

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7268 OF 2016

Mr.Rajesh Khanduji Jadhav

.. Petitioner

vs.

Mrs.Smita Pendharkar nee Jadhav

.. Respondent

Ms.Sulabha A. Dhamale for the petitioner

Mr.A.S.Karwande for the respondent

CORAM : K. K. TATED, J.

DATE : OCTOBER 15, 2016

PC.:

1 Heard the learned counsel for the parties.

2 By this petition under Article 227 of the Constitution of India, the Petitioner husband challenges the order dated 5.8.2016 passed by Family Court at Bandra, Mumbai on the application filed by respondent wife under Order 39 of the Code of Civil Procedure, 1908 directing parties to maintain status quo i.e. custody of child to remain with the wife.

3 The petitioner is also seeking permanent custody of minor son Aryan. By today's application, petitioner is seeking interim order for overnight custody of the child for ensuing Diwali Vacation i.e. from 21.10.2016 to 6.11.2016.

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4 Advocate for the petitioner as well as respondent filed Affidavit-in-Reply as well as Rejoinder. In the present proceedings, petitioner and respondent initially filed M.J. Petition No.F-1910 of 2012 before the Family Court at Bandra. In that petition, both the parties filed Consent Terms dated 23.10.2012. By that Consent Terms both the parties took divorce. It was specifically stated in the said Consent Terms that permanent custody of their son Aryan Rajesh Jadhav will remain with the petitioner husband or as per the child's wish with whoever he wants to reside.

5 The learned counsel for the petitioner submits that at present the petitioner is seeking an order from this court to direct the respondent to give overnight custody for 50% of Diwali Vacation. He submits that as per his knowledge, Diwali Vacation is from 21.10.2016 to 6.11.2016. The learned counsel for the petitioner submits that as per the Consent Terms, minor child was with the petitioner. Sometime in the year December, 2014 respondent without obtaining any order from the competent court and violating the Consent Terms took the custody of the minor child. Thereafter, respondent changed her residence as well as minor child's school. The respondent failed and neglected to inform the petitioner her whereabouts as well as the school in which she admitted the minor child for more than one year. She submits that as soon as the petitioner learnt the address of the respondent and name of the school in which the minor child admitted, the petitioner filed the Execution Application before the Family Court. She submits that on 2.6.2015 respondent wife filed Misc. Application No.70 of 2015 under section 26 of the Hindu Marriage Act, 1955 seeking modification/suspension/revocation of the order dated 21.5.2013 read with the order 39 of the Code of Civil Procedure, 1908. She submits

that in that application, respondents made following prayers:

- a) That an order be passed modifying order dated 21st May 2013 to such extent that the permanent custody of the child Aryan Jadhav be granted to the Applicant absolutely;
- b) That an order be passed declaring the Applicant as the sole custodian and guardian of the child Aryan Jadhav;
- c) That an order be passed revoking the order dated 21st May 2013 to the extent of visitation rights, if any, granted to Petitioner No.1 (Respondent herein) under the said order;
- d) That visitation, if any, be granted to the Respondent under strict supervision of the Applicant and / or counselor, government controlled supervising organizations;
- e) That an order be passed directing the Respondent to pay Rs.6000/- per month towards the maintenance of the child as per more specifically stated in prayer clause (f) of the joint petition for divorce dated 23rd October 2012;
- f) That an order be passed directing the Respondent to handover the acknowledged copy of the nomination form by the Cooperative Housing Society to the Applicant as more specifically stated in clause (c) of the consent terms dated 23rd October, 2012.
- g) That an order be passed restraining the Respondent either through himself, or through his agents, servants and/or persons claiming under him, from removing the child from the lawful custody of the Applicant from the residence of the Applicant and/or otherwise;
- h) Ad-interim and interim orders in terms of the aforesaid clauses and more specifically in terms of prayer clause (g);
- i) For such further and other orders as this Hon'ble Court may deem fit and proper in view of the facts and circumstances of the said matter.”

