

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5046 OF 2019

Vishal Doshi

...Petitioner

Versus

Rachna Doshi

...Respondent

....

Mr. Vineet Naik, Senior Advocate a/w. Yusuf Iqbal Yusuf, Taubon Irani, Kalpana Ashar, Neville Majra, Shaista Pathan, Gyanika kochar i/b. Y & A Legal, Advocate for the Petitioner.

Mr. Ramesh Lalwani a/w. Sadhna Jaykar (Lalwani), Shaanal Shah, Anand Damle, Ameya Chaudhari, J.K. Shah, Anagha Nimbkar i/b. Mehta & Padamsey, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

RESERVED ON : 16th APRIL, 2019

PRONOUNCED ON: 02nd MAY, 2019

ORDER :

1. Heard Mr. Vineet Naik, learned Senior Counsel for the petitioner and Mr. Ramesh Lalwani, learned Counsel for the respondent, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner Vishal Doshi (for short, 'Vishal') has challenged the judgment and order dated 29.3.2019 passed by the learned Judge, Family Court No.3, Mumbai below Exhibits-5 and 17 in Petition No.A-532/2019. By that order, the learned trial Judge allowed the applications and directed Vishal to bring back both the children to the premises viz. 162,

Neelamber, 16th floor, Peddar Road, Mumbai – 400 026 (for short, 'matrimonial home') on or before 1.4.2019. The learned trial Judge directed Vishal and respondent Rachna Doshi (for short, 'Rachna') to produce their children's passport on record till further order. Both are restrained from taking the children out of the jurisdiction of the Family Court, Mumbai without Court's permission.

3. Vishal has instituted petition on 1.3.2019 under Section 13(1) (i) and (ia) of Hindu Marriage Act, 1955 (for short, 'Act') for dissolution of marriage solemnized on 28.12.2003. Vishal has claimed custody of Aman aged about nine years and Aria aged about five years under Sections 7, 17(1) & (2), 25 of the Guardians and Wards Act, 1890 read with Section 7(G) of the Family Courts Act, 1984. Vishal has also claimed permanent and temporary injunctions under Sections 37 and 38 of the Specific Reliefs Act, 1963 read with Order XXXIX Rule 1(a) of Code of Civil Procedure, 1908 (for short, 'C.P.C.').

4. On the same day, Vishal filed application Exhibit-5 *inter alia* for permanent injunction restraining Rachna from removing the children out of the jurisdiction of the Family Court; to pass an order of status quo to be maintained till the hearing and final disposal of the application.

5. The learned trial Judge was moved urgently on 2.3.2019 for interim relief. On 2.3.2019, the learned trial Judge passed following

order:

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 Read application and heard learned counsel for husband. To avoid complications, respondent No.1 is directed to maintain status quo in respect of children as on today by the time till further order on next date.

Sd/- 2.3.19”

6. On 7.3.2019, Sohil Premkumar Kothari, cousin of Rachna instituted Criminal Writ Petition No.1266/2019 in this Court against :

- i. Respondent No.1 - State of Maharashtra, through Public Prosecutor;
- ii. Respondent No.2 – Senior Police Inspector, Gamdevi Police Station, Gamdevi, Mumbai;
- iii. Respondent No.3 – Vishal;
- iv. Respondent No.4 – Shreyas Kirtilal Doshi (for short, 'Shreyas'), father-in-law of Rachna;
- v. Respondent No.5 - Geeta Shreyas Doshi (for short, 'Geeta'), mother-in-law of Rachna;
- vi. Respondent No.6 – Kirtilal Doshi (for short, 'Kirtilal'), grand-father-in-law of Rachna;
- vii. Respondent No.7 – Suman Kirtilal Doshi (for short, 'Suman'), grand-mother-in-law of Rachna; and
- viii. Respondent No.8 – Ranjan Kothari, sister of respondent No.7 Suman;

praying for writ of *habeas corpus* or any other appropriate writ or direction to the respondents to produce Rachna, Aman and Aria and direct that they be allowed to reside peacefully without any hindrance at the shared/matrimonial home without deprivation of basic human rights; direct respondent No.2 to provide police protection to Rachna, Aman and Aria.

7. On 11.3.2019, Division Bench of this Court directed the petitioner to implead Rachna as respondent No.9 during the course of the day and issued notice to the newly added respondent No.9 returnable on 12.3.2019. Rachna was given liberty to remain present in the course of the proceedings and to file affidavit in reply if she so desires.

8. On 12.3.2019, Division Bench disposed of the Writ Petition. In paragraph-6, Division Bench reproduced the order dated 2.3.2019 passed by the learned Judge of Family Court below Exhibit-5 in Petition No.A-532 of 2019. In paragraph-8, it was noted that presently Rachna is residing in her matrimonial house. The Court directed respondents No.4 and 5 (Shreyas & Geeta) to hand over a copy of key of the main entrance to Rachna by the evening of that day in order to enable her entry and exit from the house as per her need.

