Reportable

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Contempt Petition (Civil) No. 394 of 2009

IN

Transfer Petition (Civil) No. 195 of 2008

Dr. Ashish Ranjan ...Petitioner

Versus

Dr. Anupama Tandon & Anr. ...Contemnors/Respondents

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. The instant contempt petition has been filed by the applicant alleging that the consent order dated 3.5.2008 passed by the Lok Adalat held by this Court has willfully and deliberately been violated by the respondents, as it has been ensured by them that the applicant may not reach his son.

2. Applicant herein got married with respondent no.1 on 31.10.2002 at Ajmer (Rajasthan), though both of them had been married earlier and stood separated from their respective spouses after getting divorced. Out of the said wedlock, one male child namely, Kislay was born at Ajmer in 2003. Father of respondent No.1 died on 9.1.2005 and soon thereafter relations between the parties became very strained and the respondent No.1 returned to her mother's place at Ajmer. She also filed FIR No.43 of 2007 with Ajmer Police on 29.3.2007, wherein after investigation the charge sheet was filed on 31.12.2007. The applicant herein, the husband filed H.M.A. Case No.2 of 2008 at Gopalganj (Bihar) on 5.1.2008 seeking divorce.

3. After receiving the summons of the said matrimonial case, the respondent no.1 approached this Court by filing Transfer Petition (Civil) No.195 of 2008 seeking transfer of the said case from Gopalganj (Bihar) to the Family Court, Ajmer. At the time of hearing of the transfer petition, this Court vide order dated 31.3.2008 stayed the proceeding in matrimonial case pending at Gopalganj and referred the matter to Lok Adalat for disposal by mutual consent. Before the Lok

Adalat, the parties agreed to resolve all their disputes and for that the terms and conditions were reduced in writing.

This Court vide order dated 3.5.2008 disposed of the transfer petition on the consent terms resolving all the civil and criminal cases pending between the parties and dissolved their marriage.

4. So far as the issue relating to custody of the child, Kislay, as per the said consent order is concerned, the following clauses are relevant:

> "……
>
> (viii) *As agreed between the parties, Dr. Anupma Tandon shall have the physical custody and guardianship of the child Master Kislay Ranjan who is at present four and a half years old.*
>
> *(ix) Dr. Ashish Ranjan and his parents shall have visiting rights to Master Kislay Ranjan who is at present living in Ajmer with his maternal grand-parents. Since Dr. Ashish Ranjan and/or his parents would have to come to Ajmer from Gopalganj at long distance, they would naturally advise about the dates and length of their visits at Ajmer before hand either by telephone or through a letter.*
>
> (x) *In Ajmer, Dr. Ashish Ranjan and/or his parents will visit Master Kislay Ranjan at mutually convenient time(s) in the house where he is living. They will stay with the child for a few hours or as long as the child*

might wish. Dr. Anupma Tandon stated before the Lok Adalat that while visiting Master Kislay Ranjan, Dr. Ashish Ranjan and his parents will be treated with courtesy and dignity and she would do everything reasonable to facilitate their meeting with the child. It will be open to Dr. Ashish Ranjan and/or his parents to bring suitable gifts for the child.

(xi) *To begin with, the meetings with the child will be held only in the house where he might be living with his maternal grandparents or his mother. However, as confidence builds up between all concerned, including the child and as the child grows up and he himself wishes to go out with his father or grandparents, it will be open to Dr. Ashish Ranjan and/or his parents to take out the child in the city where he might be living initially for brief periods.*

(xii) As the child further grows up and in case he expresses his willingness and consent to spend one or two nights with his father Dr. Ashish Ranjan and/or his grandparents, it will be open to Dr. Ashish Ranjan and/or his parents to take the child out from his residence for some period and to keep him with them for one or two nights in the same city.

(xiii) As and when the child reaches his teens and in case he is willing to spend some of his holidays or vacations with his father or grandparents away from the place where he might be living with her maternal grandparents or mother, it will be open to Dr. Ashish Ranjan and/or his parents to take the child

out of Ajmer or the city he might be living in at that time for as long as the child might wish to stay with them during his holidays or vacations.

(xiv) On each occasion when Dr. Ashish Ranjan and/or his parents take away the child from his guardian, i.e., Dr. Anupma Tandon or his maternal grandparents, it will be their duty and obligation to take full care of the physical, mental and emotional well-being of the child while he remains with them and to return him to his mother/maternal grandparents at the agreed time. As and when the child is taken out from Ajmer, all the expenses of his travel and stay will be borne by Dr. Ashish Ranjan and/or his parents.