6 The learned counsel for the petitioner submits that on that application, the Family Court passed order on 5.8.2015 directing parties to maintain status quo in respect of custody of the child. She submits that thereafter the petitioner husband filed application below Exhibit-17 in Interim Application No.264 of 2015 for custody of the child. That application was partly allowed by the Trial Court but rejected petitioners prayer for over night custody. Operative part of the said order dated 30.12.2015 reads thus:

“ORDER

1. The application is partly allowed.
2. The respondent shall take the regular access to minor Aryan on 1st 3rd & 5th Saturday in Children Complex in this Family Court for 2 hours from 3.00 p.m. To 5.00 p.m.
3. The petitioner shall give respondent access to the minor son on 1st 3rd & 5th Saturday as mentioned above. She shall bring the child in the Children Complex on 1st 3rd & 5th Saturday as per above mentioned time. If the petitioner fails to give respondent the access to minor Aryan, she shall pay the cost of Rs.2,000/- per day of missed access and if respondent fails to take access to the son, he shall pay cost of Rs.2,000/- for each missed access.
4. Both parties shall co-operate each other for smooth access.”

7 The learned counsel for the petitioner submits that though there was Consent Terms between the parties in which they agreed that permanent custody of minor child shall remain with the petitioner, respondent violated those Consent Terms. Respondent is refusing to hand over the custody even for Diwali Vacation. Therefore, the petitioner moved before this court for interim relief only to the extent of overnight custody of minor child for Diwali Vacation. She submits

that in the interest of Justice, this Hon'ble Court be pleased to direct the respondent wife to hand over the overnight custody of minor child to the petitioner husband for Diwali Vacation.

8 On the other hand, the learned counsel for the respondent wife vehemently opposed for interim relief to the extent of overnight custody of the minor child for Diwali Vacation. He submits that Family Court after considering the evidence on record i.e. report from psychiatrist as well as personal interview of the child held that custody shall remain with the respondent wife. He submits that Family Court rightly allowed the petitioner to meet the minor child on 1st, 3rd and 5th Saturday in Children Complex of the Family Court for two hours from 3 p.m. to 5 p.m.

9 The learned counsel for the respondent relied on the observation made by the Family Court in paragraph 2 and 4 of the order dated 30.12.2015. He also relied on the report submitted by Dr.Sushma Mehrotra, Consultant Psychiatrist and Physiotherapist. He submits that considering the observation made by the Trial Court in order dated 30.12.2015 and report of Dr.Sushma Mehrotra, court should not hand over overnight custody of minor child during Diwali Vacation to the petitioner. He submits that Family Court specifically recorded in its order that the petitioner is not in a position to maintain and or to take care of the minor child about his food, clothes etc. He further submits that in the Consent Terms dated 23.10.2012 it was specifically stated that minor child's wish to be considered for custody. Hence, prayer made by the petitioner in the present petition for permanent custody as well as 50% Diwali Vacation required to be rejected.

10 I have heard both the sides at length. I have gone through the order dated 30.12.2015 passed by Family Court as well as Affidavit-in-Reply and rejoinder filed by the parties across the bar. It is to be noted that both the parties filed Consent Terms dated 23.10.2012 in which it was specifically stated that the permanent custody will remain with the petitioner, though it is stated in the Consent Terms that child's wish be considered for the custody. Respondent wife without obtaining any order from the competent court took the custody of child and refused to hand over the same to the petitioner husband. Whatever observation is made by the Trial Court in its order dated 30.12.2015, is on the basis of the report submitted by Dr.Sushma Mehrotra, Consultant Psychiatrist and Physiotherapist.

11 It is to be considered in the present proceedings that, the said report was obtained by the respondent wife when minor child was with her for more than 2 years. Definitely, that affects the report. In any case at present the petitioner is not pressing permanent custody of the child. The learned counsel for the petitioner across the bar made a statement that during the pendency of the petition, petitioner is seeking custody of the child for 50% Diwali Vacation.