9. In paragraph-9, this Court noted the order dated 2.3.2019 passed by the learned Judge of Family Court below Exhibit-5 and observed that in view thereof the Court is not entering into the issue about production of minor children except directing that Vishal shall be responsible for two children until the Family Court decides the issue of custody finally. Rachna was given liberty to take such steps as she may be advised regarding the custody of the children before the learned Judge of the Family Court.

10. In paragraph-11, this Court observed that none of the observations made in the order shall have any impact on the pending proceedings initiated by Vishal before the Family Court as well as the proceedings initiated by respondents No.4 & 5 before the appropriate forum and the said Courts/Tribunals should arrive at such conclusion as per evidence produced before them. Reference made to the affidavit filed by Rachna was only for the purpose of disposal of the Writ Petition of *habeas corpus*.

11. On 26.3.2019, the matter was moved for modification of the order dated 12.3.2019 and in particular the word “finally” recorded in paragraph-9 of that order. The Division Bench felt that no modification was required to be made in view of what has been stated in paragraph-11 of said order and observed that the Family Court is at liberty to proceed with deciding the custody both interim and finally in accordance with law.

12. In the meanwhile on 18.3.2019, Rachna filed application Exhibit-17 *inter alia* praying for direction to Vishal to forthwith restore the children in their matrimonial home; pending the hearing of the application Vishal be directed to forthwith place on record the address/whereabouts of the children; permit Rachna to have free access to the children Aman and Aria and be allowed to continue to perform her motherly duties without any hurdles or hindrance from Vishal, his agents,

servants, relatives and representatives; permit her to approach the children's school, namely, The Cathedral & John Connon School to get her name and contact details restored in the school records in order to receive all communications from the school. Vishal filed reply opposing application.

13. After hearing both sides, the learned trial Judge has allowed the applications on 29.3.2019, as indicated earlier. It is against this order, Vishal has instituted present petition.

14. In support of this Petition, Mr. Naik has taken me through the cause title of the petition filed by Vishal against Rachna. Mr. Naik submitted that the address of Rachna is shown as matrimonial home as also address at CCI Chambers, Centre Wing, 2nd floor, Flat No.19, Dinshaw Vacha Road, Churchgate, where co-respondent Mikhail Dhaul (for short, 'Mikhail') is residing. Mikhail's son Ruhaan and Aman are classmates. Rachna is residing at CCI Chambers. Mr. Naik has also taken me through the passages in the Divorce Petition. In particular, he invited my attention to paragraphs-20, 26, 31 and 32 to contend that Rachna is having extra-marital relations with Mikhail. He invited my attention to paragraph-33 where Vishal has referred to the Memorandum of Understanding (for short, 'M.O.U.') entered into between the parties on 8.9.2018 (wrongly typed as 4.9.2018).

15. Mr. Naik submitted that Vishal has sought dissolution of marriage under Section 13(1)(i) & (ia) of the Act on the ground of adultery and cruelty. He invited my attention to the application at Exhibit-5 dated 1.3.2019 filed by Vishal for injunction. In paragraph-1 thereof, Vishal contended that he has instituted petition for dissolution of marriage and permanent custody and guardianship of his minor children who are presently in his exclusive care and custody.

16. In paragraph-3, Vishal asserted that he called upon Rachna to sort out the differences / matter amicably in order to avoid any adverse impact on the children keeping in mind the best interest and welfare of the minor children. Instead of considering the proposal for an amicable settlement, Rachna kept escalating her demands and further threatening Vishal to give into her demands failing which she threatened to abscond with the minor children. Vishal lodged police complaint on 28.2.2019 against Rachna lest she acts upon her threats and take away / abscond with the children.

17. Mr. Naik submitted that because of the apprehension that Rachna will abscond with minor children, application Exhibit-5 was urgently moved before the learned in-charge Judge of the Family Court. By order dated 2.3.2019, the learned trial Judge directed Rachna to maintain status quo in respect of children as of that date till further orders

on the next date. He submitted that the fact that children are in the sole and exclusive care and custody of Vishal was specifically brought to the notice of the learned trial Judge. The order dated 2.3.2019 was communicated to Rachna on 3.3.2019 by email (Exhibit-F, pages 175-176). Instead of taking urgent steps for vacating the order of status quo, Rachna got her cousin to institute habeas corpus petition before this Court. This Court noted the order dated 2.3.2019 passed by the Family Court. After hearing both sides on 12.3.2019, Division Bench of this Court specifically held that Vishal would be responsible for two children until the Family Court decides the issue of custody finally. Thus, the Division did not pass any order as regards custody of the children. He submitted that the children are in his custody and Vishal is responsible for the children until orders, interim custody or final custody, are passed by the Family Court in application filed by Rachna. Till date, Rachna has not filed any proceedings interim or final for custody of minor children.

