

Varsha

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 14746 OF 2024
WITH
INTERIM APPLICATION NO. 14317 OF 2024
WITH
CONTEMPT PETITION NO. 474 OF 2025

S [REDACTED] R [REDACTED] B [REDACTED] }
Indian inhabitant of Mumbai, }
[REDACTED]
[REDACTED] }
Powai, Mumbai – 400 076. } ... Petitioner/Applicant

Versus

D [REDACTED] [REDACTED] }
Indian inhabitant of Mumbai, }
[REDACTED]
[REDACTED] Powai, Mumbai – 400 076. } ... Respondent

WITH
INTERIM APPLICATION NO. 9137 OF 2025
AND
INTERIM APPLICATION NO. 236 OF 2026
IN
WRIT PETITION NO. 14746 OF 2024

D [REDACTED] [REDACTED] }
Indian inhabitant of Mumbai, }
[REDACTED] }
[REDACTED] Powai, Mumbai – 400 076. } ... Applicants

IN THE MATTER BETWEEN

S [REDACTED] R [REDACTED] B [REDACTED] }
Indian inhabitant of Mumbai, }
[REDACTED]
[REDACTED] }
Powai, Mumbai – 400 076. } ... Petitioner

Versus

D [REDACTED] [REDACTED] }
Indian inhabitant of Mumbai, }
[REDACTED]
[REDACTED] Powai, Mumbai – 400 076. } ... Respondent

WITH
WRIT PETITION NO. 7796 OF 2025
WITH
WRIT PETITION (ST) NO. 18398 OF 2026

D [REDACTED] [REDACTED] }
Indian inhabitant of Mumbai, }
[REDACTED]
[REDACTED] Powai, Mumbai – 400 076. } ... Petitioner

Versus

S [REDACTED] R [REDACTED] B [REDACTED] }
Indian inhabitant of Mumbai, }
[REDACTED] }
[REDACTED] }
Powai, Mumbai – 400 076. } ... Respondent

Mr. Anjani Kumar Singh i/b. Mrs. Debarati Nag a/w. Ms. Vaishali R Dhuri in CP/474/25 a/w. WP/14746/24 a/w. IA/14317/2024 in WP/14746/24 a/w. IA/9137/25 and IA/236/26 in WP/14746/24 for Petitioner and for Respondent in WP/7796/25 and WP(L) No. 18398/2026.

Mr. Snehasis Batabyal, Petitioner, present.

Ms. Dolan Acharya in person.

CORAM : GAURI GODSE, J.

RESERVED ON : 23rd JULY 2026

PRONOUNCED ON : 1st SEPTEMBER 2026

JUDGMENT :-

BASIC FACTS:

1. The dispute in these proceedings concerns custody of the minor son of the parties, who is approximately 14 years old. The petitioner in Writ Petition No. 14746 of 2024 is the father of the minor child, and the respondent is the mother. For the sake of convenience, the said parties are referred to as 'father' and 'mother' respectively.

2. Writ Petition No. 14746 of 2024 is filed by the father to challenge the judgment and order dated 20th September 2024 passed by the Family Court, Mumbai in Miscellaneous Application No. 5 of 2024 in Petition No. A-656 of 2016. Interim Application No. 14317 of 2024 is filed by the father seeking a stay on the implementation of the

impugned judgment and order dated 20th September 2024. Contempt Petition No. 474 of 2025 is filed by the father alleging breach of the order dated 6th May 2025 passed by this Court in Interim Application No. 14317 of 2024. In the Contempt Petition, it is alleged that the mother committed breach of the order where a stay was granted by this Court to the implementation of the impugned order that directs the father to hand over custody of the minor child to the mother.

3. Writ Petition(st) No. 18398 of 2026 is filed by the mother, partially aggrieved by the judgment and order dated 20th September 2024 and challenges the directions issued in clauses (3),(8),(10) and (11) of the operative order of the said judgment. The Writ Petition No. 7796 of 2025 is filed by the mother to challenge the order dated 29th May 2025 passed by the family court in Regular Darkhast No. 142 of 2025. By the impugned order in this petition, the father's application for physical custody of the minor child is allowed, and the mother is directed to hand over the minor child's custody to the father. By the said order, the mother was permitted to avail access to meet the child on the second weekend of June 2025. Regular Darkhast No. 142 of 2025 is filed by the father seeking custody of the minor child with police help alleging non-compliance with the Order dated 20th September 2024.

4. Interim Application No. 9137 of 2025 is filed by the mother in Writ Petition No. 14746 of 2024 for vacating the interim relief granted on 6th May 2025 by this Court. Interim Application No. 236 of 2026 is filed by the mother in Writ Petition No. 14746 of 2024, seeking directions to the father to make payment towards school and educational fees and the expenses of the minor child pursuant to the impugned judgment and order dated 20th September 2024.

5. This Court had passed an order dated 23rd June 2025, in Interim Application No. 14317 of 2024, directing the matter to be listed for final disposal in view of the directions issued in the order dated 6th May 2025. This Court had interviewed the child and had recorded in the said order dated 23rd June 2025 that during the interaction with the minor child in the chamber, he had expressed his desire to go back to his mother's house. The petition was directed to be listed for final disposal. The father had challenged the said Order dated 23rd June 2025 and Order dated 15th July 2025 in Contempt Petition No. 474 of 2025 before the Apex Court. By the said Order dated 15th July 2025, the contempt petition was directed to be listed with the writ petitions scheduled to be due on 17th July 2025. The Special Leave Petition was disposed of on 8th August 2025, granting liberty to the father to seek expeditious disposal of the Writ Petition

No. 14764 of 2024. It was directed by the Apex Court that if such a request for expeditious disposal was made, the matter be disposed of within six weeks.

