

Andreza

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 26 OF 2023
WITH
CRIMINAL MISC. APPLICATION NO. 591 OF 2023 (F)**

Sebastiao Falcao	... Petitioner
<i>Versus</i>	
Nicole Gonsalvez	...Respondent

Ms. Gautami Kamat, Advocate *for the Petitioner.*

Mr. Ryan Menezes, Advocate *with Ms. Gina Almeida,
Advocate for the Respondent.*

**CORAM: PRAKASH D. NAIK, J
DATED: 28th AUGUST 2023**

ORDER

1. The Petitioner is aggrieved by Order dated 23.12.2022 to the extent of refusal to grant overnight custody of the children to the Petitioner. During pendency of the Writ Petition, the Petitioner filed Criminal Misc. Application No. 591 of 2023 seeking interim reliefs of visitation rights during December vacations, custody, etc.

2. The Respondent is the wife of Petitioner. There are two minor children born out of the wedlock. The Respondent has filed the proceedings before the Court of learned Judicial Magistrate First Class at Panaji, under the Protection of Women From Domestic Violence Act, 2005, ('said Act', for short).

3. The Petitioner preferred an application before the Court of learned JMFC 'B' Court at Panaji, seeking directions that minor children be allowed to spend December vacations starting from 16th December, 2022 to 6th January 2023 with the Petitioner. The minor children be allowed to communicate with Respondent on all days at fixed convenient time of parties through video calls/phone calls. The Petitioner be allowed visitation rights and access to minor children at least three days in a week. Custody of children be given to Petitioner in case the Respondent travels out of State of Goa. Restrain the Respondent from taking the minor children out of the jurisdiction of the Court without permission of Court and direct Respondent to provide full and correct address where the Respondent resides with minor children. The Respondent filed reply to the application preferred by the Petitioner. The learned Magistrate vide Order dated 23.12.2022, directed that the Respondent to drop and pick up both the children to the house of the Petitioner on 25.12.2022, 27.12.2022 and 29.12.2022 during the time stipulated in the order. On the non-visitation days, the Respondent shall allow the Petitioner to do video calling to the children for 15 minutes and he has to call in between 7.00 p.m. to 7.30 p.m. everyday. The Petitioner to take note of the earlier Order that no abusive language be used towards the Respondent during the video calling. The Petitioner will be entitled for Wednesday of every week to have visitation of the children for two

hours preferably from 6.00 p.m. to 8.00 p.m. except on the week following the exams of the children. This shall subsist till the main visitation and the custody application is decided by the Court. On every Sunday, the Petitioner is entitled for visitation rights from 9.00 a.m. to 9.00 p.m. Prior to leaving State of Goa along with his children, the Respondent to inform the Court and the Petitioner.

4. In the Petition, the Petitioner has prayed that the Order dated 23.12.2022 be set aside to the extent that it rejects the relief of overnight custody of the children. To grant overnight custody of children thrice a week and also during half the Summer, Diwali and December vacation.

5. Learned Advocate for the Petitioner submitted that although the learned Magistrate has granted visitation rights to the Petitioner, overnight custody has not been granted to the Petitioner. There has to be bonding between the children and the Petitioner. There was no reason to refuse the overnight custody of the children to the Petitioner. The Petitioner may be granted overnight custody for three days in a week. Alternate week ends custody of minor children be given to each side.

6. Learned Advocate for Respondent submitted that the Petition is not maintainable. The impugned Order can be challenged before

the Sessions Court by preferring Appeal under Section 29 of the said Act. The learned Magistrate has granted visitation rights to the Petitioner. The minor children are too small and maximum time their custody should be with mother. He relied upon the decision of this Court in the case of **Abhijit Bhikaseth Auti vs. State of Maharashtra & anr.**¹, wherein it is held that appeal would lie under Section 29 of the Domestic Violence Act against every Order passed by the learned Magistrate. **Learned Advocate for the Respondent also submitted that there was no prayer for overnight custody made at the instance of the petitioner by way of regular arrangement and the only submission which was advanced by the Petitioner was seeking overnight visitation during Christmas.**

Corrections
carried out as per
Order dated
14.09.2023

7. Learned Counsel for the Petitioner in rejoinder submitted that the Petition relates to visitation rights and considering the fact that it was heard by this Court on several occasions and Order dated 04.05.2023 was passed by this Court, the Petitioner may not be relegated for filing of appeal under Section 29 of the said Act. **It is further submitted that the Petitioner had also sought overnight custody which is evident from the averments in the application and the order passed by the Court.**

¹ 2009 ALL MR (Cri) 1005

8. Both the Advocates jointly submitted that instead of adjudicating only on limited issue relating to visitation rights and overnight custody as urged in these proceedings, appropriate directions be issued about visitation rights during working days, vacations, Christmas, Easter, Birthdays of parents and children. Both sides made suggestions in that regard.