18. Mr. Naik submitted that as the children were having spring vacations, Vishal decided to take them to Tadoba National Park, Chandrapur from 1.3.2019 to 11.3.2019. Rachna did not accompany Vishal and she left Mumbai at 1:00 p.m. on 1.3.2019. Mr. Naik submitted that the premises at 162, Neelamber does not belong to Vishal. It solely belongs to his mother, grand-mother and a trust created for the benefit of

Vishal's mentally challenged uncle i.e. Anuj Doshi Property Trust. Rachna is residing with co-respondent at CCI Chambers, Churchgate. He submitted that Vishal's mother Geeta instituted a proceeding seeking eviction of Rachna from her house before the Senior Citizens Tribunal and the summons of hearing on 31.3.2019 was issued to her. He relied upon the decision in **S.R. Batra Vs. Smt. Taruna Batra, (2007) 3 SCC 169** to contend that Rachna cannot claim any right in the house which belongs to her mother-in-law and same is not a 'shared household'. The learned trial Judge, therefore, was not justified in granting relief claimed by Rachna in connection with parental house of Vishal, more so when they are not party before the Family Court.

19. Mr. Naik submitted that after returning from Chandrapur, Vishal is residing along with minor children in a 3 BHK apartment. Vishal has also arranged for the cook and other servants. In short, he submitted that the minor children are well taken care of by Vishal while staying in the service apartment of Indian Hotels Company Ltd..

20. Mr. Naik invited my attention to the report dated 18.3.2019 made by the Marriage Counselor, Family Court, Mumbai recording therein that both the parties had agreed for interim children access in the Children Complex, Family Court, Mumbai amicably on 1st, 3rd and 5th Saturday. Both the parties were given time to decide some more days of

interim children access on week days. Rachna did not come back to finalize the consent terms for interim children access and so the settlement regarding interim children access could not be worked out between the parties.

21. Mr. Naik submitted that Kirtilal and others preferred S.L.P. (Cri.) No.3279/2019 before the Apex Court challenging the order dated 12.3.2019 passed by the Division Bench in Criminal Writ Petition No.1266/2019. By order dated 15.4.2019, the Apex Court stayed the directions of High Court in paragraph-8 of the order dated 12.3.2019.

22. Mr. Naik submitted that in view of the serious allegations of adultery, it will not be in the interest of minor children to reside along with Rachna in the matrimonial home. Even otherwise, having regard to the strained relations between Rachna on one hand and Vishal and his family members on the other, it is not desirable that Rachna resides along with family members in the matrimonial home.

23. Mr. Naik submitted that the learned trial Judge committed serious error in rejecting the submission recorded in paragraph-7 of the impugned order. He submitted that application Exhibit-16 is filed for verification of C.D. The learned trial Judge should have directed the Marriage Counselor to hear the C.D. in presence of the parties and should have called report of Forensic Laboratory, Kalina. Said submission was,

however, rejected on the ground that the Court is not going into the details of merits of rival allegations and at this juncture, the only issue about children's interest and welfare is required to be considered which has nothing to do with the prayer in application Exhibit-16. He submitted that having regard to the serious allegations of adultery levelled against Rachna and co-respondent, it is not in the interest and welfare of the children that Rachna resides along with them.

24. Mr. Naik invited my attention to various complaints filed against Rachna. The details of the complaints are as under :

- i. On 31.10.2018, Geeta filed complaint against Vishal and Rachna with the Gamdevi Police Station about the incident of 30.10.2018.
- ii. On the same day i.e. 31.10.2018, Vishal lodged complaint against Rachna with Gamdevi Police Station as she failed to return the jewelery that was taken from Aria Doshi Trust despite several demands from the Trustees.
- iii. On 26.12.2018, Vishal filed extortion complaint with Joint Commissioner of Police and Anti-Extortion Cell against Rachna and her lawyer.
- iv. On 28.2.2019, Vishal made last attempt to reconcile with Rachna. Instead of settling the matter she threatened to abscond to Belgium with the children if her demands were not met. Vishal, therefore, filed complaint with Gamdevi Police Station.
- v. On 2.3.2019, Vishal hired the service of private security agency lest Rachna was advised to return to the house and/or harass the

family members especially in view of the fact that Vishal had already left the house.

- vi. On 5.3.2019, Shreyas filed complaint with (1) Hon'ble Chief Minister of Maharashtra, (2) Police Commissioner of Mumbai, (3) Joint Commissioner of Police, (4) Additional Commissioner of Police, (5) Deputy Commissioner of Police, (6) Assistant Commissioner of Police, (7) Senior Inspector of Police, requesting them not to intervene on behalf of Rachna and also to provide them with adequate protection.
- vii. On the same day i.e. 5.3.2019, Shreyas filed a complaint with Gamdevi Police Station because Rachna had called over her sister to further harass them.
- viii. On 6.3.2019, Shreyas filed a complaint with Gamdevi Police Station since Rachna had brainwashed the servants against the Doshi family and had poured oil on the floor intending that they slip.
- ix. On 7.3.2019, Shreyas filed a complaint with Gamdevi Police Station since Rachna had locked his mentally challenged brother in his room and had refused to give the key for over an hour.
- x. On the same day i.e. 7.3.2019, Geeta filed a complaint with the Senior Citizens Tribunal for evicting Rachna. Notice has been issued and served upon Rachna and the matter was posted for hearing on 31.5.2019.
- xi. On 16.3.2019, Vishal filed complaint with (1) Hon'ble Chief Minister of Maharashtra, (2) Police Commissioner of Mumbai, (3) Joint Commissioner of Police, (4) Additional Commissioner of Police, (5) Deputy Commissioner of Police, (6) Assistant

Commissioner of Police, (7) Senior Inspector of Police reporting the incident of 13.3.2019.