6. Since the regular bench had recused from the matter, it was listed before this Court on 26th August 2025 as an alternate bench. In view of the directions issued by the Apex Court, this Court fixed the matters for final disposal on 18th September 2025. In view of a change in the assignment, an application was filed on the administrative side for listing of the petitions before the same court. The petitions were thereafter adjourned awaiting the order on the application filed on the administrative side. In view of the administrative order dated 6th March 2026, all the petitions were listed before this court on 2nd April 2026. The petitions were heard and adjourned to 9th April 2026 as part heard.

7. Thereafter, the parties had agreed that the child would meet the father at an independent place. Accordingly, directions were issued to enable the father to meet the child. After hearing the parties for some time, they had agreed to attend the counselling sessions through the Sukoon Project of the Main Mediation Centre. Accordingly, the parties were referred for counselling. Unfortunately, the counselling sessions were not concluded as the parties had

expressed different versions about the sessions. Hence, the petitions were substantially heard on 8th May 2026. The parties were unable to conclude their arguments, and they intended to make further submissions. Hence, by consent, the petitions were directed to be listed on 8th June 2026, the first day of the reopening after summer vacation. The directions were issued by consent to enable the father to meet the child in the meantime. The petitions were thereafter substantially heard on 8th June 2026, 11th June 2026, 12th June 2026, 18th June 2026, 25th June 2026, and 2nd July 2026. The arguments were finally concluded on 23rd July 2026, and the matters were reserved for judgment.

PARTICULARS OF THE LITIGATION:

8. The father had filed Petition No. A-656 of 2016 for dissolution of marriage under Section 27(1)(d) of the Special Marriage Act, 1954. The parties filed consent terms, and the divorce petition was converted into a petition under Section 28 of the Special Marriage Act for dissolution of marriage by mutual consent. At that time when the divorce petition was filed, the child was with the father. By order dated 1st February 2020, the parties were permitted to convert the divorce petition into a petition for divorce by mutual consent. The consent terms dated 15th May 2017 at Exhibit 46, the modified consent terms

dated 18th July 2017 at Exhibit 56, and the final consent terms dated 21st December 2019 at Exhibit 85 were directed to be made part of the decree in the petition for divorce by mutual consent. Accordingly, by order dated 1st February 2020, the marriage between the parties was dissolved by a decree of divorce by mutual consent under Section 28 of the Special Marriage Act.

9. Pursuant to the consent terms at Exhibit 46, the parties agreed to joint custody of the minor child, with physical custody with the mother. At the time the said order was passed, since physical custody was with the father, the parties had agreed to hand over custody of the minor child to the mother on or before 2nd June 2017. The father had agreed to pay Rs. 35,000/- towards monthly maintenance for the child, and he also agreed to take care of the educational expenses up to the post-graduation of the child. The father had also agreed to bear the child's medical expenses.

10. The parties had further agreed that the residential flat, i.e. matrimonial home, standing in the name of the father, would be gifted to the mother to the extent of 50%, and 25% share would be gifted in the name of the minor child; 25% share would be retained by the father. The father had also agreed to repay the housing loan of the said flat. The parties had agreed to execute the gift deed, and after its

execution, the mother had agreed to withdraw the criminal case, including proceedings filed under the Domestic Violence Act and police complaints. The father had also agreed to transfer the car into the mother's name.

11. The said consent terms were modified by the executing modified consent terms dated 18th June 2017 filed on record at Exhibit 56. In view of the modified terms, the father agreed to clear the balance of the housing loan within four months and to execute the gift deed in the names of the mother and the minor child in accordance with the agreed shares. The parties also agreed that in the event the mother intended to sell the flat, the sale proceeds would be distributed as per the agreed shares in the earlier consent terms and the new flat would be purchased in the name of the mother and the son to the extent of 2/3rd share with the mother and 1/3rd share with the child. The father accordingly agreed to hand over custody of the child to the mother on or before 23rd July 2017.

12. The parties thereafter recorded final consent terms dated 21st December 2019 at Exhibit 85. In the final consent terms at Exhibit 85, the parties noted that, in compliance with the earlier consent terms, the father handed over physical custody of the child to the mother. It was recorded that the entire outstanding home loan was

repaid and the gift deed dated 25th September 2017 was executed in the name of the mother and the son. In view of the said gift deed, the father had gifted 50% of the share to the mother and 25% share to the son. The father had agreed to pay Rs. 8,00,000/- towards child maintenance, and the mother had agreed to hand over the child's custody to the father, with sole authority and responsibility for the child given to the father. The mother had agreed to withdraw all the criminal complaints.

13. The mother thereafter filed Miscellaneous Application No. 70 of 2021, seeking visitation rights to meet the child. The parties again arrived at an amicable settlement, and the consent terms were signed at Exhibit 10 in Miscellaneous Application No. 70 of 2021. As per the full and final settlement arrived at between the parties as recorded at Exhibit 10, they agreed that the said terms would be considered part of the final consent terms at Exhibit 85. The Miscellaneous Application No. 70 of 2021 was accordingly disposed of on 11th November 2021. The mother was given access to the child and 50% of the summer and winter vacation.

14. The mother had filed Petition No. D-139-2023, for custody of the minor child. She also filed Regular Darkhast No. 4 of 2024 for implementation of the 11th November 2021. The mother thereafter

filed Miscellaneous Civil Application No. 5 of 2024, in Divorce Petition No. 656 of 2016. She applied for modification of the decrees dated 1st February 2020 and 11th November 2021. The mother prayed for sole and permanent custody of the child. By the judgment and order impugned in these petitions, the said Miscellaneous Application No. 5 of 2024 is finally decided. Learned Judge of the family court partly allowed the application and modified the decree dated 11th November 2021 in Miscellaneous Application No. 70 of 2021. Learned Judge of the family court came to the conclusion that the joint parenting would be necessary as desired by the child. The learned Judge therefore directed that both parents were entitled to joint parenting of the child and 50:50 vacation time, with the child's ordinary residence with the mother from the next school academic year. The mother was made responsible for the custody, care, safety, and security of the child during the child's ordinary stay with her, for the child's maintenance expenses, and for 50% of the child's educational expenses. The father was held responsible for paying 50% of the child's school fees and educational expenses.

