



**IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**INTERIM PETITION NO.2 OF 2008
IN
SUIT NO.5 OF 2006**

Mrs. Hutoxi M. Panthaki

...Petitioner

Vs.

Mr. Kersi J. Divecha

...Respondent

Ms. Sanober P. Nanavati for Petitioner

Ms. Anusuya Dutt for Respondent

CORAM: SMT.ROSHAN DALVI, J.

DATED: 2ND JULY, 2008

P.C.

1. The parties are wife and husband. They have 2 children, sons named Jehan and Sheroy. They shall be referred to as mother and father.
2. They applied for divorce by mutual consent in the above suit on 20th February, 2006. They filed consent terms. In the consent terms the mother gave up her claim to alimony or maintenance. She also gave up custody of both the children. The father was to have custody of both the children. The mother was to have access on second and fourth week ends and half school vacations.

3. The parties were married in 1992. Children were born in 1992 and 1998. The mother left the matrimonial home in 2004. They filed the divorce petition in 2006. The mother remarried in 2007.
4. At the time of the filing of the consent terms Jehan was 13 years and Sheroy was 7 years old. Jehan was studying in standard VIII and Sheroy was studying in Standard IV.
5. The mother did not take access to the children in the school vacations in 2006.
6. It is her contention that, that was because she did not want to disturb the children's studies. She married soon thereafter. She has now settled with her new husband in Vikroli. She claimed access during the last summer vacation of May, 2008. She was to hand over custody of the children to the father at the end of the May vacation. She did not hand over the custody as per the consent terms signed by them. She instead filed this Petition for modification of the consent terms. She has applied for grant of custody and change of school of the children.

7. On the face of the consent terms she is in breach. The Consent terms came to be a part of the order of the Court. Having breached that order, she is in contempt. It need hardly be mentioned that she should have abided the order of the Court and returned the children to the custody of the father pending any application for modification of the consent terms made by her. She has not done that on the ground that the children never wanted to return to the father.
8. This change of heart has come at a very late stage. It has come after her remarriage and after she has settled with her new husband. It has come after the children were left to be cared for by the father for about 4 years. The father has not remarried. He lives with his mother and his two children at Parel. She lives with her present husband at Vikroli.
9. When she left the husband in 2004 she lived with her parents at Thane. She has stated that she did not take custody of the children then, because her parents' house was small in area.
10. The father has contended, and prima facie justifiably, that she did not take custody of the children before her

marriage whilst she wanted to be alone and away from her children. It was during those times that the father cared for the children and kept their custody. He contends that now she has well settled. She has sought to take away the children to be used as her investment as she has advanced in age.

11. Various allegations are made by her in the Petition to show how the father is unfit to have custody of the children. This is despite the fact, that upon whatever was the dispossession of the father, she had allowed him to have custody of the children in the consent terms and obtained the divorce and remarried thereafter.

12. She has produced xerox copies of certain documents showing expenses incurred for the children. Most of the documents are of the year 2008. It is seen that during the summer vacation when she kept custody of the children she incurred certain expenses. That is natural. She has produced certain bills of certain stores showing purchase of materials. These do not show who purchased the goods and for whom. She claims that the father did not incur sufficient medical expenses for medical treatment of the children, which she has done. The father has produced copies of

medical prescriptions and bills showing what he has done for the children. It is not understood how both the parties lay so much emphasis upon medical treatment for the children over other expenses.

13. No complaint was made about what the father failed and neglected to do in the year 2006 or 2007. The first complaint has been made in this Petition itself. The allegations of the mother go thus far.

14. The Petition has come up before me on a number of occasions since the reopening of the Court after summer vacation. I have interviewed the children, and the parents singly as well as jointly. I found that the children are highly stressed, anxious and nervous. I have stated my observations in earlier orders.

15. I deemed it fit that both the parties as well as the children need counselling. I sent them to the child Counsellor / child specialist from the Tata Institute of Social Services (TISS) who serve at the Family Court, Mumbai through the NGO, "MUSKAAN". The child specialist/ senior Counsellor Ms.Freny Italia and junior Counsellor Ms. Swapna Redij, have counselled the children on atleast 3

occasions. The parents have also been interviewed by them. The father was directed to obtain access to his children pending this Petition whilst the children were allowed to be with the mother, despite the breach of the consent terms dated 20th February, 2006 to maintain the status-quo that prevailed at the time of the Petition.

16. The option of sending the children to boarding school, in which they would be away from the strained relationship of both the parents, with their friends and where both parents can have equal access to them, was considered. The option has not materialised.

17. The Counsellor submitted an interim report, copies of which were given to both the parties. Further counselling of the children was done thereafter also. The mother has allowed access as directed. The father has taken access in the presence of the Counsellors. The Counsellors have submitted a further report to Court today. The report *inter alia* shows the following aspects:-

- i) Children had overcome their initial resistance to the father and had began interacting with him and the grandmother.

- ii) Jehan cares for his father and his grandmother though there is no overt display.
- iii) He yearns for greater attention and display of affection from his father, whom he feels loves his brother more.
- iv) The children are strained due to parental differences.
- v) The father is strict and disciplined them which makes Jehan rebel.
- vi) Sheroy can be easily influenced.
- vii) He gets bullied at school.
- viii) There is a strong bond between the brothers.
- ix) *The children seem to be heavily influenced by the mother as was apparent in their talk and tone, which was identical to what the mother shared or expressed.***

x) The father provided well for the children for their education and basic needs.

xi) He needs counselling.

xii) There is no reason to doubt that he will not continue to provide for his children in the future.

xiii) The mother was now in a position to take care of her children and cites this as her earlier reason for giving away custody of the children to the father.

xiv) Both parents instigate the children.

xv) Jehan has taken the role of the mother's confidante, which is unhealthy for his emotional development.

