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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FAMILY COURT APPEAL NO.114 OF 2015

Manish B. Katira ...Appellant
vs.
Smt.Aditi M. Katira ...Respondent

**ALONG WITH
FAMILY COURT APPEAL NO.99 OF 2015**

Smt.Aditi M. Katira ...Appellant
vs.
Manish B. Katira ...Respondent

FCA/114/2015 WITH with CAM/265/2015,
CAM/80/2016,CAM/144/2016
WITH FCA/99/2015 WITH CAF/184/2015 In FCA/99/2015

Mr.Yusuf Ravikant Singh for the appellant (husband) in FCA/114/15 and for the Applicant in CAM/265/2015 , CAM/80/2016,CAM/144/2016 for the respondent in FCA/99/2015 A/W CAM/184/2015, Mr.A.S.Khandeparkar a/w Mr.Arun H. Mehta , Ms Apporva Khandeparkar, Ms. Ashwini C. Pawar,Ms Sonika Mehta i/by Akshar Law for the Appellant/Applicant (Wife) in FCA/99/2015 A/W CAM/184/2015, the respondent (wife) in FAC/114/15 and for the Respondent (WIFE) FCA/114/15 and CAM/265/2015, CAM/80/2016,CAM/144/2016

CORAM : A.S.OKA, & A.S.GADKARI, JJ.
DATE ON WHICH JUDGMENT IS RESERVED:FEBRUARY 25,2019
DATE ON WHICH JUDGMENT IS PRONOUNCED:APRIL 9,2019

JUDGMENT: (PER A.S.OKA,J.)

1 As per the administrative order of the Hon'ble the Chief Justice, these Appeals are specially assigned to the Bench presided over by one of us

(A.S.Oka,J.).

2 This is a very unfortunate litigation which arises out of a matrimonial dispute. The marriage between the parties was solemnised on 5th February 2005. A female child was born from the said wedlock on 18th May 2007. The record reveals that from the day on which the child became 40 days old, the husband and wife are residing separately. The custody of the child is with the mother. By the impugned Judgment and Decree, following three proceedings were decided:-. (i) Petition No.D-30 of 2008 filed by the husband against the wife for grant of custody of the child. (ii) petition No.A-2250 of 2009 was filed by the wife for a decree of judicial separation under section 10 of the Hindu Marriage Act,1955 and (iii) Petition No.2485 of 2009 filed by the husband for restitution of conjugal rights.

3 By the impugned Judgment dated 28th April 2015, the learned Judge of the Family Court, Mumbai dismissed the petition for judicial separation filed by the wife and decreed the petition for restitution of conjugal rights filed by the husband. The petition for custody of the minor child filed by the husband was disposed of by passing the following order:

"3 The petitioner shall give access of minor daughter Udantika to the respondent on every alternate Sunday in between 11.00 a.m

to 4.00 p.m and half of the access on each and every school vacation i.e Christmas vacation, Summer vacation, Diwali vacation etc. The parties shall decide the first half or second half as per their convenience and the convenience of child. On the day of birthday of child, the respondent is entitled to get access from 9.00 a.m to 2.00 p.m only and petitioner is entitled to keep the child in her custody after 2.00 p.m.;

4 The respondent shall collect the child from the garden situated nearby the house of petitioner for access and drop the child at the same place. At the same time, it is directed to the parties to take care of mental and physical health of the child. The access is given independently.;

5 The petition bearing No.D-30/2008 is allowed to the extent of access only. The prayer of respondent for grant of custody is hereby rejected.;

6 The petitioner is entitled to retain the custody of minor daughter Udantika.;

7 The parties to bear their own costs.;

8 Decree be drawn accordingly."

4 The petitioner referred above is the wife and the respondent referred above is the husband. Appeal No.114 of 2015 has been preferred by the father for challenging that part of the impugned Judgment and

Decree by which his prayer for permanent custody of the child was rejected. Appeal No.99 of 2015 is preferred by the wife for challenging the order of access. We must note here that the wife had preferred FCA No.10 of 2015 for challenging the impugned Decree to the extent of the dismissal of prayer for grant of judicial separation and FCA 108 of 2015 was filed by her for challenging the impugned Decree to the extent to which the petition for restitution of conjugal rights filed by the husband was decreed. However, the said two appeals have been withdrawn by the wife.

