

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.74 OF 2018
IN
FAMILY COURT APPEAL NO.8 OF 2017**

Mansi Mangesh Sawant .. Applicant

In the matter between

Mansi Mangesh Sawant .. Appellant

V/s.

Mangesh Laxman Sawant .. Respondents

Mr.Ram Apte, Sr.Counsel along with Ms.Pooja Joshi i/b M/s.India Law Alliance for the Applicant

Mr.Kedar G. Prabhu for the Respondent

**CORAM: K.K. TATED &
B. P. COLABAWALLA, JJ.**

DATED : JUNE 8, 2018

P.C. :

1. This Civil Application has been filed seeking a direction to modify the order dated 30.07.2016 passed by the learned Family Court Judge, as well as to modify the Consent Terms dated 25.07.2012 which was filed in the Family Court. These Consent Terms, which was an interim arrangement for access of the minor Children (Aditi and Advait), was continued in the final order passed by Family Court dated 30.07.2016. We must mention that Aditi

has now become a major.

2. In this matter, the Family Court Appeal has been filed by the wife. The impugned order granted a divorce in favour of the wife but custody of the two minor children was given to the father. Being aggrieved by the fact that the custody of the minor children was given to the father, that the present Appeal has been filed.

3. In this Appeal, an order was passed by this court on 01.02.2017. This order specifically records that the minor child namely Advait has been interviewed by the Family Court on two occasions and child has categorically informed the fact he wants to stay with the father now since he is accustomed to that environment. The child has categorically stated that he has no disturbance at his father's house as his sister and father both are out for most of the day and he and his grand mother only remain at home. He has further stated that he does not wish to disturb his current routine and he does not want any change. Looking to this, the Division Bench of this court by its order dated 01.02.2017 gave due weightage to what was recorded by the Family Court and therefore, rejected the request of the Appellant mother / wife of handing over custody of the minor child (Advait).

4. This order was challenged by the Appellant before the Hon'ble

Supreme Court by filing Special Leave to Appeal No.14312 of 2017. This Special Leave to Appeal was dismissed by the Supreme Court vide its order dated 08.05.2017. The only liberty granted by the Supreme Court to the Appellant herein was that she was granted permission to approach before this court for visitation rights.

5. Despite this, in this Civil Application we find that the Appellant is not seeking any visitation rights but in fact seeking modification of the order passed by the Family Court dated 30.07.2016 and the Consent Terms dated 25.07.2012. We fail to see how this Application is maintainable especially in view of the fact that the order passed by this court on 01.02.2017 was challenged before the Supreme Court and from which the Special Leave Petition also was dismissed.

6. Be it as it may, Mr.Apte, the learned Senior Counsel for the Appellant, placing reliance on the decision of the Supreme Court in the case of *Nil Ratan Kundu & Anr. vs. Abhijit Kundu decided on 08.08.2008 in Civil Appeal No.4960 of 2008 arising out of Special Leave Petition (Civil) No.1243 of 2008* submitted that the interest of the child is of paramount importance and, therefore, notwithstanding the fact that though this court had originally rejected the the plea of custody being given to the Appellant and which was confirmed by the Supreme Court, we could once again revisit this

issue.

7. We are unable to agree with this submission for more than one reason. Firstly, we find that looking at the finding given by this court in its order dated 01.02.2017, as well as finding of the Family Court when the child was interviewed by the said court in 2012 and in 2016, makes it abundantly clear that the child is very happy to stay with the father. It would not be out of place to note the observations of the Family Court in its order dated 18.04.2012 when the child was first interviewed. These observations read thus:

“1. At 4.00 p.m. the Petitioner wife/mother brought her son Advait, aged 7 years for interview. During interview the innocent child within a moment expressed his earnest desire to go back to his father. His elder sister by name Aditi aged 14 years is also present for interview. Both the siblings were over whelmed seeing each other. The elder sister Aditi started crying. Both the siblings have strong desire to stay with each other. In common voice both the children stated that they want to reside at Walkeshwar with their father and grandmother. Their school is also in the vicinity of Malabar Hill which is near to the house of their father/respondent husband. I do not find any reason to separate the brother and sister who are so much attached. Moreover, the child i.e. Advait stated during interview that he was forced to stay back with mother/petitioner wife. Both the children were repeatedly inquired but they have stated that they want to stay with their father/respondent husband. Both the children were already in care and custody of father/respondent husband. During the access hours the mother/petitioner wife retained the custody of her son Advait aged 7 years and made an Application to the court saying that her son wants to reside with her which is not at all true as per the prevailing facts. The child Advait has out rightly stated that he do not want to stay with mother/petitioner wife but want to stay with father/respondent husband. The conduct of the

mother/petitioner wife is not appreciated. It is against the norms of prudent behaviour. The conduct of the mother/petitioner wife reveals that she was unjust and unreasonable by constraining the child Advait with her against the wishes of the child. It also appears that the mother/petitioner wife has misused the access time by poisoning the mind of her child but she failed in doing that. In the result, I proceed to pass the following order:

: ORDER :

The custody of the child Advait is retained back to the father/respondent husband today from the Court.

Till further order there shall be no access of the child with the mother/petitioner wife.

The mother/petitioner wife, father/respondent husband and both the child shall visit "Muskan" for a session of counselling."

8. After this, the child was again interviewed as is recorded in the impugned order. What transpired in the interview conducted by the Family Court on 11.07.2016 has also been reproduced by the Trial Court in paragraph 32 of the impugned order which reads thus:

"32. I have also interviewed minor son Advait on 11.7.2016 and noted by observations at Exh.141. Advait stated that he is studying in 7th standard in Manav Mandir school at Malbar Hill. He appeared to be well mannered and matured. I did not find him tutored. He was confident while talking. He stated that he wants to spend equal time with father and mother and if both co-operate each other and father permits. He expressed his wish to study at his father's home because he can concentrate on his studies at his habitual place. He further stated that he has no disturbance at his father's house as his sister and father both are out for a day and he and his

grandmother only are at home. He does not wish to disturb his current routine. He clearly told that he does not want any change in his present situation. It is pertinent to note that Advait is about 13 years old. He is of the age where he can form his own preferences. The wishes of the child of such age are necessary to be respected. It is crystal clear that Advait has become accustomed to this life style. He is accustomed to the said small house of his father and he will be unable to adjust himself in the new environment if his custody will be shifted to his mother. Respecting the wishes of minor Advait and for his welfare I am of the opinion that it will not be proper to uproot Advait from his settled environment and make him to struggle to adjust with new environment. The child Advait will loose his attention and concentration from his studies and will get disturbed if his custody will be shifted to the mother. It will be definitely detrimental to this physical and mental development. Moreover Petitioner has not proved that Respondent father is not taking care of son. Hence, considering the wellbeing and welfare of minor son I am of the opinion that the rulings filed by Petitioner's advocate do not apply to this case. Hence, Petitioner is not entitled to the custody of minor son however, the interim arrangement which has been followed by both parents in respect of access to minor son is to be continued. Hence, I answer the custody issue in the negative."

9. Secondly, the Appellant's daughter, (Aditi and who is now a major) has chosen to stay with her father. There is a categorical finding given by the Family Court that the brother (Advait) and sister (Aditi) are very close and we do not think that it would be in the interest of the minor child Advait to separate him from his sister and father.

10. Looking to all these facts, we find that atleast, prima facie, at this stage it is not in the interest of the child to either modify the Consent Terms or the order passed by the Family Court regarding custody. As rightly

submitted by the learned counsel for the Respondent, this clearly appears to be a case where an old wine has been put in a new bottle. Considering the earlier order passed by this Court on 01.02.2017 and from which the SLP has been dismissed, we have no hesitation in holding that this Civil Application is nothing but an abuse of the process of the Court. We would have been justified in awarding heavy costs against the Appellant, but only because the Appellant is a lady and the persuasion of Mr. Apte that we refrain from doing so.

11. The Civil Application is accordingly dismissed. However, there shall be no order as to costs. It is needless to state that the Appellant as well as the Respondent shall comply with the terms and conditions as set out in the Consent Terms dated 25.07.2012.

(B. P. COLABAWALLA, J.)

(K.K. TATED, J.)