- xii. On 26.3.2019, Geeta made complaint against Rachna with National Women's Commission.
- xiii. On 28.3.2019, Suman filed a complaint with Gamdevi Police Station against Rachna.
- xiv. On 30.3.2019, Shreyas filed a complaint with Gamdevi Police Station informing them he does not want Vishal or the children to come back.
- xv. On 1.4.2019, Vishal filed complaint with (1) Hon'ble Chief Minister of Maharashtra, (2) Police Commissioner of Mumbai, (3) Joint Commissioner of Police, (4) Additional Commissioner of Police, (5) Deputy Commissioner of Police, (6) Assistant Commissioner of Police, and (7) Senior Inspector of Police, seeking protection for his children against Rachna lest she do something that would frustrate the order of this Court dated 12.3.2019.
- xvi. On the same day i.e. 1.4.2019 Shreyas filed complaint with (1) Police Commissioner of Mumbai, (2) Additional Commissioner of Police, (3) Deputy Commissioner of Police, (4) Assistant Commissioner of Police, and (5) Senior Inspector of Police about the bogus complaint filed by Rachna to harass them.
- xvii. On 3.4.2019, on behalf of Shreyas a complaint was filed with Gamdevi Police Station as Rachna called two unknown persons and her uncle to the house. The said persons began fidgeting with the wiring of the house. When Geeta confronted them, they fled. Building security detained Rachna and her uncle.

25. Mr. Naik submitted that on 31.3.2019, Rachna filed a false complaint under Section 354-D Indian Penal Code, 1860 (for short, 'I.P.C.') for stalking through electronic means against Doshi family.

26. Relying upon various complaints, he submitted that the atmosphere in the matrimonial home is highly tense and polluted. If the impugned order is allowed to stand, it will enable Rachna and Children to stay in the matrimonial home which will further create complications and untoward scenes and lead to untoward incidents.

27. Mr. Naik further submitted that while passing the impugned order, the learned trial Judge has not considered whether the welfare of the children lies with their remaining with Vishal or with Rachna. Having regard to the serious allegations of adultery against Rachna it is not conducive that she resides along with children that too in the matrimonial home.

28. He submitted that Vishal is ready and willing to find out a suitable alternate accommodation in the same vicinity where the matrimonial home is situate so as to enable Rachna to stay there. Vishal will abide by the order of access of Rachna. As he is in exclusive custody of the children and Rachna has not filed any proceedings for custody of the children, this interim arrangement will be in the best interests of the children. He, therefore, submitted that the Petition requires consideration.

29. On the other hand, Mr. Lalwani supported the impugned order. He submitted that Vishal has alleged that Rachna is having extra-marital relations with co-respondent Mikhail. He submitted that the instances alleged in the Divorce Petition are from 13.8.2018 to 31.8.2018. It is, however, not in dispute that on 8.9.2018, M.O.U. was made between Rachna and Vishal. Recital-C of the M.O.U. records that Rachna and Vishal have had certain differences in their marriage leading them to jointly consider either of these two options : (i) reconciliation; or (ii) divorce by mutual consent. Recital-D records that until the parties consider and finalize their further course of action with respect to their marriage, they are desirous of entering into M.O.U. so as to set out the terms and conditions with respect to their duties and responsibilities towards each other as well as their minor children as more particularly set out therein. Recital-E records that the parties have mutually decided that the M.O.U. is valid for a period of 30 days from the date of its execution. The parties are at liberty to extend the M.O.U. for an additional period of 30 days or any other convenient period if the same is jointly and mutually agreed to by both the parties in writing.

30. By clause-1, the parties agreed that both the minor children will continue to reside at the matrimonial home exclusively and at no other place so as to ensure that their daily routine is maintained and their

school and extracurricular activities schedule is not disrupted.

31. By clause-2, it was agreed that Rachna will continue to reside at matrimonial home until such time as the M.O.U. is in force. The parties jointly agreed that Rachna will move out of the bedroom she shared with Vishal and will reside in the children's bed-room. In the event Rachna visits her parents in Antwerp, Belgium, for a short visit or any other place for that matter, Vishal agreed not to disturb Rachna's right to reside in the matrimonial home on Rachna's return from such visit.

32. Clause-3 recorded that it was agreed that Rachna will continue to peacefully utilize all the home facilities, amenities and resources, including cars etc. just as she has been doing since her marriage to Vishal and neither Vishal nor his parents or any of his family members shall in any way harass Rachna or interfere with her life or her use of the home resources in any manner. It was further agreed that Rachna shall be polite and respectful at all times with the children, Vishal, his parents and/or any of his family members.