15. The father is aggrieved by the aforesaid modification. The mother had initially never raised any objection to the impugned order. However, after this Court partially heard the matter, she filed a petition

challenging the directions in clauses (3), (8), (10), and (11) of the aforesaid order.

SUBMISSIONS ON BEHALF OF THE FATHER:

16. Learned counsel for the father submits that the mother willingly handed over physical custody of the child to the father by accepting Rs. 8,00,000/- as recorded in the final consent terms dated 21st December 2019. He submits that the child was 7 years of age at that time. The father agreed to execute the gift deed by transferring the 25% share he retained in favour of the mother. The father also agreed to pay Rs. 8,00,000/- to the mother. Accordingly, the mother handed over physical custody of the child with sole authority to take possession of the minor child. It was specifically recorded that the mother had handed over physical custody, that the father would be discharged from all his liabilities, and that the sole responsibility and authority to make all decisions would be with the father. He submits that, despite the said consent terms, the parties again agreed to visitation rights for the mother and custody for 50% of the school vacations. The mother withdrew the custody petition.

17. Learned counsel for the father relied upon the e-mails exchanged between the parties and with the school to point out that when the custody of the minor child was with the mother, the child

was disturbed and his grade at school declined. The mother unauthorisedly transferred the child from Nahar International School at Powai to Podar International School at Santacruz. The change of school was made without the father's consent, though the parties had submitted a joint letter to the school that the father would have sole custody of the child.

18. The learned judge of the family court did not give any opportunity to lead evidence, and the father and his advocate were absent when the impugned judgment was passed. The entries in the roznama would show that only the Interim Application in the Miscellaneous Application filed by the mother was heard and the main application was never finally heard or argued. The mother withdrew the custody petition; however, she subsequently applied to modify the terms, granting the father sole custody and sole authority to make decisions. Hence, there is a bar under Order II Rule 2 of the Code of Civil Procedure, 1908 ('CPC'). The impugned judgment and order is passed in the application by misusing powers under Section 151, 152 and 153 of the. The application to modify the final consent terms was not maintainable.

19. To support his submissions learned counsel for the father

relied upon the decisions in the cases of *Aman Lohia Vs. Kiran Lohia*¹, *Dwaraka Das Vs. State of M.P and Another*², and *Dr. Amit Kumar Vs. Dr. Sonila and Ors*³. He further submits that in deciding the issue of custody, only the welfare of the minor child is the paramount consideration. To support his submission, he relied upon the decision of the Apex Court in the case of *Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka*⁴. He submits that orders regarding custody can be modified only upon proof of a change in circumstances. In the present case, no such change in circumstances is pleaded or proved to warrant drastic modification of the consent terms. No evidence was led before the family court to prove any such change in the circumstances. To support his submissions that the orders regarding custody can be modified only by pleading and proof of change in circumstances, he relied upon the decision of the Apex Court in the case of *Jai Prakash Khadria Vs. Shyam Sunder Agarwalla and Anr*⁵, *Gaurav Nagpal Vs. Sumedha Nagpal*⁶ and *Nil Ratan Kundu and Another Vs. Abhijit Kundu*⁷.

20. Learned counsel for the father submitted that the change in

1 AIR 2021 SC 1748

2 (1999) 3 SCC 500

3 (2019) 12 SCC 711

4 (1982) 2 SCC 544

5 (2000) 6 SCC 598

6 (2009) 1 SCC 42

7 (2008) 9 SCC 413

the original environment of the child has to be considered as an important factor, as the child has substantially lived with the father and thus, by a change in the custody, there would be a substantial change in the original environment of the child. In view of the orders passed, the custody is taken over by the mother and the child is not allowed even to meet the grandmother. Thus, the change in the child's environment has adversely affected the child's mindset. According to the learned counsel for the father, the child lived with his mother in Calcutta until 22nd June 2017. Thereafter, the child resided with the father in an independent flat in Mumbai. It was only on 23rd July 2017 that the child was handed over to the mother. Thereafter, on 8th May 2025, the child was with the mother.

21. By order dated 6th May 2025, passed by this court, the directions in the impugned order to hand over the custody to the mother were stayed. However, the mother has committed breach of the orders and refused to hand over custody to the father. Thus, in view of the mother's conduct, the child's environment has been substantially changed, adversely affecting the child. Hence, the impugned order for joint custody was passed without taking into consideration the welfare of the child. Learned counsel for the father relied upon the Apex Court decision in *Mausami Moitra Ganguli V/s*

*Jayant Ganguli*⁸.

22. Learned counsel for the father relied upon the child counsellor's report on the interview of the child. According to him, the child never expressed a preference to live with the mother. The orders passed at the interim stage by the family court show that the child was always inclined to be with the father. The interview report would show that the child was conducting himself maturely and was never confused when he was with the father. However, after the child began living with the mother, the child has remained confused, which has also adversely affected the child's academic performance. The child's future is safe with the father, and he would live in a better environment with the grandmother and his friends in the locality where the child has always lived with the father. Hence, the impugned order completely unsettled the child.

23. The directions for joint parenting are therefore not in the child's best interests. Even otherwise, the application is finally decided without affording the parties any opportunity to lead evidence. Hence, in the absence of any substantial evidence and change in the circumstances not pleaded and proved, the modification of the orders passed by consent for the permanent

8 (2008) 7 SCC 673

custody and sole authority with the father could not have been modified by misusing power under Section 151 and 152 of the CPC. The application was thus not maintainable, and the learned judge of the family court erred in substantially modifying the orders of custody. He therefore submits that the impugned order must be set aside and the original consent terms must be restored.