5 Before we deal with the merits of the case, we must note here that various Division Benches tried to bring about an amicable settlement of the dispute. On many occasions, the parties and the child were interviewed by the Benches. The orders passed from time to time will show that the husband and wife were referred to Dr.Harish Shetty, a Senior Psychiatrist for counselling. The reports filed on record will indicate that Dr.Shetty took initiative and tried his level best to resolve the issue of custody by making attempts to allow the husband to meet the child. Monitored access was granted in the presence of Dr.Shetty or one of his professional colleagues. It is true that Dr.Shetty and his colleagues have made sincere efforts to find a solution in the larger interests of the child, but circumstances are such that now this Court will have to make an endeavour to decide the dispute by a

judicial order. As confidentiality of the process undertaken by Dr.Shetty has to be respected, we are not referring the contents of the reports submitted by Dr.Shetty.

6 The learned counsel for the husband and the learned counsel for the wife have taken us through the pleadings and notes of evidence. The submission of the learned counsel for the wife is that the child is reluctant to meet her father though wife has no objection for her husband meeting the child. The submission is that overnight access should not be permitted as the child is not used to the company of the father. Our attention was invited to the allegation that the husband had given interview to a particular newspaper in which he had allegedly stated that he will go to the extent of kidnapping the girl. A submission is made that considering the fact that now the age of the child is nearly 12 years, the custody of the mother should not be disturbed and the child should not be forced to stay overnight with her father. The submission of the learned counsel for the husband is that the child was tutored by her mother and therefore, on many occasions, reluctance was shown by the girl to meet her father. He pointed out that on many occasions in past, the father was successful in having some dialogue with the child. He submitted that the husband is residing with the family of his brother which consists of his brother, brother's wife and two daughters whose respective ages are 13 and 7

years. The learned counsel for the husband submitted that the child can grow happily in the company of her cousins and the husband's sister-in-law is at home to take care of the child. He pointed out there is no reason to deny permanent custody of the child to the husband. He pointed out that the news item relied upon by the wife does not record that the husband had threatened to kidnap the child. It was further submitted by the learned counsel for the husband that the reasons given by the Family Court for not granting permanent custody of the child cannot be sustained.

7 Before we deal with the merits of the case, we must record here that the child was interviewed on more than one occasions by the Division Bench to which one of us (A.S.OKA,J.) is a party. Thereafter, the monitored access was granted to the father to meet the child in presence of Dr.Shetty and/or his colleagues. Only after we found that an amicable solution is not possible that we have taken up the Appeals for final hearing. We had the benefit of perusing the reports of Dr.Shetty. We have not again subjected the child to agony by compelling the child to come to the Court and have an interaction with us.

7 Common evidence was led by the parties in the three proceedings. The wife examined herself by filing her affidavit in lieu of examination-in-chief. She was cross examined by the husband's

Advocate. The wife also examined her uncle as a witness by filing his affidavit in lieu of examination-in-chief. The said witness was cross examined by the Advocate for the husband. The wife examined second witness who is residing in the same lane in which she is residing with her parents. The cross examination of the said witness was declined by the Advocate for husband. The third witness was examined by the wife is again a resident of the same lane in which she is residing with her parents. The husband examined himself. He did not examine any other witness.

8 In his affidavit in lieu of examination-in-chief at Exhibit-40 which is common to all the three proceedings, there are specific prayers made by the husband regarding the grant of custody in paragraph 41. The said prayers read thus:

"1 That Custody of the child be shifted to the petitioner father,

2 In the Alternate, Substantial and Significant Time of Access be granted during:

a. That,Weekends : Overnight Access be granted on: 1st, 3rd and 5th Saturdays from Saturday morning 11.00 am to next day Sunday evening 7.00 p.m, and One Weekend Overnight access each during Ganpati and Navratri Festival,

b. That Festivals & Significant Occasions Day Time Access on: I) Raksha

Bandhan, II) Holi, III) Ganpati, (IV) Navratri, Diwali (Laxmi Poojan Day), 1st September Father's Birthday, 18th May Child's Birthday each for 6 hours during day.

c. That, 50% access during School Vacations : Diwali, Christmas & Summer Vacations."

