

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 10758 OF 2022

Shardul Shamprasad Dev,

.. Petitioner

Versus

1. Manjiri Shardul Dev,
2. Meera Shamprasad Dev,
3. Shamprasad Vishwanath Dev,
4. Pallavi Shailesh Kulkarni,
5. Amol Manohar Aachari,

.. Respondents

Shri Sanket S. Kulkarni, Advocate for the Petitioner.
Mrs. M. L. Sangit, Advocate for the Respondent No. 1.

CORAM : SANDEEP V. MARNE, J.
DATE : 17TH OCTOBER, 2022.

ORAL JUDGMENT :

. Rule. Rule made returnable forthwith. With the consent of parties, matter is taken up for final hearing.

2. By this petition, petitioner challenges order dated 21.09.2022 passed by the District Judge – 2, Kopergaon on application below Exhibit 236 by which his defence has been struck off. He also challenges the order dated 30.09.2022, by which application filed for recall of order dated 21.09.2022 has been rejected.

3. In the custody battle between petitioner-father and respondent No. 1-mother, an order came to be passed by the District Court on 27th August, 2020 granting visitation rights in favour of the mother on every Wednesday between 11.00 a.m. to 12.00 noon in the Court premises. Later, the order was modified on 05th August, 2022 granting visitation rights to mother from 11.00 a.m. to 01.00 p.m. on each Sunday at Shri Swami Samarth Maharaj Temple, Kopergaon.

4. The mother moved an application for striking off the defence of petitioner on account of repeated violation of the order passed by the Court. The application was allowed on 21.09.2022 and the defence of petitioner was struck off under the provisions of the Order XXXIX Rule 11 of the Code of Civil Procedure, 1908. Petitioner moved an application for recall of that order and for restoration of his defence, which has been rejected by order dated

30th September, 2022 by the District Court.

5. Appearing for petitioner, Mr. Kulkarni the learned counsel would submit that the child is not willing to meet the mother. This is essentially the reason why order granting visitation rights could not be complied with on certain dates. He submits that the matter is required to be referred to a counsellor to gauge child's inclination to meet mother, rather than striking off petitioner's defence for technical violation of court's order. He would submit that child's wish is paramount and therefore, when the child himself is not willing to meet the mother, the Court ought not to have straightway struck off defence without exploring the possibility of referring the matter to a counsellor. Mr. Kulkarni would further submit that the order striking off the defence is of drastic nature and ought not to have been passed by the Court in the peculiar facts and circumstances of the case. In support of his contention Mr. Kulkarni would rely upon decision of this Court in Kavita Krishnamurti Vs. K. N. Krishnamurti reported in *MANU/MH/2331/2014*.

6. Per contra, Mrs. Sangit, the learned counsel appearing for the respondent No. 1 opposes the petition. She would submit that there has been repeated violation of the order granting visitation rights by the petitioner and that therefore, the District Court has correctly struck off his defence. She would in particular draw my attention to the observations recorded by the District Court in its order dated 21.01.2021 regarding behaviour of the petitioner in the Court. She relies upon para Nos. 2 to 5 and 8 of that order, which reads thus :

“2. Respondent no. 1 was told at 4.30 p.m. today in clear terms that he should reach his son at home and ask his advocate to remain present for argument on Exh.122. But respondent no. 1 made allegations on the court that this court never told this to him. He further made allegations on the court that the court wants that all the proceeding should happen behind his back thereby indicating that till now all the orders came to be passed by this court behind his back without giving him opportunity of being heard. When this objectionable statement is pointed out to respondent no.1 and he is told that this is going to be recorded, he made arrogant statement that “मी येथेच थांबतो आणि बघुन घेतो” (When this statement was recorded, respondent no.1 again created hindrance by stating that he never addressed to court “बघुन घेतो” thereby making allegations against court that this court is falsely recording those words. The words “बघुन घेतो” in such arrogant tone and on such a timing gives a feeling to the court that respondent no.1 is threatening the Court of dire consequences.

3. Since this matter is assigned to this court it has come to notice of this Court that respondent no1 intentionally indulged into making allegation on the court and the staff. He filed a false complaint against senior clerk Shri. Aher of this court in the part just because he did not write the roznama to suit the respondent no.1.