SUBMISSIONS ON BEHALF OF THE MOTHER:

24. The mother appeared in person. She tendered a copy of the roznama of the main divorce petition and submitted that it was filed in March 2015. The mother was required to apply for an injunction to protect the matrimonial home where she was residing with the child. The mother relied upon various objections raised in the affidavit-in-reply filed in the interim application in the father's petition. She relied on the e-mails she sent to the father, which outlined the issues to be addressed regarding the child. The medical report would show that the medical issues of the child were never addressed when the child was with the father. She had always contributed towards the child's expenses and had also transferred the amount of Rs. 5.5 Lakhs to the father. The said amount and the other expenses incurred by the mother were returned by the father before filing the divorce petition. She relied upon the e-mails exchanged between the parties when the

child was with his paternal grandmother at Calcutta. In view of the various proceedings, her job was terminated, and thus, she faced financial constraints.

25. As per the divorce petition, the father's mother was ailing and old. Hence, there is no substance in the father's submissions that the child was in a better environment in the company of the grandmother. The father had agreed to transfer 50% of the share to the matrimonial house, as he had breached the injunction order. The amount paid to the mother at the time of filing consent terms was towards reimbursement of the school fees and expenses incurred by the mother. The father has misconstrued the payment as if the mother had handed over custody in lieu of the amount paid by the father.

26. The final consent terms were hurriedly prepared by the father. She was never given to understand the repercussions. Both parties had always agreed to the visitation rights and the mother's overnight access. She relied on the e-mails exchanged between the parties, in which the father had given the mother two options regarding custody. Hence, she never anticipated that she would not be given custody or overnight access. She agreed to hand over permanent custody to the father as she found it to be in the interest of the child that he would be better financially secured with the father, as

she had lost her job. However, she never anticipated that she would not be granted temporary custody or visitation rights. The counsellor's report regarding final consent terms was never explained to her, and she was not informed that the child was to be handed over to the father on the date of signing consent terms itself.

27. She submitted that she always tried to cooperate with the father regarding the child's welfare. She never wanted to initiate any litigation. However, the father, by e-mail, forced her to sign the terms recording the father's sole authority. She signed it, considering it would be in the child's best interest. However, she never realised the repercussion that the same would be used against her to completely deny the custody or access of the child. She relied upon various e-mails to submit that the child's medical issues were never addressed when the child was with the father, and that she was never informed about the problems faced by the child. Since her e-mail ID was retained by the school, she incidentally received an e-mail from the school intimating about the child's problem. Hence, she decided to apply for modification of the consent terms. Since the father had completely stopped the access, she was constrained to file Regular Darkhast No. 4 of 2024.

28. So far as the withdrawal of the custody petition is concerned,

she was misinformed that access or temporary custody during vacation would never be granted. In view of the consent terms, she withdrew the custody petition. She submitted that she had never given up on availing visitation rights and having overnight temporary custody. The mother submitted that it can never be in the minor child's best interests to be completely kept away from the mother. She had always agreed to solutions in the interest of the child and never anticipated that her cooperation would be misconstrued, and she would be denied custody.

29. The mother submitted that her alienation from her son is not her only grievance. The child's safety, the child's extracurricular activities, and medical issues are the main concerns. She has always been involved in the child's activities, and his performance improves when he is in her custody. The child is academically improving, and she had suggested solutions by sending emails to the father. However, despite her repeated suggestions, no progress was seen.

30. According to the mother, the parents' love is always unconditional. The payments made by the father to reimburse expenses cannot be construed as meaning that the child would never be entitled to meet the mother. The reasons for changing the school are explained by the mother, relying on the child's interview reports.

According to the mother, the child can never grow up in fear. The father had gone to the extent of visiting her residence with the police without any such permission to bring the police in the middle of the night when the child was with her. Thus, such conduct of the father affected the child's health adversely, and he suffered from bed-wetting issues. When the child was living with her, he had progressed not only academically but also in extracurricular activities such as music and sports. She therefore submitted that there are substantial reasons for seeking modification.

31. The change in circumstances refers to the problem the child faces and the need for a safe environment that would help him grow. Hence, the reasons for filing the application before the family court seeking modification are solely to consider the child's welfare. She had never objected to the child being with the father; however, her cooperation was misconstrued by the father, and the child was not only deprived of being with the mother, but it also adversely affected the upbringing. Hence, the impugned order, insofar as it concerns joint parenting, would need to be modified.

32. The mother submitted that the father has misconstrued the reimbursement of expenses to mean that she had given up her right to access to her child. She submitted such interpretation is

incomprehensible. She relied upon the decision of the Allahabad High Court in *Pawan Kumar Goyal Vs Neetu*⁹. The Allahabad High Court held that the welfare and best interests of a child cannot be bartered away by two parties, even in a consent agreement, and if the court finds that such an agreement does not serve the best interests and welfare of the child, it must declare the agreement void. The mother relied upon the Apex Court's decision in *Komal Krishnan Arora Vs Sandeep Kumar*¹⁰, to support her submissions that on interviewing the child, the Apex Court found it in the interest of the child to continue the custody considering the comfort of the child. The mother also relied upon the decision of this Court in *Michael Lobo Vs Smitha Lobo*¹¹, to support her submissions that even if she has her own source of income, the father cannot shirk his responsibility for maintaining the child and that the amount of expenses to be reimbursed cannot be determined by an arithmetical formula. She therefore submitted that she would be entitled to reimbursement of the expenses she incurred.

