

Hoshiam Shavaksha Dolikuka

Vs

Thrity Hoshie Dolikuka

Civil Appeal No. 1796 of 1981

(R. S. Pathak, A. N. Sen JJ)

04.08.1982

JUDGMENT

AMARENDRA NATH SEN, J. -

1. On the application made by the respondent who happened to be the wife of the appellant for committal of the appellant for contempt of court for violation of orders passed by the Bombay High Court, a Division Bench of the High Court for reasons recorded in the judgment delivered on July 31, 1981, found the appellant to be guilty and directed the appellant to be detained in the Civil Jail for a period of three months and also to pay a fine of Rs 1000 and in default of payment of the said fine to undergo a further period of detention in Jail for three weeks. Against the said judgment and order of the Bombay High Court the appellant has preferred the appeal under Section 19 of the Contempt of Courts Act, 1971.

2. This proceeding is indeed an offshoot of the main proceeding between the appellant and the respondent in relation to the custody of the children. It is indeed unfortunate that in view of acrimonious disputes between the parties and bitter relationship between them, various proceedings have been taken by the parties from time to time. A decree for divorce has been finally passed. The main dispute centres around the question of the custody of the two children of the appellant and the respondent, the son named Shiavux and the daughter called Gospi. As the son has reached the age of 16 years, the dispute as to the custody is now confined only to the daughter Gospi. Various proceedings had been taken by the parties in relations to the question of custody of the minor child and various orders have been passed by the High Court from time to time. The learned Judges of the Bombay High Court have also on a number of occasions interviewed the children. In the main appeal ((1982) 2 SCC 544) relating to the question of custody of the minor daughter we have set out the broad facts of this unfortunate case and the various orders which came to be passed.

3. In the present appeal, we are only concerned with the question whether the appellant had committed contempt of court by violating the orders of the High Court dated March 20, 1981 and May 13, 1981. The order dated March 20, 1981 is to the following effect :

Pending the hearing and final disposal of the appeal, the order dated February 19, 1981 appealed against stayed so far as it relates to the minor Gospi alone.

Until the St. Anne's High School in which the minor Gospi is at present studying closes for the summer vacation, the Respondent to be entitled to take the child to his residence on Thursdays from 9.00 a.m. till 8.00 p.m. The Respondent who is present in Court, gives an undertaking through his advocate to return the child Gospi to the Appellant's residence each Thursday by 8.00 p.m. So far as

the school vacations are concerned, the Appellant to keep the child Gospi with her for the first half of each vacation and the Respondent to keep the child for the second half of each vacation. The Respondent to take the child to his residence by 9.00 a.m. on the first day of the second half of each vacation, and to return the child by 8.00 p.m. on the last day of the second half of each vacation.

The Respondent who as mentioned earlier is present in Court, through his advocate given an undertaking to take the child Gospi to the Appellant's residence and leave her there by 8.00 p.m. on the last day of the second half of each vacation. We may record that we had seen the child Gospi in Chambers on March 10, 1981 and had found her to be an extremely bright and intelligent child. We may further record that the child stated that she did not have any aversion to spend the day with her father, namely, the Respondent, but was greatly apprehensive that if she did so she would not be allowed to return to her mother, namely, the Appellant, with whom she wanted to stay or that some application would be made to the Court on behalf of the Respondent for the purpose of not returning the child to the Appellant but to keep her with him.

Notice of motion made absolute in terms of prayer (c) also, and the above directions with respect to the Respondent's access on Thursdays during the school terms and the order with respect to the sharing of school vacations also to apply if the child Gospi gets readmission in the Apostolic Carmel Convent High School from the next academic year for the school terms and vacations. If the child Gospi does not get readmission in the Apostolic Carmel Convent High School but continues in the St. Anne's High School, the above direction with respect to the Respondent's access of Thursdays during the school terms and the sharing of vacations to other school terms and vacations. Costs of this Notice of Motion will be costs in the Appeal.

