

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

**CIVIL APPLICATION NO. 368 OF 2018
IN
FAMILY COURT APPEAL NO. 11 OF 2018**

Rajesh Khanduji Jadhav ... Applicant.
(Org. Respondent)

In the matter between :

Rajesh Khanduji Jadhav ... Appellant.
(Org. Respondent)

V/s.

Smita Jadhav Nee ... Respondent.
Smita Pendharkar (Org. Appellant)

Mr. Y. R. Singh, Advocate for the Applicant/Appellant.
Mr. Ajit Sudhakar Karwande, Advocate for the Respondent.

CORAM : K.K. TATED & N.J. JAMADAR, JJ.

DATE : DECEMBER 20, 2018.

P.C. :

1 The Appellant - father has preferred this Civil Application, seeking custody of minor son - Aryan during the vacations, weekly overnight access and other incidental and consequential reliefs, as regards his access to, and parental control over, Master Aryan, who is in the custody of the Respondent- mother.

2(a) The substance of the application is that the Applicant Applicant / Appellant had preferred an application bearing No. 303 of 2017 for seeking access to master Aryan. On 2nd February, 2018 this court had passed an order on the basis of the Consent Terms arrived at between the parties. The relevant part of order on the basis of Consent Terms (para nos. 5 and 6) reads as under :

“5. The respondent shall provide the overnight access once a month; first week of every month at about 11.00 a.m. Saturday morning the child Chi. Aryan custody handed over to the applicant at Family Court child complex up to Sunday evening at about 05.00 p.m., the custody of Chi. Aryan shall be handed over to the Respondent at the residential address of the respondent stated in cause title of the memo of appeal at Santacruz, Mumbai;

6. The Family Court order of access dated 30.10.2015 be modified and stop in view of overnight access as stated in condition No. 5 here in above along with one access on third Saturday between 3 p.m. to 5 p.m..”

(b) This court, vide order dated 28.06.2018 further directed that the aforesaid order dated 02.02.2018 shall

continue till further orders with liberty to the Applicant to take out appropriate application for the same cause of action in the month of November, 2018.

(c) The Applicant avers that despite the aforesaid orders passed by this court, the Respondent has been consistently denying the access to Master Aryan on one or the other pretext. The Respondent has been striving hard to alienate Master Aryan from the Applicant. The Applicant has enumerated the occasions on which 'overnight' and 'day' access was denied to the Applicant in para nos. 6 and 7 of the application. Thus, the Applicant initiated contempt proceedings against the Respondent and this court had issued notice before admission on 01.11.2018 in contempt petition (st.) no. 273 of 2018.

(d) The Applicant has, therefore, prayed for custody of minor - Master Aryan for the first half in the vacations and long continuous holidays of 4 days or more, weekly overnight access and other incidental and consequential reliefs in the nature of greater access to, and parental care of, Master Aryan.

3 The Respondent-mother has resisted the application by filing reply and affidavit. The Respondent contends that the Respondent has preferred civil application (st.) no. 25202

of 2018 for withdrawal of the consent, which formed the basis of the Consent Order. The Respondent submits that the access by the Applicant to Master Aryan has been abused by the Applicant and the Master Aryan feels traumatized after meeting the Applicant. Master Aryan does not desire to meet the Applicant. The past incidents, especially the incident which occurred on 15th May, 2018 when the Master Aryan was required to be returned to the custody of the Respondent, have been pressed into service to demonstrate that the visitation rights of the Applicant are causing great discomfort and harm to Master Aryan. On these, amongst other, grounds the Respondent has prayed for rejection of the application of the Applicant with compensatory costs.

4 We have heard learned counsel Shri Y. R. Singh for the Applicant / Appellant and the learned counsel Shri Ajit S. Karwande, for the Respondent at some length.

5 At the outset, we had made it clear to the learned counsel for the parties that, at this stage, we would not be dealing with the rival contentions and multifarious prayers made by the Applicant in the instant application, save and except the issue of access to Master Aryan during ensuing Christmas Vacation. The learned counsel for the parties were, therefore, directed to restrict their submissions on the limited issue of access during ensuing Christmas vacation, and,

accordingly, the submissions were advanced by the learned counsels on the said issue.

6 As observed earlier, it is imperative to note that in Civil Application No.303 of 2017 this court had passed the order on 02.02.2018 on the basis of the Consent Terms arrived at between the parties. The said Consent Terms, with the imprimatur of this court vide order dated 02.08.2018, envisaged the overnight access once a month and the day access on 3rd Saturday, between 3 p.m. to 5 p.m. [in terms of clauses 5 and 6, extracted above]. The learned counsel for the Applicant would urge that the Respondent has deliberately disobeyed the aforesaid order, as regards the access to Master Aryan, and tried her best to deny the visitation rights to the Applicant.

7 The averments in the Application, especially para nos. 6 and 7 indicate that overnight access was denied for the months of September, October and November, 2018. Whereas, the day access was denied on six occasions i.e. from 19th May 2018 to 20th October, 2018. The learned counsel for the Respondent did not dispute this factual position as regards the non-access (overnight access and day access) on aforesaid days. It was, however, urged that there were compelling reasons for inability of Master Aryan to meet the Applicant.