9. Vide Order dated 04.05.2023, this Court had considered the request of the Petitioner for grant of overnight custody of the children during summer vacations. It was observed that there was no allegation that Petitioner, who is the father, is ill treating the children. Overnight custody of the children who are six and nine years, can be granted to the father. Both the parties are residing in Goa. The custody of the minor children be handed over to the Petitioner on every Saturday at 10.00 a.m. The Petitioner will take the children from the residence of the Respondent. The Petitioner to ensure that children are handed over to the Respondent on every Monday at 11.00 a.m. On Wednesdays and Thursdays, the custody of the children shall be with Petitioner between 1.00 p.m. to 7.00 p.m. The Court also recorded the grievance of the Respondent that the Petitioner does not abide by the Orders passed by this Court. The Court recorded that the conduct of the Petitioner is not appreciated and he was directed to file an undertaking that he would abide by the terms as stipulated in the said Order. Liberty was granted to the

Respondent to apply for vacating the Order in the event the Petitioner is found violating the conditions. It was further directed that the children will be handed over to the mother on 04.06.2023 at 7.00 p.m. Further orders regarding visitation rights/custody is passed on 05.06.2023. It was also observed that the Order passed by the JMFC, Panaji, shall stand superseded. The Petitioner has filed the undertaking in compliance with Order passed by this Court on 06.06.2023. The interim Order dated 04.05.2023 was thereafter continued till next date of hearing.

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10. In view of the said Order dated 04.05.2023 and considering the nature of the relief sought in this proceedings, at this stage, instead of directing the Petitioner to move before the Sessions Court by preferring an appeal, this Petition and Misc. Application can be disposed of with appropriate directions.

11. The Respondent has filed affidavit in Criminal Writ Petition No. ~~415 of 2023~~ ^{26 of 2023}, expressing her grievances against the Petitioner. The Respondent has filed affidavit in reply dated 02.06.2023 and sur-rejoinder.

12. Children are minors. They are attending school. The school timings of son Michael is 7.45 to 13.30 hours. Whereas the school timing of daughter Katherine are 7.55 a.m. to 13.30 hours from

Monday to Saturday. This information is gathered from the details furnished during the hearing of the Petition on the earlier occasions. Children are involved in activities such as chess, skating, singing, Taekwondo, tuitions, etc. The son's birthday is on 17th September and daughter's birthday is on 20th September. The children have summer vacations and Christmas vacations. Presently, in view of Order dated

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visitation/custody

04.05.2023 passed by this Court, overnight ~~custody~~ has been given to father from Saturday (10.00 a.m.) to Monday (11.00 a.m.). On Wednesday and Thursday the visitation rights to father is from 1.00 p.m. to 7.00 p.m. The father is also permitted to communicate with children by video calls on non-visitation days.

13. On hearing both sides and taking into consideration factual aspect, I pass the following order :

ORDER

(i) On Tuesdays and Thursday, the mother (Respondent) will drop the children to the School in the morning. The father (Petitioner) will pick up the children from School on those days. The children will stay with the father overnight on Tuesdays and Thursdays. During the stay of the children with the Petitioner, he is expected to look after their studies, preparation for

examinations, extra curricular activities, tuitions, etc. The father will drop the children to School on Wednesday and Friday morning.

(ii) The children will spend alternate weekends with the father. On these weekends, the mother will drop the children to School on Saturday mornings. The father will pick up the children from School on those Saturdays and children will visit with the father overnight on that Saturday and Sunday. The father will take up childrens studies, prepare them for tests/exams whenever it is scheduled and take them for attending their extra curricular activities/tuitions, etc. on those Saturdays. The father will drop the children to school on Monday morning following the weekend visitation with him. After such overnight custody/**visitation**, it is understood that father would take care of children while dropping them to school by providing them tiffin, water, snacks, etc.

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(iii) The father and mother would arrange the School uniforms for each of the children whenever they are in their custody. On all days, childrens' schedule of activities shall be followed by the parent with whom the children are.

(iv) If the visitation day i.e. Tuesday, Thursday, Saturday falls on a holiday, the mother will drop the children to the father's residence at 11.00

hours and the father will drop them to School the following day/Monday.

(v) The father and mother are permitted to make video calls to the children between 7.00 p.m. to 7.30 p.m. whenever the children are not in their custody. During the video calls, both the sides shall not abuse each other.

(vi) On the festival days of Christmas and Easter, the children will spend first half of the day with one parent (up 14.30 hours) and second half from 14.30 hours onwards with other parents.

(vii) Neither parents will get the same half for both the festivals. If the children spend the morning sessions with the father for Easter, they will spend the morning session with the mother for Christmas and vice versa. Since the children spent the entire day on Christmas 2022 with their father, and most of Easter 2023 with their father, for Christmas 2023, they will spend the morning half with the mother, who will drop them at the father's residence at 14:30 hrs. on 25/12/2023. They will spend the morning half of Easter Sunday 2024 with their mother, who will drop them at the father's residence at 14:30 hrs. on Easter Sunday 2024, and the visitation on Easter and Christmas, shall follow this scheme.