ANALYSIS AND CONCLUSIONS:

33. I have carefully perused all the papers. I have heard the

9 2020 DGLS (Alld) 635

10 2025 INSC 1123

11 2025: BHC-AS: 57660

parties at length. This is an unfortunate case where the parties have adopted a balanced approach and parted ways, but are unable to adopt a similarly balanced approach for their minor son. As reflected in the interview reports of the counsellor of the family court and the counsellor's report from the Sukoon Project of the main mediation centre of this Court, it appears that the minor child has expressed concerns for the parents and wants to see them happy. This Court observed distrust expressed by both parties against each other during the course of the hearing and considered the differing versions they offered regarding the counselling sessions permitted by this Court. Hence, in the interest of the child, this Court had directed that the counsellor's report from the Sukoon project be kept in a sealed envelope. It was further clarified in the Order dated 4th May 2026 that the parties were referred for counselling sessions only to enable them to take a rational decision in the interest of the child, and that the counsellor's report shall not be relied upon by the parties. When the matter was heard by a coordinate bench of this Court, it is recorded in the order dated 23rd June 2025 that, after interacting with the child in the chamber, he had expressed his desire to go back to the mother's house.

34. From the record, it appears that until around 4 years of age,

the child resided with the mother, and that during the summer vacation of April 2016, the father took the child to Kolkata at his mother's place. The father had applied for divorce in the family court sometime in March 2015. There are printouts of emails on record showing that the parties exchanged settlement proposals. Due to an apprehension that the father might dispose of the matrimonial flat, the mother applied for protection orders. By an Order dated 2nd December 2016, the family court restrained the father from dispossessing the mother from the flat. Since the child was not brought back to Mumbai, the mother applied in the divorce petition for directions to bring the child to Mumbai. The parties filed consent terms in the divorce petition, and ultimately the child was handed over to the mother in July 2017. Thereafter, in view of the modified consent terms, the child was handed over to the father on 21st December 2019. Strangely, in the modified final consent terms dated 21st December 2019, as set out in Exhibit 85, no provision was included for the mother to meet the child. The father was granted sole custody.

35. Unfortunately, the learned Judge of the Family Court did not express any satisfaction with the consent terms as to whether they were in the child's best interests. It is unbelievable that a mother who

has repeatedly taken efforts to be with the child would sign consent terms with no provision for access and temporary overnight custody. The subsequent steps taken by the mother support her case that she never apprehended that the child would be completely kept away from her. It appears that the willingness shown by the mother to arrive at amicable resolutions for the child's welfare is misconstrued to mean that she had given up her right as a mother.

36. The submissions made on behalf of the father, that, in exchange for an amount of Rs. 8 Lakhs and interest in the flat, the mother had given up the child's custody, show the father's insensitive approach. There is no material on record to support such a contention. Whether the said amount was towards reimbursement of the expenses incurred by mother is a matter of evidence. The flat in which the father has executed the gift deed is admittedly the matrimonial flat; hence, giving a share to the mother in it is not any extra concern shown by the father. It is a common term when agreeing to a divorce by mutual consent. Such routine terms in the consent terms cannot be interpreted to mean that the mother had given up the custody of the child in exchange for any consideration. While passing the decree in terms of consent terms, it was the duty of the Family Court Judge to record satisfaction that no provision for the

child to meet the mother was in the interest of the child. I see no reason to believe that the mother at any time intended to give up the child's custody.

37. Unfortunately, the child was kept away from the mother after the final consent terms dated 21st December 2019 and thereafter, due to the COVID-19 pandemic, the mother was unable to meet the son. The mother applied to seek access to meet the child by filing Miscellaneous Application No. 70 of 2021. The parties then arrived at additional consent terms, which were made part of the final decree passed after the consent terms, as set forth in Exhibit 85. Accordingly, as per the order dated 11th November 2021 passed in the said miscellaneous civil application, the mother was given access once every two months for two nights and 50% of the summer and winter vacation.

38. On 17th July 2023, the mother received an email from the school regarding the child's problems. Hence, the mother tried to contact the father. According to the mother's allegations, the child was not permitted to speak to her; however, on 10th August 2023, the child managed to speak to her. On 3rd October 2023, the mother filed a petition under the Guardians and Wards Act seeking custody of the child. On 4th October 2023, at around 10 PM, the father arrived at the

mother's place with the police to pick up the child. However, no permission was granted to seek police protection. The mother had refused to send the child along with the Police.

39. On 21st November 2023, the mother received an email from the school stating that the child was experiencing nosebleeds. It appears that there were disputes between the parties and the child was not allowed to meet the mother. Hence, on 6th January 2024, she filed Regular Darkhast Application No. 4 of 2024 seeking implementation of the consent order dated 11th November 2021. Ultimately, the mother filed Miscellaneous Civil Application No. 5 of 2024, seeking modification of the judgments and decrees dated 2nd February 2020 and 11th November 2021. The mother thus applied for permanent custody of the child. The impugned judgment and order was passed on this application for modification.

40. In the said application for modification, the mother had also filed an application for interim relief, seeking urgent access for the minor son and for interim custody. The father filed a reply opposing the said applications. The parties filed a joint pursis dated 20th March 2024 in the Regular Darkhast No. 4 of 2024. The said Darkhast application was filed by the mother for implementation of the consent Order dated 11th November 2021. In the joint pursis, the mother

agreed that she shall hand over custody of the child to the father in accordance with the final consent terms in Exhibit 85 and the judgment and decree dated 1st February 2020. The mother also agreed to abide by the judgment and decree dated 1st February 2020 and the order dated 11th November 2021, and she agreed to withdraw the custody petition. In the joint pursis, the father agreed and undertook to facilitate access of the minor child as per Exhibit 10 of Civil Miscellaneous Application No. 70 of 2021, that is, as per the order dated 11th November 2021. The joint pursis was accepted vide order dated 20th March 2024, and the parties were directed to scrupulously follow the agreed terms. Accordingly, the mother withdrew the custody petition.

