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

**WRIT PETITION NO.14801 OF 2022
WITH
WRIT PETITION NO.14802 OF 2022**

Piyush Vijay Kumar Chopra
W/o. Rohan Pramod Kumar Khanna ... Petitioner
V/s.
Rohan Pramod Kumar Khanna ... Respondent

Mr.Jatin Sehgal with Ms. Devna Soni and Mr. Yash Bidkar i/by Mr. Kkshitij Shah for the petitioner.

Mr. Vedchetan Patil with Ms. Sunayana Kashid for the respondent.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 24, 2023

PC.:

WRIT PETITION NO.14801 OF 2022:

1. The wife has challenged the common order passed by Principal Judge, Family Court, Mumbai, on applications below Exhibit-14 and Exhibit-17.

2. The application below Exhibit-14 is an application seeking interim maintenance. Paragraph 2 of the impugned order indicates that the husband had not filed his affidavit of assets and liabilities. Filing such an affidavit of assets and liabilities is necessary in view of the judgment of the Apex Court in the case of **Rajnish Vs.**

Neha, reported in (2021) 2 SCC 324.

3. Apart from said defect, according to the petitioner, the opportunity of hearing was not granted to the wife before passing such an order. He invited my attention to the Roznama of relevant dates, which prima facie indicates that no opportunity of hearing was granted to the wife before a decision on an application for interim maintenance. Therefore, in my opinion, the order passed below Exhibit-14 cannot be sustained.

4. The writ petition No. 14801 of 2022 needs to be allowed . I, therefore, pass the following order.

5. The Impugned order below Ex. 14 dated 14.10.2022 passed by Family court Mumbai in Petition no. 3494 /2021 is set aside. Proceedings below Exhibit-14 are remanded back to the Principal Judge Family Court for a decision afresh in accordance with the parameters laid down by the Apex Court in the case of **Rajnesh** (supra).

6. Until the application for interim maintenance is decided, the husband shall continue to pay the wife at the rate of Rs.20,000/- per month.

7. However, considering the fact that this Court had earlier directed the learned Family Court to decide the interim application for maintenance expeditiously, the learned Family Court is requested to decide such application within eight (8) weeks from the appearance of the parties.

WRIT PETITION NO.14802 OF 2022:

8. The wife has filed application below Exhibit-17 for modification of consent terms recorded on 17th June 2022.

9. According to the wife, she is seeking withdrawal of consent terms based on three circumstances:

- 1) Letter written by the husband to the petitioner.
- 2) Letter written by the husband to the mother-in-law.
- 3) Filing of the charge sheet.

The learned advocate for the petitioner restricted the scope of the application below Exhibit-17 to paragraphs 6, 7 and 8 of the application. On perusal of paragraphs 6, 7 and 8, it appears that such an application has been filed based on events that occurred after the execution of the consent terms.

10. The parameters for recalling consent terms are well settled in view of the judgment of the Apex Court in **Ashish Ranjan vs Anupam Tandon** reported in (2010) 14 SCC 274. The Apex Court, in paragraphs 18 and 19, has laid down parameters for the withdrawal of consent terms in the context of relevant factors while granting custody of the child. Paragraphs 17 to 19 read thus:

“17. In *Jai Prakash Khadria v. Shyam Sunder Agarwalla* [(2000) 6 SCC 598: AIR 2000 SC 2172] and *Mausami Moitra Ganguli v. Jayant Ganguli* [(2008) 7 SCC 673 : AIR 2008 SC 2262] , this Court held that it is always permissible for the wards to apply for the modification of the order of the court regarding the custody of the child at any stage if there is any change in the circumstances. (See also *Vikram Vir Vohra v. Shalini Bhalla* [(2010) 4 SCC 409 : (2010) 2

SCC (Civ) 171].)”

“18. It is settled legal proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be determined in the background of the relevant facts and circumstances, and each case has to be decided on its own facts as the application of doctrine of stare decisis remains irrelevant insofar as the factual aspects of the case are concerned. While considering the welfare of the child, the "moral and ethical welfare of the child must also weigh with the court as well as his physical well-being". The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care and caution, with love, affection and sentiments applying human touch to the problem. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases. (Vide *Gaurav Nagpal v. Sumedha Nagpal* [(2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1 : AIR 2009 SC 557] .

19. The statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. (Vide *Elizabeth Dinshaw v. Arvand M. Dinshaw* [(1987) 1 SCC 42 : 1987 SCC (Cri) 13 : AIR 1987 SC 3], *Chandrakala Menon v. Vipin Menon* [(1993) 2 SCC 6 : 1993 SCC (Cri) 485], *Nil Ratan Kundu v. Abhijit Kundu* (2008) 9 SCC 413], *Shilpa Aggarwal v. Aviral Mittal* [(2010) 1 SCC 591 : (2010) 1 SCC (Civ) 192] and *Athar Hussain v. Syed Siraj Ahmed* [(2010) 2 SCC 654 : (2010) 1 SCC (Civ) 528] .)

11. The Apex Court thereafter, in the case of **Amit Kumar Vs. Sonila** reported in (2019) 12 SCC 711 had occasion to consider a

case of withdrawal of the consent terms. The Apex Court, while laying down the principle that when there is a conscious decision on the part of the wife, and the allegations of fraud, coercion, or misrepresentation are absent, the Court would not consider modification of the consent terms, provided such consent terms are in the interest of the welfare of a child.