4. This court also noticed that respondent no.1 abuses petitioner in court by using unparliamentary language. On one occasion in front of his father, who is respondent no. 3 in this petition, respondent no. 1 used the words “गधळी व बयताळ” for the petitioner in open Court. The word *Gadhali* means donkey and the word *Baytai* means mad. (At this pint of time respondent no.1 again interrupted this court and said that he never uttered the word “बयताळ” for the petitioner, thereby again making allegations on the court that this court is creating a wrong record). After this the respondent no.1 submitted that when petitioner made allegations against him that he is responsible for her 6 abortions, at that time, he uttered the word “गधळी” for petitioner. By making this submission respondent no. 1 admitted in open court that he used the said word for petition. The father of respondent no.1 intervened on the

said occasion and asked respondent no.1 not to use unparliamentary language in court. A record of those words was not prepared by this court at that time just because the respondent no.1 is a practicing advocate and this court did not want the career of respondent no.1 would suffer.

5. It is observed by this Court that every small thing respondent no.1 prepares videos of his son to create a record to prove that by passing of order of visitation rights in favour of petitioner this court has committed a blunder.

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8. As per visitation rights order clear directions were given to respondent no.1 not to remain present near his son or in such area where he could be visible to his son so that his son does not get intimated while meeting the petitioner. But on every date of visitation right he is disobeying the said order willfully by keeping his son next to him during the visitation is going on. Whenever his son tries to go near the petitioner he calls him back. He does not allow the petitioner to take her son close to her. On one occasion when the petitioner took her son on the second floor of the building to interact with him, the respondent no.1 created a scene. The petitioner brought her son safely in the court hall after about half an hour. But the respondent no.1 made an issue that his son suffered head injury as petitioner took him on the second floor. When his son was taken close by me and I personally verified about any injury to his son, I did not find any injury or even pain to his son. After the court was over the respondent no.1 went to his chamber and made a video of his son wherein his son was crying and saying that he suffered injury on his head. This shows that things which never happened are projected by respondent no.1 in such a way so as to suit his purpose and can be used against petitioner."

7. Mrs. Sangeet would further submit that there has been intentional disobedience of the order on the part of the petitioner. Even after passing of the order dated 30.09.2022, the petitioner

has not granted any visitation rights to the respondent No. 1 till date.

8. After having heard learned counsel for the parties, it is clear that non-grant of visitation rights by the petitioner to the respondent No. 1 is not under dispute. What the petitioner essentially contends is that the disobedience of the order is not intentional. The pretext of disinclination of child to meet mother has been presented for non-following the order passed by the Court. It is apparent that on 21.09.2022, when the District Court proceeded to strike off the defence of the petitioner, there were as many as eleven violations of the visitation rights on the part of the petitioner. During the period from 07.08.2022 to 04.09.2022, as well the petitioner seems to have obstructed the child during his visit with mother on 25.09.2022 and indulged in the act of video shooting the incidence. The Court has observed that on 25.09.2022, the petitioner created obstacle in the visitation right by going close to the child.

9. So far as the contention of Mr. Kulkarni that the matter is required to be referred to a counsellor, it appears that such an attempt was earlier made by the petitioner and by order passed on 21.09.2022, petitioner's request for referring the matter to the counsellor was set aside. It must be borne in mind that present petition does not challenge the order granting visitation rights. Therefore, the question of revisiting that order by referring the matter to the counsellor for verifying the inclination of the child to visit his mother does not arise.

10. The situation that emerges before me is that the order

granting visitation rights passed on 27.08.2020 as modified by the Court on 05.08.2022 has attained finality. Petitioner's request for verifying the disinclination of the child to meet mother by referring the matter to a counsel has also been rejected by order dated 21.09.2022. That order has also attained finality. In such a situation, it was not open for the petitioner to deny visitation rights to the mother on the pretext of disinclination of the child to meet the mother.

11. True it is that the order striking off defence is drastic one which should be avoided by the Courts. In normal circumstances, the Court would have recourse to such a drastic order only after it arrives at finding that there is something more than mere violation and that there is a willful breach of the order.