33. Clause-4 recorded that it was agreed that Rachna and Vishal will both continue to have joint custody of their children and they shall both continue their parental duties towards the children, which include participating in school related activities, accompanying the children to extra-curricular classes, birthday parties, play dates, outings, etc. without

any interference / obstruction from each other, Vishal's parents or any of his family members. All important decisions regarding their minor children shall be taken by Rachna and Vishal jointly. As per clause-2 in the event Rachna visits her parents in Antwerp, Belgium, for a short visit or any other place for that matter, her joint custody of their minor children shall continue and Vishal shall not disturb the same.

34. Clause-6 recorded that Vishal shall continue to provide for Rachna's daily personal expenses by giving her a pre-determined amount per month which has been agreed to by both the parties jointly. It was agreed that this pre-determined amount shall be paid by Vishal to Rachna on the execution of M.O.U.

35. Mr. Lalwani submitted that after execution of M.O.U. till 1.3.2019, Rachna was residing in the matrimonial home and no extraordinary untoward incident took place between execution of M.O.U. on 8.9.2018 and 1.3.2019. He submitted that the children were having Spring vacation and it was mutually decided that Vishal takes children to Tadoba National Park, Chandrapur from 1.3.2019 to 11.3.2019. Rachna did not accompany Vishal and she left Mumbai at 1:00 p.m on 1.3.2019. He submitted that the petition for divorce is filed on 1.3.2019 and application Exhibit-5 is filed on the same day. Vishal left with Children to Chandrapur on 1.3.2019. The learned Judge of Family Court was moved

urgently for ad-interim relief on 2.3.2019. In the application, a false statement is made that the children are presently in his exclusive care and custody. He submitted that the children are in joint custody of Vishal and Rachna and are staying in matrimonial home along with mother, father, grand-mother and grand-father of Vishal. In other words, the children are residing in joint family. He submitted that while obtaining the order on 2.3.2019, neither Vishal nor his Advocate brought to the notice of the learned trial Judge that the children have already left along with Vishal for Chandrapur on 1.3.2019. Thus, there was remote possibility of Rachna taking away/absconding with the children. He further submitted that Vishal has interpreted the order of the trial Court dated 2.3.2019 to suit his convenience. Instead of bringing children back to matrimonial home, he moved along with children to the service apartment. The learned trial Judge directed Rachna to maintain status quo in respect of children as on that date. The children were admittedly in company of Vishal and had proceeded to Chandrapur on 1.3.2019. Thus, in short Vishal obtained order on 2.3.2019 by misrepresentation and by practicing fraud upon the Court.

36. Mr. Lalwani submitted that in paragraph-5 the learned trial Judge rightly observed that while passing ad-interim order on 2.3.2019, it was well within the knowledge of Vishal and his Advocate that children

were with him at Tadoba National Park for vacation. As such after returning from vacation trip, Vishal and children were supposed to return to the matrimonial home where they were residing while leaving for the vacation trip. Vishal has suitably misrepresented the order of status quo and directly started residing in another premises. In fact in the proceedings the Court has not specifically, either temporarily or permanently, granted custody of children in favour of either of the parties. The Court directed Rachna to maintain *status quo* and it has to be interpreted in the light of the relief sought in the application Exhibit-5 not to remove the children out of the jurisdiction of the Court. Vishal has taken advantage of the order of status quo and withdrawn the children from not only Rachna's company but also from the company of other family members residing in the matrimonial home.

37. Mr. Lalwani submitted that the contention of Vishal that Rachna is residing at CCI Chambers along with co-respondent and that the premises at '162, Neelamber' do not constitute shared / matrimonial home, are wholly misconceived. He submitted that no material is produced to substantiate that Rachna is residing at CCI Chambers. By mere describing address of CCI Chambers in cause title does not mean that she is actually residing there. He submitted that it is an admitted position as also is evident from the Divorce Petition that the marriage between the

parties was solemnized on 28.12.2003. Son Aman is born on 21.2.2010 and daughter Aria is born on 5.1.2014. Vishal himself claims that the children are residing with him in the secure joint family set up and have enjoyed the love and attention of all the family members where they are being brought up and inculcated with good morals and values. Post marriage the parties resided at the matrimonial home. Even as per the M.O.U. dated 8.9.2018, it was agreed between the parties that both the minor children will continue to reside at the matrimonial home exclusively and at no other place so as to ensure that their daily routine is maintained and their school and extracurricular activities schedule is not disrupted. It was also agreed that Rachna will continue to reside at matrimonial home. Rachna will be provided all the home facilities, amenities and resources. However, they have been denied to Rachna. The parties also agreed that they will have joint custody of minor children. He submitted that because of the financial crisis the matrimonial home is recently transferred in the names of Geeta, Suman and the Trust. He submitted that by the impugned order, the learned trial Judge has merely directed Vishal to bring back the children to matrimonial home. He submitted that the learned trial Judge rightly observed in paragraph-7 that the allegations of adultery made by Vishal are required to be substantiated by adducing evidence and at this stage this issue cannot be gone into.

38. Mr. Lalwani submitted that though Vishal is giving much emphasis on application Exhibit-16 for verification of C.D. and seeking direction that the Marriage Counselor should hear C.D. in the presence of the parties and also for calling report from Forensic Laboratory, Kalina, till today the copy of C.D. is not furnished to Rachna so as to enable her to deal with the application. The learned trial Judge was, therefore, justified in observing that he found no substance in the prayer made by Vishal while considering the issue of interest and welfare of the children.

