

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION NO. 6963 of 2013**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE G.B.SHAH**

<b>1</b>	Whether Reporters of Local Papers may be allowed to see the judgment ?	
<b>2</b>	To be referred to the Reporter or not ?	
<b>3</b>	Whether their Lordships wish to see the fair copy of the judgment ?	
<b>4</b>	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
<b>5</b>	Whether it is to be circulated to the civil judge ?	

FRANCIS JOSEPH S/O THOSAPALIL JOSEPH....Petitioner(s)

Versus

SHOBHA FRANCIS JOSEPH....Respondent(s)

Appearance:

VIRAL K SHAH, ADVOCATE for the Petitioner(s) No. 1

**CORAM: HONOURABLE MR.JUSTICE G.B.SHAH**

**Date : 15/04/2013**

**ORAL JUDGMENT**

1. The petitioner by way of present petition challenges

the legality and validity of the orders passed below Exh.6 and the orders passed below Exh. 53 in Civil Misc. Application No.67 of 2011 by the learned Principal Judge, Family Court, Vadodara as detailed in paragraph No. 8(A) of this petition..

2. The facts of the case in brief are that the respondent-original applicant has filed Civil Misc. Application No. 67 of 2011 in the court of Ld. Principal Judge, Family Court, Vadodara against the present petitioner-original opponent in the said application under the provisions of section 7 of the Guardian & Wards Act for Guardianship and to appoint her as Guardian and for obtaining the custody of minor girl Diya from the petitioner-father. Petitioner is the father of the minor girl who is aged about seven years. The child has been residing with the petitioner in Goa. The Principal Judge, Family Court, Vadodara, by interim order dated 6.3.2012 issued notice and directed the opponent to remain present in the court on 26.3.2012 and to keep the minor child present. A cost of Rs. 1500/- was awarded as cost of the application to the applicant. Thereafter by order dated 5.4.2013, the learned Principal Judge directed the PSI, Mahila Police Station, Vadodara to take custody of the minor girl.

2. Prayer sought for in this petition vide para 8 (A) reads as under:

*“(A) This Hon’ble Court may be pleased to admit and allow the present petition and quash and set aside impugned orders dated 6.3.2012, 11.4.2012 and 3.8.2012 passed below Exh.6 and also the orders dated 1.5.2012 and 5.4.2013 passed below Exh.53 in Civil Misc. Application No.67 of 2011 by*

*the learned Principal Judge, Family Court, Vadodara and dismissed the applications Exh.6 and 53 filed by the respondent”.*

(B)                    ...                    ...  
 (C)                    ...                    ...

The operative portion of the impugned order dated 5.4.2013 which is mainly under challenge reads as under:

*“1. The PSI, Mahila Police Station, Vadodara along with the applicant/mother for safety, security and welfare of the minor child is directed to take the custody of minor girl “Diya” from the opponent and produce her before this court on or before 16.4.2013 and if the opponent creates any hurdle or denies to give the custody of the child, the PSI is directed to arrest the opponent and produce him before this court on 16.4.2013 along with the minor daughter “Diya” and if need be, the PSI, Mahila Police Station is directed to take the assistance of the PI, concerned police station at Goa (Verna Poriebhat Salcette, Goa.*

*2. Matter is kept on 16.4.2013 to produce the minor child before this court. “*

Learned Advocate for the petitioner has invited attention of this Court to the averments made in paras 3.5, 3.12 to 3.15 of this petition. Thereafter he has submitted that the learned Principal Judge ought not to have involved the police force to

take custody of the minor child when the minor child is completely unwilling to live with the respondent-wife because it would cause bad impression on the growing girl i.e. the minor child and it would jeopardize the health and progress of the minor child. Thus he has submitted that compelling the minor child by using police force to live with the respondent is completely inhumane approach of the learned Principal Judge and, therefore, the impugned order is violative of the fundamental rights of not only the minor child but also the petitioner/original opponent-husband and accordingly requested to set aside the said order forthwith.

3. I have carefully perused the impugned orders dated 6.3.2012 at page No. 19, 11.4.2012 at page No. 35 and order dated 3.8.2012 at page No.38 passed below Exh.6 and also perused the orders dated 16.5.2012 at page No.70 and 5.4.2013 at page No.79 passed below Exh.53 in Civil Misc. Application No.67 of 2011 passed by the learned Principal Judge, Family Court, Vadodara. Learned Advocate for the petitioner has drawn attention of this court to a decision in the case of ***Nil Ratan Kundu Anr. v. Abhijit Kundu, reported in (2008) 9 SCC 413***, more particularly head note (A) and paras 24 to 30 and submitted that what is required to be considered is the wish of the child and in his submission, it is lacking. It is by now well settled to ascertain the wish of a child so ar as custody is concerned. He has submitted that a child is not a 'property' or 'commodity' as held by the Supreme Court which can be handed over to the mother. He, then submitted that in spite of the fact that minor daughter is not ready, the impugned order is passed by the learned Principal Judge. It is held by the Apex Court that issues relating to custody of

minors and tender-aged children have to be handled with love, affection, sentiments and by applying human touch to the problem. In spite of the fact that minor daughter is not ready, the impugned order is passed.

4. Keeping in mind the observations and the ratio laid down by the Hon'ble Supreme Court in the above referred decision and a combined reading of the above referred orders as well as the orders passed by this court on 3.7.2012 and 23.3.2012 respectively at pages No.44 and 51, I am of the view that the petitioner/original opponent has deliberately flouted and disobeyed the orders of the court below and with a view to prolong the said issue i.e. to keep the minor child present as far as possible and hence the initial order of notice dated 18.10.2011 and later on the order to keep the minor child present have not seen light of the day in its proper perspectives. The Hon'ble Supreme Court has rightly observed in the case referred above that the issues relating to custody of minors and tender-aged children have to be handled with love, affection, sentiments and by applying human touch to the problem.

5. In view of the above, the orders under challenge mentioned in para 8 (A) to the petition appears just and proper and in my view, the attempt made by the petitioner to overreach the process of law cannot be tolerated for a second. There appears no substance in this Special Civil Application and accordingly the same is dismissed. Registry is hereby directed to forward yadi of this order to the concerned court at Vadodara immediately.

**[G. B. SHAH, J.]**

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