12. In its order, the District Court has recorded specific finding that the petitioner has intentionally committed breach of the interim order and that there is intentional disobedience on the part of the petitioner. Para 10 of the order passed by the District Court reads thus :

"10. So far as, the present proceeding is concerned, the record does speak of volumes. On apparent perusal of some documents on record, the very conduct of non-applicant no.1 in disobeying the interim order of visitation is very much glaring and evident. This Court observes that, there are applications at Exh. Nos.66, 82, 143, 175, 176, 180, 183, 201, 208, 210 and Exh. 212. ON apparent perusal of these applications, it may be noted that, non-applicant no. 1 has not allowed the applicant to meet son Reyansh in past also. To this, there is no categorical account or explanation coming-forth on behalf of non-applicant no.1. Apart from the aforesaid voluminous documents, which shows intentional disobedience of

interim order of this Court by non-applicant no.1, the very observations recorded by my Ld. Predecessor equally speaks of volumes and throw light on attitude of non-applicant no.1 in flouting the interim order of this Court as to visitation. In this premise, the order of this Court dated 21/01/2021 below Exhibit.1, particularly across paragraph nos. 8 and 9 are self-speaking. It is categorically observed by the Ld. Predecessor of this Court as below-

But on every date of visitation right he is disobeying the said order willfully by keeping his son next to him during the visitation is going on. Whenever his son tries to go near the petitioner he calls him back. *He does not allow the petitioner to take her son close to her.* On one occasion when the petitioner took her son on the second floor of the building to interact with him, the respondent no.1 created a scene. The petitioner brought her son safely in the court hall after about half an hour.

13. Thus, the issue as to whether there is an intentional violation on the part of the petitioner has already been gone into by the District Court and a finding of fact is recorded that the petitioner has intentionally committed disobedience of the order.

14. Reliance of Mr. Kulkarni on the judgment of this Court in **Kavita Krishnamurti** (supra) would be of little assistance to the petitioner as this Court has observed in that case that no specific finding of willful disobedience was recorded by the Family Court while passing the order of striking off defence. As against this, in the present case a specific finding has been recorded by the District Court to the effect that the petitioner has committed intentional disobedience of the interim orders passed by the Court.

15. Also of relevance is the fact that after passing order dated 21.09.2022 striking off the defence as well as after passing of the order dated 30.09.2022 rejecting application for recalling of that order, Petitioner has once again defaulted on grant of visitation rights in favour of the mother. In these circumstances, I do not feel that any error is committed by the District Court in passing the impugned orders.

16. The child today is eight years old and the mother has been granted visitation rights for only two hours in a week. During custody battle pending for 3 years, the child has grown from 5 years to 8 years. It is really unfortunate that father is creating hurdles and preventing the mother from meeting the child. Petitioner's conduct in Court as reflected in the order dated 21.01.2022 extracted hereinabove also speaks volumes about lack of *bonafides*. Petitioner appears to be attempting to frustrate the order granting visitation rights in an indirect manner.

17. After the judgment was dictated in open court, Mr. Kulkarni, learned counsel for the petitioner has tendered across the bar an undertaking of the petitioner dated 17.10.2022 to follow and abide by the orders passed by the District Court regarding visitation rights. Said undertaking is taken on record. In my opinion, Petitioner ought to have shown remorse before the District Court in respect of his conduct and improved upon his behaviour atleast after his defence was struck off. Far from doing so, he sought to justify his conduct on the pretext of disinclination of child to meet the mother. However, his inalcitrant attitude has continued even after passing of impugned orders. The contention of child's disinclination to meet

mother and plea for referring the child to counsellor were strenuously pressed before me. It is only after the judgment is dictated that the undertaking is tendered. Counsel appearing for the Respondent has opposed modification of the present judgment by taking into consideration Petitioner's undertaking. In such circumstances, tendering of such undertaking at a belated stage is inconsequential. Petitioner is otherwise bound by the orders passed by the District Court even after his defence has been struck off.

18. Petition is devoid of merits. It is dismissed without any orders as to costs. Rule is discharged.

[SANDEEP V. MARNE, J.]

bsb/Oct. 22