41. Regarding the withdrawal of the custody petition, the mother states that she withdrew it with the intention of ending the litigation and in the hope that she would not be deprived of access to and custody of the child. By order dated 6th May 2024 passed below Exhibit 12 in Regular Darkhast No. 4 of 2024, the father was directed to hand over the custody of the child to the mother for the second part of the vacation and the mother was permitted to take the child abroad during the said period. Thus, it appears that till 6th May 2024, the parties mutually agreed to abide by the original consent terms and

conditions. Hence, it is necessary to ascertain what transpired after 6th May 2024, warranting modification of the agreed terms and conditions.

42. According to the mother, on 16th June 2024, the child expressed gum pain to the mother, and she immediately took steps to address the issue. The mother has produced documentary evidence to show that the child had dental issues, for which the mother took immediate steps. She has also pointed out the emails exchanged between the parties to show that she had made efforts to resolve issues pertaining to the child's best interests; however, the father replied that the treatment was not that important and that he would reimburse any costs. The mother has contended that on 17th August 2024, the Regular Darkhast Application No. 4 of 2024 filed by her was disposed of, and the child was interviewed in the application for modification filed by her. For the said interview, the child had come to the Court from the father's house. On 29th August 2024, the father filed his reply to the modification application.

43. According to the mother, on 9th September 2024, the parties were heard in the family court, and the impugned order was passed thereafter. However, according to the father, the main application was never finally heard. According to him, a hearing had taken place only

on the interim application. The father also contended that he and his advocate were absent when the impugned judgment and order was passed. Learned Counsel for the father pointed out the entry in the Roznama on 9th September 2024. He submitted that the matter was shown as adjourned to 30th September 2024 for judgement/order. However, the proceedings were taken on the board on 20th September 2024 on an application filed by the mother, and the judgement was passed. Hence, a serious grievance is made on behalf of the father that, without conducting a proper hearing on the application for modification, a drastic order has been passed, disturbing child custody for no valid reason.

44. According to the father, the mother had filed a compliance pursis on 8th August 2024, in Regular Darkhast No. 4 of 2024 and accordingly, the execution proceedings were disposed of. According to the father, the learned judge had directed the father to bring the child for interview and posted the matter on 17th August 2024 at around 4:30 PM. Accordingly, the child was interviewed, and thereafter the parties were called by the learned judge in the chamber and told that the child was brought up very well and is intelligent, cheerful, cooperative, sensible, and mature. According to the father, the parties were informed that the child's feelings for both parents

were respectful. According to the father, the parties were advised to explore the possibility of modifications to the access rights by mutual consent, and the next date was set for 4th October 2024. It is a grievance made on behalf of the father that the date was unilaterally changed at the behest of the mother to 29th August 2024. It is further contended by the father that the mother's advocate sent an email to the father's advocate stating that the parties would seek clarification from the court on 19th August 2024 at 3 PM regarding the next date. The father has relied upon the printouts of the email.

45. I have perused the printout of the emails. It appears that there was some confusion on the next assigned date. However, the mother had informed the father that she was unaware of the agreed date because she was busy interacting with the child. She further stated that she later learnt that the next date was 29th August 2024. However, it appears that the mother's lawyer had informed the father's lawyer that the next date was 4th October 2024, while the case status showed 29th August 2024. The lawyer had further informed that the date would be clarified on the next date and had requested the father's advocate to remain present. I do not find it necessary to get into the controversy regarding the date assigned by the court, as the entries in the Roznama show that on 17th August

2024, the child was interviewed and the case was adjourned for orders on 29th August 2024. As per the entry in the Roznama on 29th August 2024, the next date for hearing was assigned for 31st August 2024, and on that date it was adjourned to 9th September 2024.

46. The entry of 9th September 2024 records the particulars of various exhibits, and lastly, it is recorded that the court was busy in a contested judgement; hence, it was adjourned for judgement/order to 30th September 2024. However, it appears that in view of the application filed on behalf of the mother, the matter was taken up on 20th September 2024, and final judgement was passed. There is some substance in the grievance made on behalf of the father that although the case was adjourned to 30th September 2024, for no valid reason, it was preponed and the judgement was passed in the absence of the father and his advocate. From the entry in the Roznama and the impugned judgement, there is no clarity on why the case was preponed for the passing of the final judgement.

47. It is also alleged by the father that, on 9th September 2024, the case was taken up out of turn and that he and his advocate were not given a proper hearing to respond to the mother's allegations. It is thus contended on behalf of the father that, without any proper hearing on the application to modify the consent terms, a drastic

order was passed, thereby disturbing the child's custody.

48. I have perused the compliance pursis and the order dated 8th August 2024. The mother has stated in the compliance pursis that the father has complied with the access order dated 3rd May 2024, and the Regular Darkhast Application stands satisfied. Accordingly, the learned judge of the family court has passed an order on 8th August 2024, recording the compliance and disposing of the execution proceedings. The learned judge has recorded that the father's grievance that he had not received video calls when the child was with the mother was a minor issue that had become redundant, and therefore disposed of the execution proceedings. Thus, it appears that until 8th August 2024, the parties complied with the agreed terms and conditions, as set out in the final consent terms at Exhibit 85 and the modified terms dated 11th November 2021. Unfortunately, the record does not provide clarity on what transpired between 8th August 2024 and 20th September 2024, when the assigned date was preponed, and the impugned judgment was passed, thereby drastically modifying the original order in terms of the consent terms filed by the parties.

49. Both the parties are aggrieved by the impugned judgment. The father feels aggrieved because the sole custody given to him,

subject to the mother's access to meet the child and 50% of the vacation, has been disturbed, and the physical custody has been handed over to the mother. The mother feels aggrieved by the directions issued regarding joint parenting.