(xv) Dr. Ashish Ranjan and/or his parents will be at liberty to speak to Master Kislay Ranjan on telephone at convenient times.

(xvi) All these arrangements insofar as they relate to the child will be subject to the express wish and willingness of the child. No visits to see him or taking him out would be permitted unless the child himself is willing and prepared to meet the father and the grandparents and is willing to go out with them.

……..”

To begin with, the meeting with the child will be held o

5. In order to substantiate his claim, a large number of documents have been placed on record by the applicant, particularly, several

returned envelopes seeking visitation rights for the applicant in the year 2008, with endorsement of "refusal" or "the addressee was not available". Copies of E-mails dated 24.6.2008, 17.9.2008 and 23.12.2008 intimating the respondent no.3 in this respect have also been filed. It has also been submitted that telephone calls made by the applicant were not attended by the respondent no.1, as she had the facility of identifying the caller on her landline Telephone Set. The applicant claims that he had gone to Ajmer in July 2008 to meet his son, Master Kislay, but the respondents ensured that he could not meet his son.

In view of the fact that the applicant could not receive any response for his proposal to meet the child, the applicant and his parents have to cancel the Ajmer visit scheduled on July 22, 2008. On 10.9.2009, the applicant travelled along with his parents to Ajmer by car to see the child but they found the house of the respondent No.2 locked and could not meet the child.

6. In this contempt petition, notice was issued by this Court on 15.1.2010. The respondent entered appearance. On 5.4.2010, the respondent No.1 appeared in person. After considering the grievances of the applicant, this Court passed the following order :

"In terms of the earlier direction of this Court dated 03.05.2008, we pass the following order:

`It is brought to our notice that at present the Child Master Kislay Ranjan is studying in Sanskriti School, Ajmer. The petitioner Dr. Ashish Ranjan is permitted to visit the above referred school from 12.07.2010 to 23.07.2010. We request the Principal of the School to permit Dr. Ashish Ranjan and his parents to meet the child Master Kislay Ranjan after school hours in his/her chamber or any suitable place within the school premises. We also request the Principal to render all assistance for a conducive atmosphere and send a report to this Court about the behaviour and attitude of the child Master Kislay Ranjan towards his father Dr. Ashish Ranjan.'

Copy of this order be forwarded to the Principal, Sanskriti School, Ajmer, Rajasthan.

List in the first week of August, 2010."

7. In pursuance to the aforesaid order, the applicant had gone to Ajmer and was allowed to meet his son at Sanskriti School, Ajmer. The Principal of the said school has also submitted a report. After perusing the same, this Court vide order dated 13.9.2010 directed that both the parties alongwith the child, Master Kislay, would remain present before this Court on 22.10.2010. On the said date, both of us had a long conversation with the child in Chambers and tried to know his mind and understand his views about the applicant. We came to

the conclusion that the matter required full hearing. Hence, the matter came for final hearing.

8. Shri Prashant Bhushan, learned counsel appearing for the applicant, has submitted that there is ample evidence on record to show that the consent order passed in the Lok Adalat has been violated by the respondents. The mind of the child has been poisoned/polluted and the child does not have any inclination towards his father because of the tutoring by the respondents. The child had been taught not to pick up the phone. Respondent No.2 is quite aged, seriously ill and it was one of the main grounds seeking transfer of the matrimonial case pending before Gopalganj Court (Bihar) by the respondent no.1. It is not in the interest/welfare of the child to continue his education at Ajmer, as the respondent No.1 lives and is working in U.P. Institute of Medical Sciences at Saifai, Dist. Etawah (U.P.). The Court must ensure the compliance of the right of visitation to his son given to the applicant.

9. Shri V.K. Shukla, learned counsel appearing for the respondents, has fairly conceded that the applicant has right of visitation and must be concerned about the welfare of the child. However, the child is getting the best education at Ajmer, which

should not be disturbed. As the child himself is not inclined to talk to the applicant, he cannot be forced to have any communication/meeting with the applicant. None of the respondents has tutored the child. The applicant has filed a writ petition No. 155 of 2009 before this Court seeking the relief, which has been sought in this petition, and the same stood dismissed vide order dated 29.9.2009. Therefore, this petition itself is not maintainable and, thus, is liable to be dismissed.

10. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

This matter has been heard by us and we had an opportunity to talk to the parties, as well as to the child. We are of the view that the applicant could not get the benefit of his visitation right under the final order passed by this Court on 3.5.2008, and, to certain extent, the respondents are responsible for tutoring the child as the conversation between the applicant and the child reveals many things which a child is not supposed to know/understand at the tender age of 2-1/2 years. Even in conversation with us, the child, Master Kislay, has narrated many things which could not be in his personal knowledge and which he could not say by his own memory.

During our conversation with the child we could clearly note that the child has been tutored by the respondents to make him completely hostile towards his father.

11. The submission made by Shri Shukla, learned counsel for the respondents, that the writ petition filed by the applicant seeking the same relief stood dismissed and thus, no relief can be granted to him, is preposterous. It stood dismissed more than 15 months ago, wherein the applicant had appeared in person. The niceties of law cannot come in the way of this Court while deciding an issue of such a delicate nature. More so, the writ petition could not be maintainable for the relief sought herein.

Be that as it may, it is settled legal proposition that a party cannot be rendered remediless. (See: **Rameshwar Lal v. Municipal Council, Tonk & Ors.** (1996) 6 SCC 100).

12. In **Mohammad Idris & Anr. v. Rustam Jehangir Bapuji & Ors.,** AIR 1984 SC 1826; and **Y.N. Gangadhara Setty & Ors. v. Jaya Prakash Reddy, MD, Karnataka Cooperative Milk Products Federation,** (2007) 14 SCC 434, this Court held that even undergoing the punishment for contempt does not mean that the court

is not entitled to give appropriate directions to remedy and rectify the consequences of actions in violation of its orders.

13. In **Delhi Development Authority v. Skipper Construction Company (P) Ltd. & Anr.,** AIR 1996 SC 2005, this Court held as under:

> *"There is no doubt that the salutary rule has to be applied and given effect to by this court, if necessary, by over-ruling any procedural or other technical objections. Article 129 is a constitutional power and when exercised in tandem with Article 142, all such objections should give way. The Court must ensure full justice between the parties before it."*

14. Thus, it is evident from the above that a mere technicality cannot prevent the Court from doing justice in exercise of its inherent powers. The power under Article 142 of the Constitution can be exercised by this Court to do complete justice between the parties, wherever it is just and equitable to do so and must be exercised to prevent any obstruction to the stream of justice.

15. In **Rosy Jacob v. Jacob A. Chakramakkal,** AIR 1973 SC 2090, this Court (Three-Judge Bench) considered the nature of custody of a minor under the provisions of Guardians and Wards Act, 1890 and application of doctrine of res-judicata/estoppel in respect of the same and held as under:

"The appellant's argument based on estoppel and on the orders made by the court under the Indian Divorce Act with respect to the custody of the children did not appeal to us. All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based on consent decrees, cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation."

16. The aforesaid judgment was re-considered by this Court (Two-Judge Bench) in **Dhanwanti Joshi v. Madhav Unde,** (1998) 1 SCC 112, and after quoting the ratio of the said judgment, held as under:

"21……However, we may state that in respect of orders as to custody already passed in favour of the appellant the doctrine of res judicata applies and the Family Court in the present proceedings cannot re-examine the facts which were formerly adjudicated between the parties on the issue of custody or are deemed to have been adjudicated. There must be proof of substantial change in the circumstances presenting a new case before the court. It must be established that the previous arrangement was not conducive to the child's welfare or that it has produced unsatisfactory results….."

17. In **Jai Prakash Khadria v. Shyam Sunder Agarwalla & Anr.**, AIR 2000 SC 2172; and **Mausami Moitra Ganguli v. Jayant Ganguli,** AIR 2008 SC 2262, this court held that it is always permissible for the wards to apply for the modification of the order of the court regarding the custody of the child at any stage if there is any change in the circumstances.

(See also **Vikram Vir Vohra v. Shalini Bhalla,** (2010) 4 SCC 409)

18. It is settled legal proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be determined in the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of *stare decisis* remains irrelevant insofar as the factual aspects of the case are concerned. While considering the welfare of the child, the "moral and ethical welfare of the child must also weigh with the court as well as his physical well-being". The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care and caution with love, affection and sentiments applying human touch to

the problem. Though, the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases. (vide **Gaurav Nagpal v. Sumedha Nagpal**, AIR 209 SC 557).

19. Statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. (vide **Elizabeth Dinshaw v. Arvand M. Dinshaw,** AIR 1987 SC 3; **Chandrakala Menon v. Vipin Menon,** (1993) 2 SCC 6; **Nil Ratan Kundu & Anr. v. Abhijit Kundu,** (2008) 9 SCC 413; **Shilpa Aggarwal v. Aviral Mittal & Anr**. (2010) 1 SCC 591; and **Athar Hussain v. Syed Siraj Ahmed & Anr.,** (2010) 2 SCC 654).

20. In addition to the statutory provisions of the Contempt of Court Act, 1971 the powers under Articles 129 and 142 of the Constitution are always available to this court to see that the order or undertaking which is violated by the contemnor is effectuated and the court has all powers to enforce the consent order passed by it and also issue further

directions/orders to do complete justice between the parties. Mutual settlement reached between the parties cannot come in the way of the well established principles in respect of the custody of the child and, therefore, a subsequent application for custody of a minor cannot be thrown out at the threshold being not maintainable. It is a recurring cause because the right of visitation given to the applicant under the agreement is being consistently and continuously flouted. Thus, doctrine of res-judicata is not applicable in matters of child custody.

21. If the instant case is considered in totality taking into consideration the above referred judgments, we are of the view that in the facts and circumstances of the case, inference can be drawn that the rights of visitation given to the applicant by this court vide order dated 3.5.2008 stood completely frustrated and the respondents have ensured that the applicant may not reach his son and all attempts made by the applicant in this regard stood futile. The mind of the child has been influenced to such an extent that he has no affection/respect for the applicant. In such a fact-situation, we do not hesitate in holding that the respondents have deliberately and willingly violated the terms of the consent order and are guilty of committing the contempt of this court.

However, imposing any punishment on the respondents would not serve any purpose, nor it would serve in a better way to the welfare of the child, Kislay.

The respondent No.1 is serving at Saifai, Dist. Etawah (U.P.) at a distance of about 500 Kms. from Ajmer and is certainly not in a position to take care of the child, Kislay. The respondent No.2 is quite aged lady who herself has been suffering from various ailments. Therefore, interest/welfare of the child, Kislay is not being taken care of at all. A child of this age may not be able to learn family values, the importance of bonding or have interpersonal relationships, etc. if he gets inadequate opportunities for social inaction. It is necessary for a child that he should be in regular contact of the non-custodial parent also.

22. Be that as it may, undoubtedly, the order dated 3.5.2008, so far as the custody of the child, Kislay, is concerned, has proved unworkable as the respondents succeeded in frustrating the same totally. The child has been tutored by the respondents to the extent that he has no inclination towards the applicant father. The respondents have ensured that all efforts of the applicant or his parents to meet the child turned futile. The child, Kislay, has been instructed

not to pick up the phone, so that even by chance he may not hear the voice of the applicant or his parents.

In such a charged/hostile atmosphere, it is beyond one's imagination that the other terms/conditions incorporated in the order dated 3.5.2008, that the applicant may take out the child to another city; or stay with the child for few nights in the same city, would be complied with.

More so, further, clause no.(XV) of the order, that the applicant or his parents would be at liberty to talk to the child on telephone has never been observed as all attempts made by the applicant in this regard have failed.

The child, Kislay, has been tutored by the respondents and he has adopted an hostile attitude towards the applicant.

In such a fact-situation, where circumstances have substantially changed subsequent to the order dated 3.5.2008, due to non-compliance of the terms of compromise order, the applicant is fully justified seeking review/modification of the said order.

The issue raised herein being a pure question of fact requires to be examined by an appropriate forum taking into consideration all the factual and legal aspects.

23. Thus, in view of the above, we dispose of the contempt petition giving liberty to the applicant to approach the appropriate court/forum for seeking custody of the child, Kislay, or any other appropriate relief in this regard. In case, such a petition is filed, the court concerned is requested to proceed and dispose of the same in accordance with law, without being influenced by the consent order dated 3.5.2008 or dismissal order of the writ petition dated 29.9.2009 passed by this Court regarding the custody and visiting rights of the parties towards the child, most expeditiously.

Needless to say that the court concerned would proceed with the case, if any, without taking note of any observation made hereinabove in this judgment as we have expressed no opinion on merit on the issue of custody.

…….J.
(P. SATHASIVAM)

..…….J.
(Dr. B.S. CHAUHAN)

New Delhi;
November 30, 2010