12. In the facts of the case, the consent terms confer physical and virtual visitation rights to the husband.

13. The importance of visitation rights has been laid down by the Apex Court in the case of **Yash Vs. State of Rajasthan** reported in 2020(3) SCC 67. In paragraph 25, the Apex Court held that access to both parents is necessary for a child's development. The Apex Court, in paragraphs 22 to 25, held as under:

“22. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent, the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact

with the child. Courts dealing with the custody matters must while deciding issues of custody, clearly define the nature, manner and specifics of the visitation rights.

23. The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

24. Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks and holidays. In cases like the present one, where the parents are in two different continents, effort should be made to give maximum visitation rights to the parent who is denied custody.

25. In addition to "visitation rights", "contact rights" are also important for the development of the child, specially in cases where both parents live in different States or countries. The concept of contact rights in the modern age would be contact by telephone, e-mail or in fact, we feel the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes every day. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained, the child will have no difficulty in moving from one home to

another during vacations or holidays. The purpose of this is, if we cannot provide one happy home with two parents to the child, then let the child have the benefit of two happy homes with one parent each.

14. Subsequently, in the case of *Smriti Madan Kansagra v. Perry Kansagra*, (2021) 12 SCC 289 , the Apex Court, in paragraphs 15.1 to 15.6, laid down the parameters for custody of children.

15.1. It is a well-settled principle of law that the courts while exercising *parens patriae* jurisdiction would be guided by the sole and paramount consideration of what would best subserve the interest and welfare of the child, to which all other considerations must yield. The welfare and benefit of the minor child would remain the dominant consideration throughout. The courts must not allow the determination to be clouded by the inter se disputes between the parties, and the allegations and counter-allegations made against each other with respect to their matrimonial life. In *Rosy Jacob v. Jacob A. Chakramakkal* [*Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840] this Court held that : (SCC p. 855, para 15)

“15. ... The children are not mere chattels : nor are they mere playthings for their parents. *Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society....*”

(emphasis supplied)

15.2. A three-Judge Bench of this Court in *V. Ravi Chandran (2) v. Union of India* [*V. Ravi Chandran (2) v. Union of India*, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44] opined : (SCC p. 194, para 27)

“27. ... It was also held that whenever a question arises before a court pertaining to the custody of a minor

child, the matter is to be decided not on considerations of the legal rights of the parties, but on the sole and predominant criterion of what would serve the best interest of the minor.”

(emphasis supplied)

15.3. Section 13 of the Hindu Minority and Guardianship Act, 1956 provides that the welfare of the minor must be of paramount consideration while deciding custody disputes. Section 13 provides as under:

“13. Welfare of minor to be paramount consideration.—(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

15.4. This Court in *Gaurav Nagpal v. Sumedha Nagpal* [*Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1] held that the term “welfare” used in Section 13 must be construed in a manner to give it the widest interpretation. The moral and ethical welfare of the child must weigh with the court, as much as the physical well-being. This was reiterated in *Vivek Singh v. Romani Singh* [*Vivek Singh v. Romani Singh*, (2017) 3 SCC 231 : (2017) 2 SCC (Civ) 1] , wherein it was opined that the “welfare” of the child comprehends an environment which would be most conducive for the optimal growth and development of the personality of the child.

15.5. To decide the issue of the best interest of the child, the Court would take into consideration various

factors, such as the age of the child; nationality of the child; whether the child is of an intelligible age and capable of making an intelligent preference; the environment and living conditions available for the holistic growth and development of the child; financial resources of either of the parents which would also be a relevant criterion, although not the sole determinative factor; and future prospects of the child.

15.6. This Court in *Nil Ratan Kundu v. Abhijit Kundu* [*Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413] set out the principles governing the custody of minor children in para 52 as follows : (SCC p. 428)

“Principles governing custody of minor children

52. In our judgment, the law relating to custody of a child is fairly well settled, and it is this : in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided *solely* by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising *parens patriae* jurisdiction and is expected, *not* bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.”

15. In the facts of the case, the consent terms were recorded on 17th June 2022. Prior to recording of consent terms, on 31st March 2022, a supplementary statement of the petitioner/wife was recorded by the investigating agency in an offence registered against the husband under sections 354A and 67 of the Information and Technology Act, 2000. Reading the supplementary statement dated 31st March 2022 makes it clear that on 31st March 2022, the wife had made specific allegations against the husband for registration of an offence. Despite such knowledge, she consciously enters into compromise terms with her husband. No allegation of fraud, misrepresentation or coercion while entering into consent terms is pleaded in the application for recalling of consent terms. The custody of the child is with the wife. The effect of consent terms is to confer physical and virtual visitation rights to the husband. The reasons in paragraphs 6, 7 and 8 of the application, which are pressed into service, do not allege that such visitation rights would be against the welfare of a child. As is well settled, the only predominant factor for modification/recalling of consent terms is the welfare of a minor child. In the absence of any allegation or proof that such visitation rights as are conferred under consent terms would affect the welfare of a minor child, the learned Family Court was justified in rejecting the application for recall of consent terms.

16. There is neither illegality nor miscarriage of justice. The writ petition is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)