50. Hence, it is necessary to determine whether the reasons recorded in the impugned judgment are well within the scope of the well-settled legal principles regarding child's welfare to be the paramount consideration and permitting modification of the consent orders regarding custody of the minor child. In *Nil Ratan Kundu*, the Apex Court held that apart from the well-settled law relating to custody of a child, and keeping in mind the relevant statutes and the rights flowing therefrom, such cases cannot be decided solely by interpreting legal provisions. It is held that a child custody dispute is a human problem and must be solved with a human touch. It is held that, in selecting a guardian, the court exercises *parens patriae* jurisdiction and is expected to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development, and favourable surroundings. It is further held that 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.

51. In *Gaurav Nagpal*, the Apex Court held that when the court is confronted with conflicting demands made by the parents, it must justify each demand. It is held that the court must not only look at the issue on a legalistic basis but also consider human angles, and must not place emphasis solely on what the parties say, but must exercise jurisdiction aimed at the welfare of the minor. In *Aman Lohia*, the Apex Court discussed the procedure to be followed in the family courts. It is held that the nature of inquiry before the Family Court is, indeed, adjudicatory and it is obliged to resolve the rival claims of the parties and while doing so, it must adhere to the norms prescribed by the statute in that regard and also the foundational principle of fairness of procedure and natural justice. It is held that the Family Court is expected to follow procedure known to law, which means insisting on a formal pleading to be filed by both sides, then frame issues for determination, record evidence of the parties to prove the facts asserted by the party concerned and only thereafter, to enter upon determination and render decision thereon by recording reasons for such decision. It is further held that for following such procedure the Family Court is expected to give notice to the respective parties and provide them sufficient time and opportunity to present their claim

in the form of pleadings and evidence before determination of the dispute.

52. In the present case, the application for modification of the consent orders is decided under Sections 151, 152 and 153 of the CPC read with Section 7 of the Family Courts Act, 1984. The learned Counsel for the father, therefore, relied upon the decisions of the Apex Court in ***Dwarka Das*** and ***Jayalakshmi Coelho***. The Apex Court held that if the correction sought for goes to the merits of the case, it is beyond the scope of Section 152 of CPC. It is held that the powers under Sections 151 and 152 are inherent powers and would be available to all courts. In the present case, even if the learned Judge of the family court has referred to Sections 151, 152 and 153 of CPC, it is a well-settled legal principle that custody orders by their very nature are never final and are subject to modification upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interest of the child.

53. The learned counsel for the father relied upon the Apex Court's decision in ***Dr Amit Kumar*** to contend that since the mother had withdrawn the custody petition, the bar under Order II Rule 2 of the CPC would apply. However, in the present case, the withdrawal of

the custody petition was in view of the joint pursis filed in the execution proceedings filed by the mother for implementation of the consent order dated 21st November 2021 granting access and overnight custody of the child. Simultaneously, the mother had also filed the application for modification of the custody order on the ground of change in circumstances; therefore, the bar under Order II Rule 2 would not apply. In view of the well-established legal principles, it is not necessary to discuss in detail the other decisions relied upon by the parties governing the legal principles that the child's welfare must be the paramount consideration and that modification of the custody orders can be granted subject to proof of change in circumstances.

54. In the present case, the learned Judge of the Family Court has placed significant importance on the child's desire to be in the mother's company and, more specifically, on joint parenting to ensure the child's satisfaction, as noted during the child's interview. The learned judge has observed that the child is attached to both parents and loves and cares for them. According to the family court judge, the child desires equal time with both parents and ultimately wants to keep both of them happy. However, what the learned judge overlooked is whether the directions for joint parenting would be

feasible in the facts of the case. While considering the child's desire, the original arrangement agreed by the parties by consent can be modified, subject to proof of changed circumstances requiring a change of custody and to a determination of whether such a change would be in the paramount interest of the child. When ruling on the application for modification of the consent orders, it is important to consider all the facts and circumstances of the case, the allegations made by the parties against each other, and the proof supporting those allegations. Therefore, it is necessary to permit the parties to lead evidence in support of their allegations and counter-allegations before deciding any application to modify consent orders.

55. If it is found that the arrangement reached between the parties by consent is not followed in its true letter and spirit, the initial attempt should be to ensure adherence to that arrangement. No doubt the order of custody, even if by consent, can be modified; however, it is necessary that the court record its satisfaction that there has been a change in circumstances warranting modification of the arrangement arrived at by the parties by consent. In the facts of the present case, it appears that when the parties recorded the final consent terms, there was no provision for the child to meet the mother. Hence, upon the mother's application, the parties modified

the earlier consent terms and provided that the child would meet the mother and stay with her once every two months and be with her during 50% of the school vacations. Even after the application for modification was filed, the parties had agreed in the execution proceedings that the terms and conditions of the original consent orders would be scrupulously followed. Therefore, while giving effect to the child's desire to be with both the parents and having an affection towards both, it was necessary for the learned Judge of the family court to permit the parties to make their submissions and lead evidence if necessary before issuing directions of joint parenting. Both the parties feel aggrieved by the directions issued for joint parenting.

56. In Indian law, the statutory framework governing child custody and guardianship does not recognise the concept of joint parenting. There is no compelling equal parenting, and the legal foundation in Indian law is the welfare of the minor child. The statutes governing parental disputes emphasise child welfare as a paramount consideration and not parental rights. Time and again, in various decisions, the Apex Court has ruled that the welfare of the child is the paramount consideration in deciding parental disputes. Hence, the discretionary powers must be exercised by the courts not on the basis

of parental rights but on the basis of a child's entitlement to the love, affection, and care of both parents. Parents' legal rights can never override the child's welfare.