8 It is evident that despite Consent Terms and the Order by this court, the access to Master Aryan could not materialize, as envisaged by the Consent Terms. On a number of occasions, the access has been denied to the Applicant. The Applicant and Respondent have made allegations and counter-allegations against each other for the said non-access. We are not inclined to enter into the veracity and correctness of the said allegations and counter-allegations. We are of the view that the limited question of providing access to Master Aryan during the ensuing Christmas vacation can be determined without delving into the said allegations and the counter-allegations.

9 The learned counsel for the Respondent stoutly urged that the impact of visitation rights of the Applicant upon Master Aryan is of a paramount significance and cannot be lost sight of. He was at pains to impress upon the court to believe that Master Aryan is wholly averse to be in the company of the Applicant. He went on to urge that it has traumatizing effect on Master Aryan's mind and, therefore, not in the interest of overall physical and psychological well-being and welfare of Master Aryan.

10 It is pertinent to note that the custody of Master Aryan is not claimed by the Applicant for the first time. Neither it is the case that Master Aryan was never in the

custody of the Applicant, except access at a pre-defined place for a couple of hours. In pursuance of the order passed by this court on 02.08.2018, “overnight custody” of Master Aryan has been granted to the Applicant once a month. Indisputably, Master Aryan has been in the “overnight custody” of the Applicant in the months of February, March, April, May, June, and July, 2018. This factor assumes critical significance. It is evident that Master Aryan has been familiar with the company and surroundings of the Applicant during the aforesaid overnight access. The submission on behalf of the Respondent that the access to Master Aryan is in the nature of forceful access, does not appear to be justifiable.

11 It is trite that the visitation rights are granted to non- custodial parents, keeping in view the welfare of the child as a paramount consideration. There can be no duality of opinion on the point that Master Aryan needs the care, comfort, company and guidance of the Applicant father for his overall development.

12 The thrust of the submission on behalf of the Respondent is the alleged reluctance and disinclination of Master Aryan to meet the Applicant. This submission is required to be appreciated in the backdrop of the fact that Master Aryan has been in the custody of the Respondent for a long. Such a continuous and prolonged custody with one

parent and the consequent distance, which it generates qua the non-custodial parent, has its share of impact on the mind-set of the child. The influence which the custodial parent exerts upon the child in a situation where there is animosity, bitterness and acrimony between the erstwhile partners in life, is required to be kept in view. The alleged dis-inclination and reluctance, therefore, cannot be of a decisive significance.

13 A useful reference in this context can be made to a judgment of the Hon'ble Supreme Court in the case **Vivek Singh vs. Romani Singh - (2017) 3 Supreme Court Cases 231**, wherein the Apex Court directed that the custody of a girl child be transferred to the mother from the father, in whose custody the girl child was from the age of 21 months. The Apex Court, in the said case, adverted to the impact of prolonged custody which one parent has over the mind-set of the child and the resultant "Parental Alienation Syndrome". The observations in para 18 are instructive and thus extracted below :

“..... This Court cannot turn a blind eye to the fact that there have been strong feelings of bitterness, betrayal, anger and distress between the Appellant and the Respondent, where each party feels that they are 'right' in many of their views on issues which led to separation. The intensity of negative feeling of the

Appellant towards the Respondent would have obvious effect on the psyche of Saesha, who has remained in the company of her father, to the exclusion of her mother. The possibility of Appellant's effort to get the child to give up her own positive perceptions of the other parent, i.e., the mother and change her to agree with the Appellant's view point cannot be ruled out thereby diminishing the affection of Saesha towards her mother. Obviously, the Appellant, during all this period, would not have said anything about the positive traits of the Respondent. Even the matrimonial discord between the two parties would have been understood by Saesha, as perceived by the Appellant. Psychologist term it as '**The Parental Alienation Syndrome**'. It has at least two psychological destructive effects:

“(i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

(ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality. ”

(emphasis added)

14 In view of the aforesaid proposition and consideration, the submission on behalf of the Respondent, based on the alleged dis-inclination and reluctance of Master Aryan, to be in the company of the Applicant, does not warrant acceptance.

15 We are, therefore, inclined to allow the Applicant to have the custody of Master Aryan for a certain period during the ensuing Christmas vacation which is stated to be from 22nd December, 2018 to 2nd January, 2019. The rest of the prayers in the civil application may be considered later on, on their own merits.

16 Hence, the following order :

- i. The civil application stands partly allowed.

- ii. The Applicant shall have custody of Master Aryan from Saturday, 22nd December, 2018 to Thursday, 27th December, 2018.
- iii. The Respondent shall hand over the custody of Master Aryan to the Applicant on 22.12.2018 at 10 a.m. at Children's Complex, Family Court, Bandra.
- iv. The Applicant shall hand over Master Aryan to the Respondent at 5 p.m. on 27.12.2018 at the residential address of the Respondent, at Santacruz, Mumbai.
- v. The Applicant shall, however, permit Master Aryan to attend any school functions/ activities, like Christmas day celebration, during the said period between 22.12.2018 to 27.12.2018 and make necessary arrangement to drop and fetch Master Aryan from the School.
- vi. Rest of the prayers in the civil application shall be considered on their own merits after hearing the parties.
- vii Stand over to 18.01.2019.

(N.J. JAMADAR, J.)

(K. K. TATED, J.)

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