12 In consent terms clause No."a" the petitioner and respondent have agreed as follows :

"a. The Petitioner No.1 & Petitioner No.2 states that the custody of their son, Aryan Rajesh Jadhav, shall permanently remain with the Petitioner No.1 or as per the child's wish with whoever he wants to reside. It is further agreed by the Petitioner No.1 and Petitioner No.2 that Petitioner No.2 can avail overnight access to her son Aryan Rajesh Jadhav from

every Friday evening to Monday morning. The Petitioner No.2 shall be entitled for the custody of Aryan Rajesh Jadhav for half of the vacations. The exact duration & timings of the custody of Aryan Rajesh Jadhav will be mutually decided by the Petitioner No.1 & Petitioner No.2 as per the schedule of school vacations of their son Aryan Rajesh Jadhav.”

The above consent terms clearly shows the reciprocal arrangement between petitioner and respondent. After divorce, Respondent wife married and she is residing with her partner. Son was with the petitioner.

13 No doubt the order of access and maintenance is always temporary, it can be modified, cancelled, terminated at any time in light of change of circumstances. While dealing with the issue of access and custody the existence and non existence of order is totally depend upon the welfare of minor. The visit between son and father will create good bond and rapport between them, which is most essential factor for nourishment of the child. The issue of welfare of the minor is multi angle issue which includes providing love and affection, better education, better medication, financial assistance etc. The issue of welfare shall be determined by taking into consideration that in future the child will fight with future contingencies and become a prudent and good man, will be success in his life. Without the love and affection of one parent the child cannot grow up healthily and always it will not become a good gentleman in future. The child requires love and affection at the hands of father and mother.

14 The question of waiver of right does not arise in case of custody and access as it is not a right of parents. Actually access, visitation and custody is the right of minor and it is not a right of parents. When it is

not a right of parents then how they can waive. The right of access and custody is always changeable for the welfare of minor. Admittedly the respondent mother of the child has not pleaded any disqualification of father for holding access with minor child except waiver of right at his hand.

15 The decree of divorce is passed basing upon the consent terms. Till setting aside/modification of the decree passed on 23rd October 2012, it is necessary to follow said decree. The petitioner in his petition has prayed for custody of minor Aryan Rajesh Jadhav. Without setting aside the decree or without modifying the decree, Court is unable to pass any order in favour of the Respondent wife. I do agree with the submission of learned advocate for petitioner that in interim stage, court cannot set aside or modify the decree which is already passed.

16 The issue of modification of decree is pending before the Family Court. Apart from this the issue of shifting custody or granting visitation is the issue of finality of petition. At this primary stage it is unsuitable to determine the final issue. Considering the existence of decree in my view at this primary stage, petitioner is entitled for getting access but at the same time his right shall not be curtailed for long duration. Considering this it is necessary to expedite the petition. The parties shall cooperate for speedy disposal of the petition.

17 Considering these facts and the Consent Terms filed by both the parties in the Family Court, I am of the opinion that petitioner is entitled custody of minor child for atleast 50% of Diwali Vacation. Considering the fact that Diwali Vacation for child is from 21.10.2016

to 6.11.2016, I am of the opinion that petitioner is entitled for overnight custody of the child from 22.10.2016 to 29.10.2016 on condition that he has to file undertaking before this court that on 29.10.2016 on or before 6 p.m. he will hand over custody of child to the respondent wife at Child Complex in Family Court at Bandra. It is made clear that if petitioner fails to hand over the custody on 29.10.2016 on or before 6 p.m. respondent wife is at liberty to move before this court immediately for taking action against the petitioner.

18 Matter to appear on board for admission on 25.11.2016.

Parties to act on authenticated copy of this order.

JUDGE