

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION [STAMP] NO. 31404 OF 2018**

Sayyed Anis Ahmed	]	Petitioner
Vs.		
Imran Anwar Hussain Dafedar	]	Respondent

Mr. Gaurav Bhavnani, for Petitioner.

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CORAM : R.G. KETKAR, J.

DATE : 1st NOVEMBER, 2018.

P.C.

Not on board. At the request of Mr. Bhavnani, taken up for admission.

2. Heard Mr. Bhavnani, learned Counsel for the petitioner.

3. Leave to amend so as to annex order dated 24th October, 2018 is granted. Amendment shall be carried out forthwith.

4. By this Petition under Article 227 of the Constitution of India, the petitioner-maternal grandfather of Ayan aged about 8 and ½ years and Sufiya aged about 6 and ½ years has challenged the order dated 24th October, 2018 passed by the learned Judge, Family Court No.5, Mumbai below Exhibit 41 in Petition No. D-26 of 2013. By that order, the learned Judge allowed the application made by the respondent herein in the following terms;

- “2. The petitioner [respondent herein] is entitled to get overnight access of both the children from 3.00 pm of 3.11.2018 to 3.00 p.m of 9.11.2018.
3. The respondent [petitioner herein] shall handover custody of the children to petitioner [respondent herein] before the marriage counsellor Smt. S.B. Pujar/Shri R.R. Kotwal at 3.00 p.m on 03.11.2011.
4. The petitioner [respondent herein] shall handover the custody of the children to the respondent [petitioner herein] on 09.11.2018 at 3.00 p.m in an Inorbit Mall, Malad (West), Mumbai.
5. The petitioner [respondent herein] shall take proper care of the children's health, food etc.”.

5. In support of this Petition, Mr. Bhavnani strenuously contended that the learned Judge, having regard to the fact that the respondent was prosecuted for committing murder of his wife, was not justified in allowing the application. He submitted that aggrieved by that order of acquittal, the petitioner has preferred appeal before this Court. He submitted that till date the respondent has not taken overnight access. He submitted that while passing the impugned order, the learned trial Judge did not consider welfare of the children. The learned trial Judge did not interact with the children before passing the impugned order. In support of this submission, he relied on the following decisions;

- [1] Anirudha Herwadkar Vs. Namita Herwadkar, (2017) 6 AIR Bom R 241.**
- [2] Nil Ratan Kundu and another Vs. Abhijit Kundu, (2008) 9 Supreme Court Cases 413.**

6. I have considered submissions advanced by Mr. Bhavnani. I have also perused the material on record. In paragraph 5, the learned trial Judge recorded the submissions advanced on behalf of the respondent that he is getting regular access of the children. The children are aware about relation with the respondent. The respondent is biological father of the children Ayan and Sufiya. The respondent was getting regular access in Child Care Center of Family Court, Mumbai. It was submitted on behalf of the respondent that he did not get overnight access till date. The case pending against him in Session Court is disposed of on merits. The respondent and his relatives have been acquitted from the criminal case.

7. In paragraph 6, the learned trial Judge recorded the submission of the petitioner herein to the effect that the respondent is guilty of killing his wife though he has been acquitted by the sessions Court. The petitioner has preferred appeal against the acquittal of the respondent and the same is pending in this Court. Till date the respondent has not taken overnight access and, therefore, it was submitted that the application may be dismissed.

8. In paragraph 7, the learned Judge considered the judgment of the Sessions Court in Case No.100 of 2012 which was produced along with list Exhibit 46. The learned Judge noted that the appeal preferred by the petitioner is pending before this Court. The learned Judge thereafter recorded that initially the access of both the children has been granted to the respondent in Child Care Center and thereafter in Inorbit Mall, Malad (West), Mumbai. Thus, children know the respondent as their father. Earlier, the respondent did not take overnight access and the application is made for overnight access. The learned trial Judge observed that welfare of the children is that they must know their biological father, paternal grand parents and relatives of the respondent. If overnight access is not granted then it creates obstruction to

enhance rapport between father and children and grand parents. It is also settled law that the children must get love and affection from father and grand parents. Considering welfare of the children, it is necessary to grant overnight access to the father of the children.

9. In paragraph 8, the learned trial Judge recorded that if overnight access is granted to the respondent, no harm or pressure will be caused to the petitioner. The learned trial Judge further observed that even no damage will be caused to the petitioner if overnight access is granted to the respondent. In paragraph 9, the learned trial Judge considered the school notice of Diwali Vacation which shows that the children have examination till 2nd November, 2018 and there is spare day on 3rd November, 2018. This shows that the children have Diwali Vacation from 3rd November, 2018 to 18th November, 2018. Accordingly, the learned trial Judge granted overnight access of both the children from 3rd November, 2018 at 3.00 p.m to 9th November, 2018 at 3.00 p.m and issued other directions.

10. Mr. Bhavnani relied on the decision of this Court in **Anirudha Herwadkar** (supra). A perusal of that decision shows that in paragraphs 9 to 11, the learned Single Judge of this Court has referred to the medico-legal certificates dated 28th January, 2017 and 18th February, 2017 in respect of minor child Ms. Janhavi. Upon considering these certificates, the learned Single Judge noted that child was found to be physically injured at the time of her medical examination.

11. In the present case, as noted earlier, the learned Judge has recorded that no harm will be caused if overnight access is given to the respondent. In view thereof, decision in **Anirudha Herwadkar's** case (supra) is not applicable. Mr. Bhavnani also relied on the decision of **Nil Ratan Kundu**

(supra). In that case, the Apex Court was considering section 17 of the Guardians and Wards Act, 1890 as regards appointment of guardian. In the present case, the impugned order grants overnight access, that too, for a limited period from 3rd November, 2018 to 9th November, 2018.

12. In view thereof, no case is made out for interfering with the impugned order by invoking powers under Article 227 of the Constitution of India. Hence, the Petition fails and the same is dismissed.

[R.G. KETKAR, J.]