(viii) If the festival days of Christmas and Easter fall on a weekend, or a Monday following a weekend when the father has visitation as per the normal visitation schedule, and the children are to spend the first half of Christmas or Easter day with the mother, the mother will, if necessary (i.e. if the children are with the father on the Saturday or Sunday preceding Christmas or Easter day) collect the children from the father's residence at 17:00 hours on the day before Christmas/Easter, and drop them to the father's residence at 14:30 hours the following day. The children shall visit overnight with the father on that day, and the mother will collect them from the father's residence at 9 am the next morning. If the festival is Easter, and the children are with the father for the second half of the day, he will drop them to school on the Monday following Easter Sunday. If the weekend prior to Christmas or Easter Sunday was spent with the father, the mother will have visitation on the weekend following Christmas or Easter Sunday. If the weekend prior to Christmas or Easter Sunday was spent with the mother, the father will have visitation on the weekend following Christmas or Easter Sunday, and weekend visitation thereafter will follow the scheme of hereinabove, i.e. the children will spend alternate weekends with each parent.

(ix) If the festival days of Christmas and Easter fall on a weekend, or a Monday following a weekend when the father does not have visitation as per the normal visitation schedule, and the children are to spend the first half of Christmas or Easter day with the father, the mother will drop the children to the father's residence at 17:00 hours on the day before Christmas/Easter, and collect them from the father's residence at 14:30 hours the next day. If the festival is Easter Sunday, and the children are spending the second half of the day with the father, he will drop them to school on the Monday following Easter Sunday. If the weekend prior to Christmas or Easter was spent with the father, the mother will have visitation on the weekend following Christmas or Easter. If the weekend prior to Christmas or Easter was spent with the mother, the father will have visitation on the weekend following Christmas or Easter, and weekend visitation thereafter will follow the scheme hereinabove, i.e. the children will spend alternate weekends with each parent.

(x) If Christmas day falls on a weekday, and if the children are to spend the first half of the day with the mother, the mother will drop the children off at the father's residence at 14:30 hours on Christmas day, and collect them on the next day at 09:00 hrs. In such a case, if the day on which Christmas falls is a Wednesday or

Friday, and the father would ordinarily have visitation on Tuesday or Thursday preceding Christmas as per the normal visitation schedule, the father will not take visitation on that Tuesday or Thursday.

(xi) If Christmas day falls on a weekday, and if the children are to spend the first half of Christmas day with the father, the mother will drop them off at the father's residence on the previous day at 17:00 hours, and collect them on Christmas day at 14:30 hours, unless the previous day is a Tuesday or Thursday on which the children will be with the father as per the normal visitation schedule.

(xii) Since the birthdays of the children are three days apart, both the children shall spend the birthday of one of the children with the father and the birthday of the other child with the mother, alternately for each year, and each parent may celebrate both the children's birthdays on the day that the children spend with each of them.

(xiii) For the year 2023, the children shall spend Michael's birthday 17.09.2023, which is a Sunday with the father and Katherine's birthday 20.09.2023, which is a Wednesday 20.09.2023 with the mother.

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(xiv) The parents can celebrate their respective birthday with the children between 3.00 p.m. to 7.00 p.m. in the event the custody of the children on that day and/or during that time with opposite side.

(xv) During Summer, Diwali & Christmas vacations, apart from Christmas day, the schedule for general visitation specified hereinabove shall be followed, with the modification, that the children shall be dropped at the father's residence at 08:30 hrs. by the mother, on the days that they are to spend with the father, and they shall be picked up by the mother from the father's residence at 10:30 hrs. on the following day, or, if a weekend, then on the Monday morning following the weekend.

(xvi) If the father wishes to take the children on a trip out of Goa, for a period not exceeding half the vacation period, he shall be at liberty, to apply to the Judicial Magistrate, First Class, well in advance, in the pending proceedings, i.e. Criminal Case No. DVA/21/2019/B before the Hon. Judicial Magistrate First Class at Panaji, Goa, for permission to take them on such a trip. Such an application shall be decided on its own merits, and the father shall forgo, visitation days equal to the number of days of such trip, if permitted by the Court, to ensure sufficient vacation time to the mother with the children.

Same principle applies to mother and she is permitted to prefer such application before the said Court.

(xvii) If the mother is unable to give the father visitation on any scheduled visitation day/weekend, she shall inform the father about the same at least one day prior, unless the same is due to a last minute and unforeseen event, and he shall be entitled to compensatory visitation for the same, as mutually agreed to between the parties.

(xviii) If the father is unable to avail of visitation with the children on any scheduled visitation day/weekend, he shall inform the mother about the same at least one day prior, unless the same is due to a last minute and unforeseen event.

(xix) Both the parties cannot take children out of Goa without permission of Court and intimation to opposite side. **In the event the mother goes out of Goa in an emergent situation without taking her children along, the father would take care of the children.**

(xx) These directions will supersede the Order dated 23.12.2022 passed by JMFC 'B' Court, Panaji, and Order dated 04.05.2023 passed by this Court.

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14.09.2023

14. Criminal Writ Petition No. 26 of 2023 and Criminal Misc.
Application No. 591 of 2023(F), stands disposed of.

PRAKASH D. NAIK, J

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