

Vishnu & Ors.

...Petitioners

Versus

Jaya

....Respondent

ORDER

Petitioner no.1 (hereinafter 'the petitioner') and the respondent used to be husband and wife. The petitioner married her after the death of his first wife who had left behind a two and a half year old son. The petitioner and the respondent are now separated by a decree of divorce obtained by the former. The respondent has filed an appeal against the decree but there is no stay in the pending appeal.

On July 15, 2003 the petitioner's son Parag (eleven and a half years old) from his first wife died by falling into a well. The petitioner was then away from home. He suspected that the respondent had killed the child from his first wife and instituted a criminal case against her under section 302 of

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the Penal Code. The respondent was put on trial in which her two sons from the petitioner deposed against her. Anyway, the trial ended in her acquittal.

The death of the petitioner's son from his first wife completely broke down his marriage with the respondent and he eventually obtained a decree of divorce against her. For past seven years, as also noted by the High Court the petitioner and the respondent have been engaged in a series of litigation.

The present SLP arises from the proceedings for the custody of their two children (Kumar Gaurao and Kumar Kunal aged 11 years and 9 years respectively) instituted on the basis of an application filed by the respondent under sections 7 and 9 of the Guardian and Wards Act and registered as Misc. Civil Application No.158 of 2008 in the court of the District Judge- 2, Jalgaon. The District Judge by his order dated March 25, 2009 rejected the respondent's petition and left the two children in the custody of their father, the present petitioner. In appeal by the respondent, the High Court of

Bombay, Aurangabad Bench by its judgment and order dated February 3, 2010 passed in FA No.887 of 2009 with Civil Appeal No.5044 of 2009 reversed the order of the District Judge and directed that the custody of the two children be given to the respondent wife within 15 days of the date of the order. The petitioner, the father of the two children has now brought the matter to this court.

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When the case was called out, apart from the counsel for the petitioner, the counsel for the respondent was also present on caveat. We were informed that not only the petitioner and the respondent were present in court, but the petitioner had also brought along the two children whose custody is the subject matter of the dispute. We, therefore, decided to pass any order in the matter only after meeting the two children and the petitioner and the respondent. After rising from the court at 2pm, we met the two children and their two parents, one by one, in the chamber. Certain facts that came to light from the meeting may be enumerated as follows:

1. The elder child, Kumar Gaurao is slightly mentally retarded.

He is more comfortable speaking in Marathi. Nevertheless, he made his wishes quite clear to us. The younger child, Kumar Kunal, is perfectly normal and speaks freely in Hindi.

2. Both the children live in a house at Bhusawal with their paternal grandmother. Both of them are going to schools. The younger boy is in class five. The paternal aunt of the children (petitioner's sister) lives close by.

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3. The petitioner is a member of the Railway Protection Force.

Till sometime ago he was posted at Bhusawal and lived there together with his mother and children.

4. Sometime ago, he has been transferred to Kalyan (according to him, to Mummar, 2 or 3 stations beyond Kalyan) and he can no longer live at Bhusawal. (This was the main ground on which the High Court held that he was not in a position to look after the children properly). According to the petitioner, he did not take the children with him to Kalyan because at

the time of his transfer the children were in mid-session in their schools. The final exams of the children are now over and once their results are declared, he planned to take them with him to Kalyan where he would get them admitted in proper schools.

5. The respondent lives in Bhopal with her mother. She is a graduate and has also done the MBA course. According to her, she presently earns her livelihood by running a hostel. She has some properties in Bhusawal also. She has not got any alimony and does not receive any maintenance from the petitioner.

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6. The respondent admitted that the two children were living with their father continuously for the past seven years. She further admitted that during this period she had no access to the children or even a brief meeting with them.

7. Both the children were very clear and firm that they want to live with their father and they do not want to go with their mother. The elder son was not even able to recall the name of the mother.

In the aforesaid facts and circumstances, we are of the view that if the children are forcibly taken away from their father and handed over to the mother, it will only traumatize them and it will not do any good to anybody. In the present situation, the better course would be that the mother should first be allowed to make the initial contact with the children, build up her relationship with them and slowly and gradually restore her position as their mother.

The High Court of course did not have the advantage of meeting all concerned in this case but we after meeting both the children and the petitioner and the respondent and after speaking to them for quite sometime are clearly of the view that the course indicated above needs to be adopted. We can even say that at the end of the meeting, the mother seemed to agree

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that for the present at least, she should accept and be satisfied with her right

to access and visitation rights to her two children. We, accordingly, stay the operation of the order of the High Court and make the following interim arrangement in its place:

1. Every alternate Saturday, it will be open to the respondent wife to come to Bhusawal or Kalyan or wherever the children may be living with their father and to take them out, if she so desires, for an overnight stay with her. She will take the two children from their father's house at 10 in the morning of the Saturday. She may bring the children back to their house on the same day in the evening or if she so desires, she may keep them overnight with her and reach them back at 10 in the morning of the following Sunday. Having regard to the distance from Bhopal, it may not be possible for her to visit the children every alternate Saturday. In that event, she will inform about her programme to come to their place on a particular Saturday, either telephonically or by post, for mutual convenience.

2. During the three long vacations, namely the summer vacation, Diwali vacation and Christmas vacation the two children will spend half their vacations with the respondent mother at her house, in Bhopal or wherever she might be living. Before taking away the children she will duly notify the petitioner about her whereabouts and her residential address. After the period of the children's stay with her is over, she will duly reach the children to their father's house and hand them over to the petitioner father.

The direction comes into immediate effect and the respondent will be free to take the children for half the period of their current vacation.

The directions made above must be followed strictly without the slightest breach from either side.

Put up this SLP after six months.

.....J
(AFTAB ALAM)