39. Mr. Lalwani submitted that the reliance placed on the complaints lodged by Vishal and his family members are pending and as on date no adverse order is passed against Rachna. The complaints are filed solely with a view to making out a ground for driving out Rachna from the matrimonial home.

40. Mr. Lalwani submitted that Kirtilal and others have challenged the order dated 12.3.2019 passed by the Division Bench of this Court in Criminal Writ Petition No.1266/2019 by filing S.L.P. in Apex Court. However, on the same day i.e. 12.3.2019, Shreyas addressed a letter to Rachna handing over key of the matrimonial home to her. He submitted that Rachna is not served with the proceedings of S.L.P. and is not aware whether this fact was brought to the notice of the Apex Court. Rachna is also not aware as to whether the order impugned in this Petition was

brought to the notice of the Apex Court. He submitted that as the order dated 12.3.2019 passed by the Division Bench of this Court in Criminal Writ Petition No.1266/2019 is implemented and in fact Rachna is residing in the matrimonial home, the stay granted by the Apex Court, with respect, is inconsequential. Mr. Lalwani, on instructions, further submitted that in the entire S.L.P. the petitioners therein did not refer to the letter dated 12.3.2019 addressed by Shreyas to Rachna handing over key of the matrimonial home to her. That apart, they also did not refer to the impugned order dated 29.3.2019 passed by the Family Court. He submitted that the submission was made before the Apex Court that Rachna is residing elsewhere and on that basis exparte ad-inteirm order was obtained. Mr. Lalwani, on instructions, submitted that first compilation of additional documents was submitted by the petitioners therein before the Apex Court on 25.4.2019. The second compilation of additional documents was submitted by the petitioners therein before the Apex Court on 30.4.2019 which contains the letter dated 12.3.2019. The impugned order is, however, not filed before the Apex Court.

41. Lastly, Mr. Lalwani submitted that the contention of Vishal that as serious allegations of adultery are levelled against Rachna it will not be in the interest of children is concerned, Vishal is proceeding on the premise that the said contentions are either admitted by Rachna or have

been proved by Vishal by adducing cogent evidence. Rachna stoutly denies said allegations. He, therefore, submitted that no case is made out for interfering with the impugned order.

42. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Following facts are not in dispute :

- i. The marriage between Vishal and Rachna was solemnized on 28.12.2003.
- ii. Son Aman is born on 21.2.2010.
- iii. Daughter Aria is born on 5.1.2014.
- iv. In paragraph-4 of Divorce Petition, Vishal claims that his family comprises of his father Shreyas, his mother, Geeta, his uncle who is mentally challenged, his grand-father Kirtilal and his grand-mother Suman. Vishal further claims that the children have been with him in the secure joint family set up and have enjoyed the love and attention of all the family members where they are being brought up and inculcated with good morals and values.
- v. Divorce Petition is instituted on 1.3.2019 under Section 13(1)(i) and (ia) of the Act. Along with Divorce Petition, Vishal has filed application at Exhibit-5 on 1.3.2019.
- vi. In the divorce petition, Vishal has alleged the instances of adultery covering the period of July and August, 2018.
- vii. The parties have entered into M.O.U. on 8.9.2018. Clauses-1, 2, 3 and 4 of M.O.U. read thus :

- “1. It is agreed that both the minor children will continue to reside at their home at 161, Neelambar, 37, Dr. Gopalrao Deshmukh Marg, Peddar Road, Mumbai 400 026 exclusively and at no other place, so as to ensure that their daily routine is maintained and their school and extracurricular activities schedule is not disrupted.
2. It is agreed that Rachna will also continue to reside at 161, Neelambar, 37, Dr. Gopalrao Deshmukh Marg, Peddar Road, Mumbai 400 026 until such time as this MOU is in force. However, the Parties jointly agree that Rachna will move out of the bedroom she shared with Vishal and will reside in the children's bedroom. In the event Rachna visits her parents in Antwerp, Belgium, for a short visit or any other place for that matter, Vishal agrees not to disturb Rachna's right to reside in the said matrimonial home on Rachna's return from such visit.
3. It is agreed that Rachna will continue to peacefully utilize all the home facilities, amenities and resources, including cars etc. just as she has been doing since her marriage to Vishal and neither Vishal nor his parents or any of his family members shall in any way harass Rachna or interfere with her life or her use of the home resources in any manner. It is further agreed that Rachna shall be polite and respectful at all times with the children, Vishal, his parents and/or any of his family members.
4. It is agreed that Rachna and Vishal will both continue to have joint custody of their minor children and they shall both continue their parental duties towards the children, which include participating in school related activities, accompanying the children to extra-curricular classes, birthday parties, play dates, outings, etc. without any interference / obstruction from each other, Vishal's parents or any of his family members. All important decisions regarding their minor children shall be taken by Rachna and Vishal jointly. As mentioned in Clause 2 hereinabove, in the event, Rachna visits her parents in Antwerp, Belgium, for a short visit or any other place for that matter, her joint custody of their minor children shall continue and Vishal shall not disturb the same.”