9 As far as the evidence of the wife and husband is concerned, most part of the evidence is on their matrimonial dispute. There are allegations and counter allegations which need not be dealt with as we are not concerned with the matrimonial dispute. The law is well settled. When it comes to deciding the dispute about the custody of minor child, the paramount consideration is the welfare of the minor. Such proceedings cannot be decided only on the basis of the rights claimed by the parties.

10 The date of birth of the girl is 18th May 2007. Therefore, she will complete the age of 12 years on 18th May 2019. Since she was 40 days old, the husband and wife are residing separately and there is an ongoing matrimonial dispute between them. The wife stays with her parents. The husband stays with the family of his brother which consists of his brother, brother's wife and two daughters. Going by the statements made in paragraph 14 of the affidavit in lieu of examination-in-chief of the husband, approximate ages of the daughters of his brother as of today must be 13 and 7 years respectively.

11 Perusal of the evidence of both the husband and wife show that there are no serious allegations made by them against each other as regards the treatment given by them to the child. Perusal of the evidence of the husband show that he is not able to establish that either the wife is not properly looking after the child or that the child is being neglected by the wife. The child is taking education in a good school. At the same time, it cannot be said from the material evidence on record that whenever the husband had an opportunity to meet the child, he has not properly treated the child or his conduct was objectionable. There is an allegation made in examination-in-chief by the wife that the husband gave interview to a newspaper in which he has even threatened to kidnap the child. We have perused the newspaper cutting which is on record. What is reproduced therein will show that though there was some desperation displayed by the husband as according to him he is being prevented from meeting the minor child for considerably long time, it cannot be said that he gave a serious threat to kidnap his own daughter. Some of the affidavits and applications filed on record will also indicate that there is a desperation set in husband as he feels that he is deprived of the a proper access to meet the minor child. However, the statement attributed to the husband in the newspaper cannot be read to mean that he had threatened to kidnap the child.

12 As far as the prayer made by the husband for grant of permanent custody is concerned, we are not inclined to grant the same. Today, the age of the female child is about 12 years. She has been in the exclusive custody of mother ever since she was 40 days old as from the 40th day of her birth, the parents have separated. Considering the tender age of the female child, and considering the aforesaid circumstances, the welfare of the child requires that her custody at this stage should not be disturbed. Any attempt to permanently disturb the custody of the child will adversely affect the child.

13 Now the question is about the grant of access. There cannot be any dispute that as the girl child grows, she will need the company of both the parents and therefore, the husband must get a reasonable access to meet the girl. Real contest is for granting overnight access. We have already quoted the operative part of the impugned Decree which deals with this aspect.

14 As stated earlier, the husband is seeking overnight access on 1st, 3rd and 5th Saturdays and one weekend overnight access during Ganpati and Navratri festivals. The access is sought for six hours on the child's birthday as well as father's birthday. Lastly, 50% access is sought during the school vacations of the child. The wife has a strong objection for grant of overnight access. As narrated

earlier, the husband is residing with his brother's family. The brother has two girls having age of 13 and 7 years respectively. His brother's wife is available to take care of the child. There are two cousins of the child who are in the same age group. The child has an advantage of their company. Therefore, there is no difficulty in acceding to the request made by the husband for grant of overnight access. The wife has not stated anything adverse against her sister-in-law. Today, the apprehension of the mother is that the child is reluctant. However, with the passage of time, the child is bound to start enjoying the company of her cousins and her father. We, therefore, propose to direct the wife to give overnight access to the husband from Saturday evening to Sunday evening on 1st, 3rd and 5th Saturday of every month. The access time will be between 6.00 p.m on Saturday till 6.00 p.m of Sunday. Overnight access should also be granted for at least one continuous week in Diwali vacation and for half of the Christmas vacation of the school. As far as the summer vacation is concerned, the husband will be entitled to continuous overnight access for half of the vacation. On the birthday of the child, the husband will be entitled to day access for five hours as may be mutually decided by the parties. He will be entitled to access in similar manner on his birthday provided his birthday is on a school holiday. In addition, during the Ganpati and Navratri festivals, the husband will be entitled to overnight access for a period of 24 hours. Needless

to add that the access shall be granted only on those days on which there will be school holidays.

