

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10508 OF 2023

Mrs. Seema Karandikar

... Petitioner.

Versus

Mr. Jayesh Karandikar

... Respondent.

Mr. Sachindra B. Shety, Ms.Sarika Shety a/w Ms.Molina Takur,
Mr.Akshay Pansare, Advocates for the Petitioner.

Mr.Santosh Kyadiguppi, Advocate for the Respondent.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : DECEMBER 22, 2023.

P. C.:

1. By this petition, the challenge is to the order dated 17th June, 2023 passed by the Family Court below Exh.133, rejecting the Application of the Petitioner seeking directions to the concerned police station for handing over the custody of the child.

By the impugned order, the Petitioner has been allowed to visit the child, whenever the child wants to meet the mother and vice-versa.

2. The facts of the case are that the Petitioner, pursuant to the order passed in proceedings under the Protection of Women from Domestic Violence Act, 2005 was permitted to reside in the shared household where the Respondent as well as the child were

residing. In the month of January, 2023, the Petitioner left the matrimonial house alongwith the child and settled in Pune, where the child was admitted in the Pune school. On 23rd March, 2022, an application was made by the Respondent for restoration and the custody of the child which came to be rejected. In March, 2022, the Respondent filed a petition for divorce as well as the custody of the child. In September, 2022, the Respondent's application for access of the child was granted and after availing access, he handed over the child to the Petitioner. The second order of access was passed on 6th December, 2022 and after availing the access the child was returned to the custody of the petitioner. It is only at the time of third access granted vide order dated 3rd May, 2023, that the custody has not been restored to the Petitioner-mother. While availing access of the child, the Respondent has filed an affidavit-cum-undertaking dated 6th May, 2023 specifically undertaking that he shall return the child once the vacation was over. As the child is not returned back, the application came to be filed seeking directions to the police for handing over the custody of the child.

3. Heard Mr.Shetye, learned counsel for the Petitioner and

Mr.Kyadiguppi, leaned counsel for the Respondent.

4. Learned counsel appearing for the Petitioner submits that the application in fact sought restoration of the custody of the child to the Petitioner-mother in view of the affidavit-cum-undertaking which was filed by the Respondent-father. However, the Family Court construed this application as seeking directions to the police restoring the custody and that it is harmful for the child to involve the police in the dispute between the Petitioner and the Respondent. He submits that without considering that the custody of the child was with the Petitioner-mother. The Family Court has held that the child has his own preference considering the wishes of the child, the application is rejected.

5. Learned counsel appearing for the Respondent submits that initially, the child was in the custody of the Respondent-father and he had taken admission in a prestigious school in Mumbai. He would further submit that without his consent, the child was taken from his custody and was admitted to Pune school without leaving certificate being given by the Mumbai school. He further submits that the respondent was regularly restoring custody of the child to the Petitioner-wife, however, when the

vacation access was taken in the month of May, 2023, he has been informed by the son that he desires to study in Mumbai and does not want to be surrounded by the petitioners' brothers and nephews, who are drug abuser and indulged in drinking. He would further submit that the child has informed the father that one of the petitioner's brother possesses a gun and the child has been told that he would kill his father, if he tries any funny act with the petitioner. He submits that in view of this situation, the atmosphere in the petitioner's house is not conducive for the welfare of the child.

6. Considered the submissions and perused the record.
7. Both the parties have raised the dispute as regards the custody of the child inasmuch as the mother claims that the custody was always with her, whereas the father claims that the child was in his custody and subsequently in January, 2022, without the consent of the father, the child was taken to Pune by the mother and admitted in a school at Pune. The submission indicates that atleast from the month of January, 2022, the child was in the custody of the mother.
8. The issue as regards the permanent custody of the child is

something that has to be decided by the Family Court after the necessary evidence in that behalf has been led. At this stage, what is required to be noted is that the subsequent to an application seeking vacation access, the access of the child was given to the father upon an undertaking given by the father. An undertaking given to the Court has some sanctity and no litigant can be permitted to violate the undertaking with such impunity. The reason advanced by the Petitioner is that certain information has been given to him by the child as regards the family of the Petitioner and as such, the atmosphere is not conducive for the welfare of the child.

9. There is no material at present before this Court to substantiate that the information was in fact given by the child and not a ploy to retain custody of the child. As a solemn undertaking was given to the Court, it was expected of the Petitioner to restore the custody of the child and not drive the mother to file an application before the Family Court seeking restoration of the custody. In event, such a situation had arisen where certain information has been divulged by the child to the Respondent, it was the duty of the Respondent to file necessary

application before the Family Court and seek transfer of the custody. However, that has not been done and Respondent despite the solemn undertaking given to the Family Court has retained the custody of the child, which cannot be sustained.

10. As regards the order of the Family Court, the Family Court has considered the Application as being one limited to seeking direction to the Shivaji Park Dadar Police Station to get the child from the Petitioner and handover the same to the Respondent. The Family Court should not have been sensitive to the fact that what was sought by the Petitioner was restoration of the custody of the child to the Petitioner, when the admitted position is that atleast from January, 2022 the child was in the custody of the mother. While rejecting the application, the Family Court has considered that the child has expressed his wishes, however, the Family Court failed to take into consideration that the child is about 11 years of age and whether the child is mature enough to take a well-informed decision about his own custody has not been considered by the Family Court.

11. The Family Court also failed to consider that despite a solemn undertaking given to the Court, the Respondent-father has

not returned the custody of the child to the Petitioner-mother. If this conduct is permitted than in every matter of access, on the basis that the child does not wish to stay with the other spouse, the custody would be retained and render the whole purpose of granting the access a mockery. This is precisely what had happened in the present case and the Family Court without taking into consideration the relevant facts has dismissed the application.

12. In light of the above, the impugned order dated 17th June, 2023 is hereby quashed and set aside. The application below Exh.133 filed by the Petitioner-wife stands allowed.

13. It is open for the Family Court to adopt the necessary action for the violation of the affidavit-cum-undertaking given by the Respondent to the Family Court. Petition stands allowed in the above terms.

(Sharmila U. Deshmukh, J.)