18. Both the parents, the present husband of the mother as well as the grandmother have attended my chamber on all the dates of hearing. The children attended once before. They have attended today.

19. Jehan expressed his desire to speak to me. I have allowed him to speak to me. He has parrot-like narrated the facts and allegation urged by his mother, argued by his Advocate and stated in this interim application.

20. It may be mentioned that when I interviewed the children, I had not asked them directly when they would want to live with. That would have been the most inappropriate question. Children in the custody of one of the parents, and more so when there is so much resistance and acrimony between them, are essentially and considerably tutored. That is the case in this Petition also. That has been specifically noted by the Counsellors as shown in item No.ix above.

21. Sheroy also spoke to me. He was more brief. He stated what he would want. In short, without being questioned, and on their own desire the children stated that they wanted to be with the mother.

22. This is hardly a sagacious, informed choice. It is more apparent in view of the fact that Jehan spoke at length and exactly as his mother had stated earlier as has been noticed

by the Counsellors also. It would be most inappropriate and improper to consider that as the choice of the children. The Court has to determine the interest and welfare of the children. The Court may interview the children. The interviewing must be in keeping with the circumstances. The Court must try to ascertain upon asking questions and obtaining answers, the true position of the children, emotionally as well mentally and determine where their interest and welfare is. It has been held in the case of **Thirty Hoshie Dolikuka Vs. Hoshiam Shevaksha Dolikuka**, that :-

“where the child is not in a position to express any intelligent preference between his/her parents, as in this case, mature thinking is necessary to decide as to what will enure to his/her benefit and welfare. In such a situation therefore, it is not necessary to send for the minor and interview her to ascertain her wishes before proceeding to decide the question of her custody. Personal interview of the child is also to be avoided when she is torn between the affection for both parents and such interviewing would further cause depression and

demoralisation in her mind.”

23. Giving the custody of the children to the parent who has kept custody upon hearing a parrot-like statement cannot determine the child' swelfare. I do not mean to suggest that the welfare of the children would not be heeded by the mother in this case. She has married a very reasonable person. He has attended Court on every date of hearing. I have spoken to him also along with the mother. It is to his credit that the father has not made allegations of what the mother or her husband did not do.

24. However, what is important in this case is that the children have been well cared for by the father for 4 years whilst the mother essentially abandoned them. Whatever be her justification, the fact remained that the father was the single parent for a number of years. There was no complaint and no application. The situation of change of heart, therefore, cannot show the demerits of the father's upbringing.

25. The fact remains that the mother is in breach of the Court's order as reflected in the consent terms dated 20th February, 2006. The father has complained of the breach

from 10th June when he was denied custody. The children have been brain-washed by the mother during this period. The children deserve the love and affection of both the parents. They must in turn love both the parents. Any upbringing which runs counter to these basic principles is itself against the interest and welfare of the child and must be eschewed.

26. In this case the further fact is the breach of the order already passed and coupled with the mother's initial abandonment.

27. Since all the allegations made against the father are not substantiated at all, the case for modification rests only upon the change of mind and the change of heart of the mother. In that case the mode exercised by her is seen to be completely incorrect. The children must be given a chance and an opportunity to be with the father to obtain the best out of him. The children must continue with their access to the mother as before to obtain the best out of her.

28. Both the parents have been seen to be instigating the children as is reflected in Clause XIV of the Counsellor's report extracted above. In fact the father is advised further

Counselling as is reflected in Clause XI extracted above. This would be more so as the children consider him extremely strict, a fact easily observed by this Court also. Similarly because both the parents are seen to be instigating the children, a fact noted by this Court also, they would need a further counselling to win over the children, specially Jehan, who believes his father does not love him as much as his brother. However, there is no one else the children can go to. None is seen to be particularly better than the other.

29. Despite my entreaties and observations, I have not found any improvement in the upbringing of the mother as is reflected in the Counsellors' last report shown to me today, which shows how the children have been **“heavily influenced”** by the mother as reflected in clause IX of the report extracted above.

30. This is not the case in which the Petition can be disposed of by way of a final order. In Custody matters modification of the order is the rule rather than the exception. However, modification must be in accordance with law and upon obeying of the law. Breach of orders cannot be lightly allowed in the name of modification except if gross acts of neglect or demerits of a parent having custody are

shown. Hence, the following order:

ORDER

- 1.The custody of the children is restored to the father.
- 2.The children Jehan and Sheroy are directed to go with their father to his home.
- 3.Both the children as well as the father shall continue to be counselled by the same Counsellors. They shall go for counselling Sessions on Tuesdays, Thursdays and Saturdays as before. This shall continue for a period of 1 month.
- 4.The father shall pay the Counsellors' fees for each counselling session as determined by the Counsellors.
- 5.The other terms between the parties remain unchanged. The children, however, will be entitled to talk with the Mother on telephone whenever they desire.
- 6.The Counsellor shall submit further report to the

Court at the end of one month from today. Since the children feel that the father is very strict and has on occasions beaten them, the father is specially advised to be milder with the children:

7.The further future custody shall be determined based upon the Counsellors' further report.

8.The children have been explained this order by the Court.

(SMT. ROSHAN DALVI, J.)