15 We propose to continue the directions in terms of clause 4 of the impugned Judgment and Decree. If the parties or one of them desire to change the venue, we grant them liberty to apply the Family Court for suitable modification.

16 The husband will have to give an undertaking that whenever overnight access is granted, whether at weekends or on festive days or during the school vacations, he will not take the child out of Mumbai without permission of the Family Court and that he will bring the child for overnight access to his residence only when his brother's wife is available in the house.

17 The grievance of the husband is that the wife had defied all the orders of access passed by the Family Court as well as this Court. It is the responsibility of the wife to ensure that the girl is persuaded to stay in the company of her father. It is the responsibility of the wife to ensure that the directions issued by the Family Court as modified by this Court are implemented in its true letter and spirit.

18 We are substituting the operative part of the order on the custody petition by the aforesaid arrangement. By its very nature, the orders

regarding custody of the minor child and visitation rights/access are never final in the sense that in case of change in circumstances, the orders can be always modified. In this case, in the event, the parties desire to seek modification to the directions issued by this Court on the ground of change in circumstances, we propose to grant them liberty to move the Family Court which will be empowered to consider the prayer for modification of the arrangement in accordance with law provided a case of the change in circumstances is made out. That will be more appropriate as the Family Court can record evidence. In case, there is any difficulty in implementing the directions issued under this Judgment, it will be open for the Family Court to issue appropriate directions on an application being made by the parties.

19 Accordingly, we dispose of the Appeals by passing the following order:

(I) The prayer of the husband for permanent custody of the minor child is rejected. The permanent custody shall continue with the wife;

(II) Clause 3 of the operative part of the impugned Judgment and Decree is substituted by the following directions:

(a) The husband will be entitled to overnight access on every 1st, 3rd and 5th Saturday of every

calendar month. The access shall be granted from 6.00 p.m on every 1st, 3rd and 5th Saturday till 6.00 p.m. of the next day;

(b) The husband will be entitled to overnight access for one week in Diwali vacation and half of the Christmas vacation of the school. He will be entitled to overnight access for half of the summer vacation. The actual days shall be decided by the parties by mutual convenience;

(c) The husband will be entitled to overnight access on one day each in Ganpati and Navratri festivals subject to condition that the access shall be only on school holidays;

(d) The husband will be entitled to meet the child on her birthday for a period of five hours by taking her to his residence. He will be entitled to access in similar manner on his birthday provided the birthday is on a school holiday. The time shall be decided by mutual consent of the parties;

(e) The aforesaid directions are subject to condition of the husband filing an undertaking to this Court that during the aforesaid period of access, he shall not take the child out of Mumbai without prior permission of the Family Court and that he will bring the child for overnight access only when his brother's wife is available in the house. The undertaking shall be filed within one month from today. A copy of which shall be furnished to the

Advocate for wife. The aforesaid directions shall become operative only after undertaking is filed;

(III) Clauses 4 to 6 of the operative part of the impugned Judgment and Decree are maintained with above modification;

(IV) In the event, the parties desire to seek modification of the directions contained in this order, they will be entitled to apply to the Family Court by filing an application for modification which shall be decided by the Family Court in accordance with law as if the aforesaid directions are issued by the Family Court. In the event, there is any difficulty in implementation of the above directions, the Family Court will be entitled to issue necessary directions on application of the parties;

(V) The Petition bearing No.D-30/2008 is disposed of on above terms;

(VI) Both the appeals are disposed of on above terms with no order as to costs. Pending Civil Applications do not survive and the same are disposed of.

(A.S.GADKARI,J.)

(A.S.OKA,J.)

. After pronouncement of Judgment, the learned counsel appearing for the wife seeks stay of

operation of the directions contained in clause (II) of the operative part of the Judgment. The prayer is opposed by the learned counsel for the husband.

. Considering the facts of the case, clause (II) of the operative part of the Judgment will remain stayed for a period of one month from today.

(A.S.GADKARI,J.)

(A.S.OKA,J.)