4. The material portion of the order dated May 13, 1981 passed for reasons recorded in the judgment delivered is in the following terms :

In the circumstances set out above, we would have had no hesitation in directing that the child Gospi should stay with her mother, the Appellant, throughout the summer vacation. However, an unfortunate thing is that the Appellant is working in the Tatas and therefore has to be away from home the whole day except during week-ends, while the Respondent, who drives his own taxi, can always find time to contact Gospi in the course of the day and lure her away. Bearing these factors in mind, we permit Gospi to stay with the Respondent during the vacation. The Respondent will, however, take Gospi and leave her at the Appellant's residence on every Friday at 8 p.m. and will collect her from the Appellant's residence every Monday by 8 a.m. during the vacation. In our opinion the best thing for Gospi would be to go to a boarding school. However, we are sure that the Respondent would so poison her mind against any boarding school as to cause yet another psychological turmoil and conflict in her mind. Mrs D'Souza's report has also convinced us that it is better for Gospi that she should be in Carmel Convent High School rather than St. Anne's High School, and that part of the order passed by us on March 20, 1981 will stand. During the school terms the Appellant will be entitled to take Gospi to her residence straight from the school every Saturday and to keep her with her and to leave her in the school on Monday mornings. During the rest of the days during the school terms Gospi will stay at the Respondent's residence. The above directions will be operative during the pendency of the Appeal for all school terms and vacations.

So far as the reimbursement to Mrs D'Souza of the expenses she has incurred is concerned, we

direct that out of the balance of Rs 300 remaining deposited with the Prothonotary and Senior Master a sum of Rs 100 be paid to Mrs D'Souza and the balance of Rs 200 be refunded to the Appellant.

5. The main allegation of the wife in the contempt application is that the husband has not brought the daughter Gospi to her in terms of the aforesaid orders passed by the court and he has thereby violated the said orders and has also committed breaches of the undertakings given by him to court.

6. The main defence of the husband in the contempt replication is that he was not in a position to carry out the said orders and to comply with his undertakings, as the daughter Gospi was unwilling to go to her mother's place. It is his defence that in spite of his best endeavours he could not persuade the daughter Gospi to go to her mother's place, and in view of the attitude of Gospi and taking into consideration the question of Gospi's health and welfare, he was prevented from taking Gospi to her Mother's place and the violation is, therefore, unintentional and for reasons beyond his control.

7. The High Court, in its judgment has fully set out all the relevant facts and circumstances of this case and has also carefully considered the respective contentions of the parties. The High Court came to the conclusion that there was no merit in the defence of the husband and he had deliberately and wilfully flouted the said orders of the court and had also violated the undertakings given to court. In that view of the matter the High Court has found the appellant guilty and the High Court has imposed the sentences as noted earlier.

8. The main argument of Mr Bhandare, the learned counsel for the appellant, has been that the High Court has failed to appreciate properly the facts and circumstances of the case and to take into consideration the important facts that the daughter Gospi was not at all willing to go to her mother's place and the father who is vitally concerned with the welfare of the daughter and her health was not in a position to persuade the daughter to go and stay with her mother. Mr Bhandare submits that the non-compliance with the orders passed by the High Court by the appellant and his failure to observe the undertaking given by him to court were due to reasons beyond the control of the appellant and the appellant had failed to comply with the said orders and his undertakings only in view of the attitude of the daughter whose welfare and interest he had in mind. It is Mr Bhandare's submission that under these facts and circumstances, it cannot be said that the appellant was guilty of any such act which merited any punishment. The violation of the orders and the breaches of undertakings, according to Mr Bhandare, were only technical in nature. Mr Bhandare has offered various criticisms of the judgment under appeal.

9. Mr Desai, the learned counsel for the respondent, has submitted that the High Court in the facts and circumstances of this case is justified in coming to the conclusion that there was wilful disobedience to the court's orders by the appellant who has also unhesitatingly committed breaches of the undertakings solemnly given by him to court. It is the submission of Mr Desai that the facts and circumstances of the case go to indicate that the appellant has always been obsessed with the idea of obtaining exclusive control of the child and keeping her with himself and the appellant has never relished the idea of the child being with her mother.