57. Therefore, shared parenting must be structured with visibility in mind. Hence, without affording the parties an opportunity for a meaningful hearing, a joint or shared parenting plan cannot be imposed on them. Such a joint parenting plan may result in further complications that may affect the welfare of the child and may have an adverse psychological impact on the child. With Indian families' mindset in mind, the visibility of a joint or shared parenting plan must be properly structured. A joint parenting plan would mean a meaningful role for each parent in decision-making and the child spending sufficient, high-quality time with both parents. The educational requirements, medical or health issues, extracurricular activities, and the child's emotional stability must be kept at the centre while structuring a joint parenting plan. A strict 50-50 split is not a practical solution and may lead to further conflicts.

58. A shared or joint parenting plan, if found to be in the best interests of the child, would be the best solution, but the parents' willingness is most important. Hence, before structuring a joint or shared parenting plan, a meaningful and fair discussion and hearing

are necessary. In the present case, a fair and proper procedure is not followed before imposing a joint parenting plan. Hence, the impugned judgment would warrant interference.

59. The mother's application for modification, therefore, must be remanded to the family court for a fresh decision, keeping in mind the observations in this judgment. In the meantime, the existing position must continue. In the impugned judgment, the learned judge has observed, based on the child's interview, that the child's inclination is to be with the mother, and that he has equal respect and affection for both parents and wants to see them happy and be with them. This court, in the order dated 23rd June 2024, has also recorded that the child had shown an inclination to return to the mother's house.

60. It is the custodial parent's duty to make genuine efforts to help the child feel comfortable meeting the other parent. Thus, some efforts on the part of the mother, with whom the child is presently residing, must be made to enable the minor son to spend sufficient time with the father. Apart from the father's right to meet his son, the son also has the right to have his father's company.

61. Writ Petition No. 7796 of 2025 is filed by the mother to challenge the Order dated 29th May 2025 passed in Regular Darkhast

No. 142 of 2025 filed by the father for implementing the Order dated 20th September 2024. The father also prayed for directions and injunctions to implement the Judgments and Decrees dated 1st February 2020 and 11th November 2021. In view of the Order dated 23rd June 2025 passed by this Court and this Order, the order impugned in Writ Petition No. 7796 of 2025 would not survive and cannot be implemented.

62. Contempt Petition No. 474 of 2025 is filed by the father alleging breach of Order dated 6th May 2025 passed in Interim Application No. 14317 of 2025 in Writ Petition No. 14746 of 2024. By the said order, only the directions issued in the impugned judgment and order for handing over custody were stayed. This Court further directed that the arrangement for access agreed between the parties would continue to operate. The last agreed arrangement for access between the parties was recorded in the Order dated 11th November 2021. By Order dated 23rd June 2025, the grievances regarding the implementation of the access arrangement were considered. This Court interviewed the child and recorded that the child expressed a desire to return to the mother's house. By Order dated 15th July 2025 in the Contempt Petition, this Court directed that it should be listed with the Writ Petition. Both these Orders were challenged by the

father before the Apex Court. However, the SLP was disposed of by issuing directions for expeditious disposal of the writ petitions. Hence, in view of the orders passed by this Court and the circumstances discussed in the above paragraphs, I do not see any deliberate or willful breach by the mother of any orders passed by the Family Court or this Court.

63. Hence, for the reasons recorded above, the following order is passed in Writ Petition No. 14746 of 2024 and Writ Petition (Stamp) No. 18398 of 2026:

- a) Writ Petition No. 14746 of 2024 and Writ Petition (Stamp) No. 18398 of 2026 are partly allowed.
- b) The judgment and Order dated 20th September 2024 passed by the learned Judge of the Family Court No. 3, Mumbai is quashed and set aside. Petition No. Civil MA-5 of 2024 is restored to file.
- c) The concerned Judge of the Family Court shall decide Petition No. Civil MA-5 of 2024 afresh in accordance with law after giving hearing to the parties and permission to lead evidence, if any, desired by the parties.

- d) The learned Judge shall decide Petition No. Civil MA-5 of 2024 afresh, keeping in mind the observations in this judgment. Rival contentions of the parties on merits of Petition No. Civil MA-5 of 2024 are kept open.
- e) Till final decision of the Petition No. Civil MA-5 of 2024, the physical custody of the child will continue with the mother. The father shall be granted temporary custody for the first half of the Diwali, Christmas and Summer holidays. The father shall be granted overnight, alternate-weekend access from Friday evening 7 pm until Sunday evening 7 pm. The mother shall drop the child at the father's place for the said alternate weekend access, and the father shall drop the child back at the mother's place after availing the said access.
- f) The parties are at liberty to apply in the Family Court for any modification of the aforesaid interim arrangement for access, subject to any valid and reasonable cause pleaded and proved. If such an application is filed, the Family Court shall decide the same in accordance with law.

- g) Both parties shall bear the child's expenses equally, including education and medical expenses, if any. From the date of the physical custody of the child with the mother until the decision in Civil MA-5 of 2024, the mother is entitled to reimbursement from the father half the expenses, upon production of proof of the expenses, with the father to be intimated by email to the father.
- h) If the expenses are not reimbursed by the father, within two weeks of the intimation, the mother is at liberty to file an appropriate application for reimbursement before the Family Court in the Civil MA-5 of 2024. The Family Court shall decide such an application in accordance with law expeditiously.
- i) Considering the age of the child, the parties shall cooperate for early disposal of the Civil MA-5 of 2024, without seeking unnecessary adjournments. The Family Court shall endeavour to decide the Civil MA-5 of 2024 as expeditiously as possible.

64. For the reasons recorded above, Writ No. 7796 of 2025 is

allowed by passing the following order:

- a) The Order dated 29th May 2025 passed below Exhibit 5 in Regular Darkhast No. 142 of 2025 is quashed and set aside. The application at Exhibit 5 in Regular Darkhast No. 142 of 2025 is dismissed.

65. For the reasons recorded above, Contempt Petition No. 474 of 2025 is dismissed.

66. The pending interim applications stand disposed of in the aforesaid terms.

(GAURI GODSE, J.)