasmuch as the petitioner is directed to hand over interim custody of the children to the respondent until further orders. He submitted that it would not be in the interest of the children to disturb their custody when all along the petitioner is looking after the welfare and education of the minor children. The very fact that the respondent is opposing adjournment of hearing of this Petition beyond examination of son Yajat shows that welfare of children is not in his mind. Instead of passing the impugned order, the learned trial Judge ought to have decided application

Exhibit 5. The learned trial Judge was not justified in passing the impugned order.

7. Mr. Warunjikar has invited my attention to the undertakings dated 25th July, 2018 filed by Mrs. Rajkumari Singh, mother of the respondent at Exhibit 68 and of the respondent at Exhibit 69. From perusal of the undertaking at Exhibit 68, it would be evident that mother of the respondent is residing at C.B.D Belapur, Navi Mumbai, The petitioner along with children is residing at Vashi. In paragraph 1, it is stated that the respondent and two children will be staying with her in C.B.D Belapur. Thus, the children will be shifted from Vashi to C.B.D Belapur. That apart, mother of the respondent is a trustee of B.P. Marine Academy. She will not be in a position to take care of her grand children. As far as undertaking at Exhibit 69 is concerned, Mr. Warunjikar submitted that the respondent is working in shore job since December, 2011 as Administrative Officer in B.P. Marine Academy. He has invited my attention to paragraph 1. In paragraph 1, it is stated that the respondent is having responsibility of supervision, inspection, audit stationed in C.B.D Belapur as also having responsibility over Panvel Campus. In short, he submitted that even the respondent will not be in a position to take care of the children. Therefore, it would not be in the interest of the children to disturb their custody more so when application at Exhibit 5 is pending. At the time of hearing of the application, Exhibit 18, the petitioner did not have schedule of examination which is now to commence from 24th September, 2018. This subsequent development needs to be taken into consideration and the impugned order accordingly deserves to be interfered with.

8. Mr. Warunjikar invited my attention to paragraph 10 of the order dated 12th June, 2018 passed by this Court in Writ Petition No.6226 of 2018 to contend that the petitioner is abiding by the undertaking recorded therein. For

all these reasons, he submitted that the impugned order deserves to be set aside.

9. On the other hand, Mr. Deshmukh supported the impugned order. He has invited my attention to paragraphs 14 to 17 of the impugned order and submitted that after considering the welfare of the children as also the circumstances in which presently they are residing, no case is made out for interfering with the impugned order. He has also invited my attention to paragraph (iv) of the reply dated 26th June, 2018 filed by the petitioner to application Exhibit 18. In paragraph (iv) the petitioner alleged that the respondent had assaulted her barbarously when the children were at School on 19th April, 2018 in the morning. She was left with no option and was forced to leave her matrimonial house. He invited my attention to reply dated 3rd August, 2018 filed to this Petition and in particular paragraph 4 (e) and submitted that respondent No.2 in the main Petition had booked tickets on 18th April, 2018 for the journey on 19th April, 2018. He, therefore, submitted that the petitioner has not approached the Court with clean hands and even otherwise, no case is made out for interfering with the impugned order.

10. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. It is no doubt true that application Exhibit 5 filed by the respondent is pending before the trial Court. It is equally no doubt true that on 20th April, 2018, the respondent filed application Exhibit 18. Prayer clause (1) of that application reads thus;

“Respondent No.1 be directed to hand over the 2 children Yajat and Yana to the petitioner so that he can bring the children back to his house at Vashi and enable them to appear the final school exam”.

By order dated 20th April, 2018, the learned trial Judge directed the petitioner herein to hand over custody of minor children to the respondent till further order on the application. That order was challenged by the petitioner in this Court. By order dated 12th June, 2018, clause (1) of the operative order was set aside and the learned trial Judge was directed to dispose of the application Exhibit 18. The petitioner was directed to file her reply within two weeks. In pursuance thereof, the petitioner filed reply to application Exhibit 18 on 26th June, 2018. A perusal of the reply does not even remotely indicate that the petitioner contended that application Exhibit 18 is rendered infructuous as the exigency and/or urgency namely examination of son Yajat on 23rd April, 2018 was over. The said exigency did not exist. In fact, a perusal of the order dated 12th June, 2018 passed by this Court also does not indicate that any such contention was raised before this Court to the effect that as examination was over and son Yajat was promoted to Grade-4, application Exhibit 18 was rendered infructuous. Thus, the parties proceeded before the trial Court on the footing that Exhibit 18 has to be decided on merits. That apart, now examination of grade-4 of son Yajat is commencing from 24th September, 2018. In view thereof, it cannot be said that application Exhibit 18 is rendered infructuous.

11. A perusal of the impugned order and in particular paragraph 11 shows that the respondent has produced photographs on record showing daughter Yana sitting on the lap of respondent No.2 in the main Petition. The respondent has filed Petition for divorce on the ground of adultery and has impleaded respondent No.2 in the main proceedings. The learned trial Judge has considered this aspect in paragraph 17 of the impugned order. In paragraph 14, the learned trial Judge has referred to the letter dated 4th April, 2018 of the School Counsellor which mentions as under;

“Since last few days Yajat seems sad and disturbed. This is manifested through either being quite or having sudden emotional burst of cry”.

After considering this letter, the learned trial Judge categorically recorded a finding that children are taken away from the safe, secured and healthy life which they were leading. In paragraph 15, the learned trial Judge noted that respondent had issued cheque of the amount of Rs. 2,50,000/- to the petitioner towards securing accommodation. The petitioner filed pursis at Exhibit 55 to the effect that children are residing at Rajanigandha Building. The learned trial Judge observed that pursis Exhibit 55 is very vague. The material on record shows that the children are not at all living secured life. Suddenly they are withdrawn from the healthy environment. Such drastic and sudden change will have deep impact on the children from all the aspects. The learned trial Judge further made it clear that impugned order is an interim order till the decision of application Exhibit 5.

12. In paragraph 17, the learned trial Judge noted that daughter Yana is growing girl and is getting exposed to the strangers. Hence, apprehension of the respondent as a father is reasonable. The learned trial Judge observed that it is painful for a father to see his young daughter with a person against whom he had made serious allegations. As such, it is extremely necessary to safeguard the young daughter from getting exposed to the strangers and her welfare cannot be put at a risk.

13. Mr. Warunjikar submitted that the very fact that the respondent has opposed adjournment of hearing of this Petition beyond examination of son Yajat to 8th October, 2018 shows that welfare of the children is not in the mind of the respondent. I do not find any merit in this submission. In the past, the petitioner had removed the children, more particularly, son Yajat and went

to Dilbis, Uttar Pradesh when his examination was on 23rd April, 2018. In view thereof, the petitioner now cannot complain that welfare of the children is not in the mind of the respondent.

14. For the reasons recorded in paragraphs 14 to 17 of the impugned order, I do not find that any case is made out for invocation of powers under Article 227 of the Constitution of India. In custody matters, paramount consideration is welfare of the children. The learned trial Judge has correctly applied the principles governing custody matters. The learned trial Judge after considering the material on record came to the conclusion that welfare of the children will be with father and accordingly has passed the impugned order. Hence, the Petition fails and the same is dismissed.

15. At this stage, Mr. Warujikar submits that this order may not be implemented till 8th October, 2018. Mr. Deshmukh strongly opposed to this prayer. In the facts and circumstances of the case, I do not find that the request is reasonable. Hence, Oral request is rejected.

16. All the parties to act upon an authenticated copy of this order.

[R.G. KETKAR, J.]