viii. Thus, *prima facie* notwithstanding serious allegations levelled by Vishal against Rachna in Divorce Petition, they executed M.O.U. on 8.9.2018 and arrived at interim arrangement. The interim arrangement *prima facie* recorded that the minor children will continue to reside at the matrimonial home exclusively and at no other place so as to ensure that their daily routine is maintained and their school and extracurricular activities schedule is not disturbed. The parties also agreed that Rachna will move out of the bedroom she shared with Vishal and will reside in the children's bed-room. In the event Rachna visits her parents in Antwerp, Belgium, for a short visit or any other place for that matter, Vishal agreed not to disturb Rachna's right to reside in the matrimonial home on Rachna's return from such visit. It was further agreed that Rachna will utilize all the home facilities, amenities and resources, including cars etc. just as she has been doing since her marriage to Vishal. Neither Vishal nor his parents or any of his family members shall in any way harass Rachna or interfere with her life or her use of the home resources in any manner. It was further agreed that Rachna and Vishal will both continue to have joint custody of their minor children.

43. It has now come on record that the children were having Spring vacation. Vishal decided to take them to Tadoba National Park,

Chandrapur from 1.3.2019 to 11.3.2019. Rachna did not accompany Vishal and children and left Mumbai at 1:00 p.m. on 1.3.2019. *Prima facie* after execution of M.O.U. till filing of Divorce Petition, no untoward incident is alleged both in Divorce Petition and application for interim relief at Exhibit-5. In paragraph-1 of the application at Exhibit-5, Vishal alleged that the children are presently in his exclusive care and custody.

44. On 2.3.2019, application at Exhibit-5 was moved for urgent relief on the ground that Rachna is likely to take away/abscond with children. At the time of moving the learned trial Judge for urgent interim relief, neither Vishal nor his Advocate informed the learned trial Judge that Vishal had already left Mumbai along with children for Chandrapur on 1.3.2019. In other words, children were not with Rachna after 1:00 p.m. on 1.3.2019 and were with Vishal. The learned trial Judge was, however, given impression that Rachna was likely to take away/abscond with children. In fact, it was impossible for Rachna to take away children when they were in the company of Vishal. When Vishal was moving the learned trial Judge for urgent ad-interim relief on 2.3.2019, it was expected from him and also his Advocate to appraise the learned trial Judge about Vishal's visit to Chandrapur. That apart, when Vishal had already left with the children on 1.3.2019 for Chandrapur, there was absolutely no necessity for moving the learned trial Judge urgently for obtaining ad-

interim relief. *Prima facie* Vishal had obtained ad-interim order by withholding vital information from the trial Court.

45. After obtaining ad-interim order on 2.3.2019, the order dated 2.3.2019 was communicated to Rachna on 3.3.2019 by email at Exhibit-F, pages 175-176. After returning from Chandrapur, Vishal did not return to matrimonial home along with children. In fact the apprehension expressed by Vishal was taken care of by order dated 2.3.2019. Notwithstanding this fact, instead of returning to matrimonial home, Vishal shifted to the service apartment of Indian Hotels Company Ltd..

46. It is material to note that the relief of permanent custody is claimed by Vishal in his divorce petition. No application for interim custody is moved either by Vishal or Rachna. Though Vishal and Rachna are in joint custody of children and are residing in matrimonial home upto 1.3.2019, Vishal claims that he is in exclusive custody of minor children. In my opinion, the learned trial Judge was perfectly justified in holding that after returning from vacation from Chandrapur Vishal and children were supposed to return to matrimonial home where they were residing while leaving for the vacation trip. Vishal has suitably misinterpreted the order of status quo and directly started residing in other premises. Vishal has taken advantage of order of status quo and withdrawn the children from not only Rachna but also from the company of other family members. The

order of status quo granted by the learned trial Judge on 2.3.2019 has to be considered having regard to the prayers made in application Exhibit-5. Vishal has claimed permanent injunction restraining Rachna from moving children out of the jurisdiction of Family Court, Mumbai. Vishal himself had removed the children out of the jurisdiction of the Family Court, Mumbai by taking them to Chandrapur. The order of status quo claimed by Vishal is referable to the assertions made in Divorce Petition and application at Exhibit-5 which unmistakably shows that children are residing in the matrimonial home.

47. It has come on record that Sohil Premkumar Kothari, the cousin of Rachna instituted Criminal Writ Petition No.1266/2019 in this Court. In paragraph-4 of the order dated 12.3.2019, Rachna narrated various difficulties faced by her. It was contended that her entry and egress in the matrimonial house have been substantially curtailed since the main lock of the house has been changed in the meanwhile and she does not possess the key for allowing her entry and egress from the house. In view thereof, the Division Bench passed the following direction in paragraph-8 of that order :

- “8. Presently respondent No.9 is residing in her matrimonial house. Therefore, we direct the respondent Nos.4 and 5 to hand over a copy of key of the main entrance to the respondent No.9 by this evening in order to enable her entry and exit from the house as per her need. The Respondent

No.9 shall keep in mind and consideration the advanced age of the respondent Nos.4 and 5 and other family members residing in the house. Respondent No.9 is requested to respect their needs and to ensure that no disturbance is caused to them.”