10. In the view that we have taken we do not consider it necessary to deal at length with the various submissions made from the Bar. It is an admitted fact that the orders passed by the High Court have not been complied with and there has been a violation of the undertakings given by the appellant to the court. The defence sought to be put forward on behalf of the appellant that the appellant was

unable to comply with the said orders and to carry out the undertakings in view of the attitude of the minor girl does not impress us. If there had been any truth in the case sought to be made by the appellant, it would have been clearly the duty of the appellant, to apply to the court, drawing the notice of the court to this aspect and to ask for appropriate directions. It may be mentioned in this connection that on earlier occasion when the girl Gospi had been found missing from her mother's place and was found in her father's place, the appellant had produced the girl before the court and asked for appropriate directions so that the appellant might not be held up for contempt of court. It, however, appears that the appellant took no such steps in the present case when the appellant felt that he would not be in a position to carry out the orders of the court and to comply with the undertakings given by him. The fact and circumstances of this case go to suggest that the appellant was not willing to part with the company of his daughter and to allow her to stay with her mother. We are, therefore, of the opinion that the High Court was right in coming to the conclusion that the appellant has committed acts which amount to contempt of court.

11. The main dispute between the parties has centred around the question of the custody of their minor daughter. The present proceeding arose out of the main proceeding and was taken by the mother for proper enforcement of the right conferred on her to have the child with her in terms of the orders passed by the High Court. We have now disposed of the main appeal in relation to the custody of the child and we have delivered our judgment ((1982) 2 SCC 544) in that matter. The judgment delivered by us in the custody case sets the matter at rest. We cherish earnest hopes that in view of our judgment and order passed in the custody appeal, the parties will now get reconciled to the question of the child's custody and will properly comply with the directions given by us in the interest of and for the welfare of their daughter. We have no doubt in our mind that the daughter is quite fond of both her parents. There is also no manner of doubt that both the father and the mother are greatly attached to the daughter. Acrimonious relationship between her parents who should necessarily have the welfare of the daughter in their mind, has brought about a very embarrassing and unfortunate situation for the little girl. In our judgment in the main appeal relating to the custody we have dealt with this aspect at length. We feel that imposition of any kind of punishment on the father for whom daughter has a lot of affection is likely to upset her and cause her mental distress. In the unfortunate and acrimonious dispute between the husband and the wife our main concern in the instant case has been the welfare of the child. Only taking into consideration the fact that the welfare of the child is likely to be affected, we are of the opinion that under the present circumstances and in the situation now prevailing we should let off the father with a reprimand and a warning, although he has been rightly found guilty of having committed contempt of court by the Bombay High Court, in the hope that the appellant in future will not do any such act as may constitute contempt of court and will try to serve the cause of welfare of the minor daughter by carrying out the directions given by us in our judgment in the custody appeal in the proper spirit.

12. We, therefore, modify the order passed by the Bombay High Court insofar as it directs the appellant to be committed to Civil Jail for a period of three months and further direct him to pay a fine of Rs 1000 and in default of payment of fine to undergo further imprisonment of three weeks, although we affirm the finding of the Bombay High Court that the appellant had been guilty of contempt of court. Instead of the aforesaid punishment directed by the Bombay High Court which we hereby set aside, we reprimand the appellant for his conduct and we issue a warning to him not to repeat any such act in future.

13. The respondent-wife normally should have been entitled to the cost of this appeal. The Bombay High Court had rightly allowed the cost of the proceeding before the Bombay High Court to the wife. Realisation of costs by the wife from the husband may very likely add to the bitterness

between the parties and may result in further acrimonious litigation. The bitter feeling between the father and the mother has been the main cause for all the troubles of the child. The mother has undoubtedly the welfare of the child in her heart. The dispute relating to the child's custody is now finally concluded. To avoid the possibility of further bitterness and future litigation between the parties we direct, bearing in mind the welfare of child, that the appellant and respondent should pay and bear their own costs of this proceeding throughout. The appeal is accordingly disposed of on the above terms.

14. We wish to make it clear that we have interfered with the order passed by the High Court only bearing in mind the interest and welfare of the child in the changed situation in view of our judgment in the custody appeal ((1982) 2 SCC 544).

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