

Arjun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.17547 OF 2024

ARJUN
VITTHAL
KUDHEKAR

Aakash Kishore Raghani

...Petitioner

Versus

Jena Aakash Raghani

...Respondent

Digitally signed by
ARJUN VITTHAL
KUDHEKAR
Date: 2025.03.20
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Ms. Aishwarya Kantawala a/w Divya Jayan, for the Petitioner.

Mr. Rammani Upadhyay, for the Respondent.

CORAM: MADHAV J. JAMDAR, J.

DATED: 10 MARCH 2025

P.C.:

1. Heard Ms. Kantawala, learned Counsel appearing for the Petitioner and Mr. Upadhyay, learned Counsel appearing for the Respondent.

2. The challenge in this Writ Petition is to the Order dated 20th August 2024 passed by the learned Judge, Family Court, Mumbai below Exhibit - 75 in Petition No. A-862 of 2021. The operative part of the said Order dated 20th August 2024 reads as under :-

“11. For all these reasons, I am of the considered opinion that petitioner is under obligation to return the custody of the daughter named Yati to respondent as directed in the order at Exh.58. Hence, the following order.

Order

1. *This application is allowed as follows.*
2. *Petitioner is directed to hand over the custody of Yati to respondent by delivering the child to the residence of*

respondent on 23.08.2024 between 4.00 p.m. to 5.00 p.m.

3. *Petitioner shall submit the compliance of this order on the next date without fail.”*

(Emphasis added)

3. Perusal of the record shows that the daughter of 8 and 1/2 years who was given in the temporary custody of the Petitioner - father in May 2024 for summer vacation access and during that period the girl child has undergone a surgery and therefore the access period was extended and even thereafter the Petitioner failed to handover the custody of minor daughter to the Respondent - wife. In fact, the Petitioner has unilaterally changed the school of the child without informing the Respondent - mother.

4. Perusal of the record also shows that by Order dated 1st July 2024 passed by the learned Judge, Family Court, Mumbai below Exhibit - 58 in Petition No.A-862 of 2021, the said Application has been disposed of by directing the Petitioner to deliver the custody of the daughter to the Respondent on the very day i.e. on 1st July 2024. It appears that on 1st July 2024 the girl child has been handed over to the Respondent.

5. As per the Consent Terms dated 1st July 2024, it is recorded that the Petitioner - husband shall avail access from Friday to Monday. The said Consent Terms read as under :-

“CONSENT TERMS FOR HANDING OVER THE CUSTODY

1. *As per the order of this Hon’ble Court dt. 01/07/2024 on Exh 58, this Hon’ble Court has directed Petitioner to deliver back the custody of Yati to Respondent today in the court premises at 03:30 pm before Marriage Counsellor.*
2. *Accordingly Petitioner has handed over the custody of Yati to the Respondent at 04:15 pm.*
3. *It is agreed between the parties, to make comfortable child Yati, Petitioner shall accompany Respondent and child and he shall drop the child at the residence of the Respondent.*
4. *Petitioner shall avail access from Friday to Monday as agreed in the earlier consent terms.*
5. *Both the parties have reported that child has her birthday on 15/07/2024. Petitioner shall avail extra one day access for Birthday of the child and instead of Sunday he shall drop her back on Monday at 09:00 pm.”*

(Emphasis added)

Accordingly, for availing the said access the girl child was handed over to the Petitioner on 12th July 2024 and thereafter the custody of the child has not been given to the mother as per the Consent Terms and as per the Order dated 1st July 2024.

6. Thereafter, an Application bearing Exhibit - 75 has been filed in Petition No.A 862 of 2021 seeking compliance of the Order dated 1st July 2024. The said Application bearing Exhibit - 75 in Petition No. A-862 of 2021 has been allowed by Order dated 20th August 2024. The operative part of the said Order dated 20th August 2024 is already reproduced.