48. It has come on record that by letter dated 12.3.2019, Shreyas, father of Vishal, handed over key of the matrimonial home to Rachna. The copy of the S.L.P. is subsequently placed on record. It is, however, not possible to find out whether the fact of handing over key by Shreyas on 12.3.2019 itself was brought to the notice of the Apex Court. It is also not possible to find out whether the order impugned in this petition was brought to the notice of the Apex Court. The fact, however, remains that Rachna continues to live in the matrimonial home post handing over key by Shreyas to her on 12.3.2019.

49. Mr. Naik submitted that the premises at '162, Neelamber' does not constitute shared / matrimonial home. He relied upon the decision in **S.R. Batra's** case (supra). It is not possible to accept this submission. I have already indicated that after solemnization of marriage in the year 2003, Rachna resided in matrimonial home till 1.3.2019 and after handing over keys on 12.3.2019. She is residing along with Vishal, his parents and grand-parents and his uncle. Section 2(s) of the Protection of Women from Domestic Violence Act, 2005 (for short, 'D.V. Act') defines the expression

“shared household”, which reads thus :

“2. Definitions .-- In this Act, unless the context otherwise requires,-

(s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household. ”

[emphasis supplied]

50. A perusal of the above extracted definition shows that shared household means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household. Thus, Rachna is residing continuously since 2003 till

date in the matrimonial home excepting few days. *Prima facie* at this stage it cannot be said that the premises at '162, Neelamber' is not shared household / matrimonial home of Rachna. In paragraph-26 of **S.R. Batra's** case (supra), the Apex Court observed that the husband and wife may have lived together in dozens of places e.g. with the husband's father, husband's paternal grandparents, his maternal parents, uncles, aunts, brothers, sisters, nephews, nieces etc. If the interpretation canvassed by the learned counsel for the respondent is accepted, all these houses of the husband's relatives will be shared households. This is not so in the present case. In view thereof, the reliance placed by Mr. Naik on the decision of **S.R. Batra's** case (supra) does not advance the case of Vishal.

51. Mr. Naik submitted that Rachna is residing at CCI Chambers, Churchgate along with co-respondent. As against this, Mr. Lalwani submitted that no material is produced for substantiating that Rachna is residing at CCI Chambers, Churchgate along with co-respondent. *Prima facie* I find merit in this submission. Vishal has merely described the address of CCI Chambers of Rachna. *Prima facie* that does not mean that Rachna is actually residing there.

52. Insofar as the contention that it is not in the interest and welfare of the children to reside with Rachna in view of serious allegation is concerned, they are required to be substantiated by adducing evidence.

It is not in dispute that Vishal has not furnished C.D. to Rachna till date. Rachna has, therefore, no opportunity to deal with the allegations raised in application Exhibit-16. In view thereof, no fault can be found with the findings recorded by the learned trial Judge in paragraph-7 of the impugned order. At this stage, this cannot be a ground for Vishal to refuse to bring back the children at matrimonial home. In fact in paragraph-4 of the Divorce Petition Vishal himself has contended that that his family comprises of his father Shreyas, his mother, Geeta, his uncle who is mentally challenged, his grand-father Kirtilal and his grand-mother Suman. Vishal further claims that the children have been with him in the secure joint family set up and have enjoyed the love and attention of all the family members where they are being brought up and inculcated with good morals and values. It is, therefore, in the best interests of children that they are brought back to matrimonial home in the company of their grand-father Shreyas, grand-mother, Geeta, great-grand-father Kirtilal and great-grand-mother Suman.

53. A perusal of the impugned order shows that in paragraph-4, the learned trial Judge noted that he had tried to explore the possibility of amicable settlement so far as the interim relief in application Exhibit-17 is concerned. During the course of hearing, I suggested that Rachna, without prejudice to her right and interest to reside in the matrimonial home, will

shift to 3 BHK premises where presently Vishal and children are staying. As and when Vishal makes arrangement for alternate accommodation, Rachna will shift along with children to that place. This arrangement was suggested as Vishal has expressed reservation for Rachna residing in the matrimonial home along with his parents and grand-parents. This will obviate the allegations and counter allegations by the parties. Mr. Naik, upon instructions, submitted that Vishal is ready and willing to find out suitable alternate accommodation in the same vicinity where the matrimonial home is situate so as to enable Rachna to stay there. However Vishal is not agreeable for Rachna shifting to alternate accommodation along with children as allegations of adultery are levelled against her. Thus, at this stage there is no possibility of amicable settlement.

54. Mr. Naik relied upon several complaints filed against Rachna. As on date, no adverse orders are passed against Rachna on the basis of these complaints. Filing of various complaints cannot be a ground for not bringing the children to matrimonial home. That apart, having regard to the conduct of Vishal, I am of the firm opinion that no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, the petition fails and the same is dismissed.

(R. G. KETKAR, J.)