7. By the present Writ Petition the challenge is to the said Order dated 20th August 2024. The Writ Petition has been filed on 21st November 2024. Till date, there is no stay operating in this Writ Petition.

8. It is significant to note that the impugned Order dated 20th August 2024 has been passed to ensure compliance of the Order dated 1st July 2024. The said Order dated 1st July 2024 is not challenged by the Petitioner. Following observations in the impugned Order dated 20th August 2024 are very significant :-

- (i) *It is not in dispute that the child was given in the temporary custody of petitioner in May 2024 for summer vacation access. During this period, the child has undergone surgery. It would not be out of place to mention that petitioner has taken the necessary and appropriate care of health of the child. **Fact remains that the custody of the child was with respondent and has been temporarily shifted to petitioner for vacation and thereafter for the treatment of the child.***
- (ii) *By order dated 26.07.2024, the Marriage Counsellor was directed to interview the child and submit report. Consequently, the Counsellor has submitted the interview report at Exh.87. This report states that the child is happy in the custody of petitioner. The child was repeatedly stating that she does not want to go to her mother. The child told that her mother said that she shall not send back to the father. The report mentions that the **child does not have negative imprints about the mother. She does not carry any feeling of fear, anger or hatred for respondent. The child did not narrate any past incident about annoyance or discomfort by respondent.***
- (iii) *The child is about 8 years of age. The wish of the child is ascertained by the interview. However, the wish of the child of such tender age cannot be the sole criteria for*

determining custody. Because the welfare of the child shall also prevail over the wish of the child, particularly when the child is of tender age. It is pertinent to note that the petitioner has taken care of the medical health of the child since the child has been placed in his custody. The child was having vacation. Obviously, the child had ample time with petitioner during her vacation. Development of close affinity is obvious. Possibility of tampering the child for retaining the custody also cannot be ruled out. In such situation, the wish of the child that she does not want to go back to the mother cannot be considered. Moreover, this wish is not justified by any unhappy incident or any past memory. Mere denial would not be sufficient.

- (iv) *These documents show that petitioner has changed the school of the child after the child has been placed to his custody. No doubt, this could be a plausible justification that the child should not suffer in education. However, this act of petitioner also tends me to infer about his intention of retaining the custody. Because, in the backdrop of the permissive custody pursuant to consent terms and in the backdrop of pending litigation, it was incumbent upon petitioner to seek permission of this Court before changing the school. Atleast petitioner ought to have shown courtesy of informing the change of the school before the documents were called from him. Therefore, his alleged efforts as narrated in the reply at Exh.79 appeared to be articulated.*
- (v) *Here it is necessary to mention that by executing consent terms the parties agree to abide by the same. Therefore, it was the bounden duty of petitioner to abide by the consent terms, restore the custody and thereafter avail his remedies. The consensus extended by respondent cannot be permitted to be misused by retaining the custody. Secondly, the consent terms carry the seal of the Court. Judicial discipline demands strict and scrupulous obedience to the undertaking given to the Court. Retention of custody in such fashion would be an easy way to circumvent the provisions of law and the rigours of proof during trial for claiming custody. It shall be an easy method for the non custodial parents to gain the custody under the guise of consent terms.*

9. The learned Judge of the Family Court has rightly relied on the

decision of a learned Single Judge in *Seema Karandikar v. Jayesh Karandikar*¹, wherein the learned Single Judge has observed as follows :-

“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.”

(Emphasis added)

The above observations are squarely applicable to the present case.

10. In any case, it is required to be noted that the girl child is only 8 and 1/2 years old. The Petitioner has not complied with the Order dated 1st July 2024. The said Order is not even challenged. The Order dated 20th August 2024 is passed just to ensure compliance of the Order dated 1st July 2024. Accordingly, no case is made out for interference under the jurisdiction of this Court under Article 227 of the Constitution of India.

11. For the above reasons, the Writ Petition is dismissed, however, with no order as to costs.

[MADHAV J. JAMDAR, J.]

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