

## IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CIVIL APPELLATE JURISDICTION

**CONTEMPT PETITION NO. 509 OF 2013**

Tabassum Vinchu (earlier known as

Tabassum Shafeeq)

Aged : 31 years,

Occupation : Housewife/divorcee,

Indian Inhabitant, residing at 158, Bala

Compound, 4<sup>th</sup> Nizampura, Vanjarpatti

Naka, Bhiwandi-421 302

.....Petitioner

v/s.

Shafeeq Rahim Pagarkar

Aged : 42 years, Indian Inhabitant

residing at 2/64, Samrat, K.C. Marg

Bandra Reclamation, Bandra (W),

Mumbai-400 050.

.....Respondent

Ms. Farhana Shah, Advocate appointed for the petitioner.

Mr. E. A. Sasi, Advocate for the respondent.

**ALONG WITH**  
**CONTEMPT PETITION NO. 211 OF 2014**  
**IN**

**CONSENT TERMS DATED 16.04.2013, DULY TAKEN ON**  
**RECORD ON 17.04.2013 AND UNDERTAKING**  
**CONTAINED THEREIN**

**IN**  
**FIRST APPEAL NO. 1028 OF 2010**

Shri. Shafeeq Abdul Rahim,  
Aged : 39 Yrs, Occ : Self Employed  
R/at 2/64, Samrat K.C. Marg,  
Bandra Reclamation, Bandra  
[West], Mumbai-400 050

.....Petitioner  
(Appellant/Org.Petitioner)

V/s.

1. Smt. Tabassum Shafeeq, Aged  
32 Years, Occ. Housewife,  
At Present R/at 158, Bala  
Compound, 4<sup>th</sup> Nizampura,  
Vajar Patti Naka, Bhiwandi,  
402302, Dist. Thane

2. The State of Maharashtra  
Copy to be served on A.G.P.  
High Court, Appellate Side

..Respondents  
(Respondent no.1-  
Contemnor & Org.  
Respondent,  
Respondent No.2-  
formal party)

\* \* \* \* \*

Mr. E.A. Sasi, Advocate for the petitioner.

Ms. Farhana Shah, Advocate appointed for respondent no.1.

**CORAM :- SMT. R. P. SONDURBALDOTA, J.**

**DATED :- 12TH JULY, 2016.**

**JUDGMENT :-**

1). This is the common order on the above two contempt petitions filed by the parties against each other alleging violation of the consent terms dated 16<sup>th</sup> April, 2013 and the order dated 17<sup>th</sup>

April, 2013 passed in terms of the consent terms in First Appeal No. 108 of 2010. Though the acts constituting contempt, alleged in the two petitions, are distinct and different, the background from which they arise is same. Also there are common contentions involved. The petitions have been heard together.

2). The petitioner in the first petition is respondent no.1 to the second petition. They were married under the Shariyat Law. On 16<sup>th</sup> January, 2007 a girl child was born from the wedlock. After differences arose between the two, both started residing separately since July, 2009. The marital tie between the two stands severed by declaration of "Talaq". However, they continue to be related to each other through their daughter. Hence, they shall hereinafter be referred to as "the father" and "the mother". Both the proceedings also refer to the mother of the father. She will hereinafter be referred to as "the grandmother". At the time of divorce, the custody of the daughter was with the mother. Therefore, the father filed Civil Misc. Application No. 101 of 2010 under Sections 17 and 25 of the Guardians and Wards Act in the District Court, Thane for custody of the daughter. The District Court, dismissed the application by its judgment and order dated 7<sup>th</sup> July, 2010. Being aggrieved by the order, the father preferred First Appeal No.102 of 2010 in this Court. During the pendency of the proceedings, various interim orders as regards the access including the overnight access and vacation access to the father were passed. On 16<sup>th</sup> April, 2013 the parties signed consent terms which were taken on record on 17<sup>th</sup> April, 2013 and the First Appeal disposed off in terms of the consent terms.

3). The consent terms, *inter-alia*, provide for custody of the daughter to be given to the father from the date of filing of the consent terms. Clauses-2 to 5 thereof, record arrangements for access to the mother which include weekend access, vacation access, access in school and access over telephone. Clauses-6 and 8 are the agreements about the passport of daughter and financial arrangement for her and Clause-7 is the agreement arrived at between the two relating to various proceedings filed against each other.

4). In the first petition, the mother alleges willful and deliberate violation of Clauses-2 to 5 of the consent terms by the father and by the second petition, the father essentially alleges violation of Clause-7 of the consent terms by the mother. These clauses read as under :-

“2. Appellant shall give access of their daughter Reeba to Respondent of every first half major vacation for Diwali, X'mas and Summer Vacation of the School where Reeba is taking education.

3. Appellant shall give access of child on every first and third weekend of every month i.e. from Saturday at 10 a.m. to Sunday at 5 p.m., to Respondent, except during Reeba's second half major vacation of School for Diwali, X'mas, and Summer.

4. For giving access as contemplated in clauses 2 and 3 above, appellant should pick-up and drop Reeba from Respondent's residence from 4<sup>th</sup>, Nisampur, Balla Compound, Bhiwandi. Drop will be between 8 a.m. to 10 a.m. and pick up will be between 5 p.m. to 7 p.m. on such scheduled dates.

5. Whenever Respondent comes to Mumbai, she

will be at liberty to meet Reeba at any place in Mumbai without any interference from Appellant or his family members. Appellant shall allow Respondent to talk to Reeba over phone every day.

7. Appellant and Respondent gives undertaking to this Hon'ble Court that whatever complaints/allegations they have made against each other and their relatives, during the pendency of present proceedings, in respect of subject matter of the present dispute shall stand withdrawn from the date of filing of these consent terms. The actual formality of such withdrawal/compounding shall be done by the respective party/complainant without four weeks of filing of these consent terms from the concerned Court/authorities. Such fact should be intimated by the respective party to the other party through their respective advocates. Appellant and Respondent give undertaking to this Hon'ble Court that in future they will not file any complaint or make allegation against each other and their relatives in respect of subject mater of the present dispute.”

5). Before adverting to the acts of contempt alleged by the parties against each other, it is necessary to refer to some of the allegations made by them against each other as regards the past events which will have some bearing on the two petitions.

6). Each side has pleaded a different case as regards the reasons for the marital discord, as well as, for filing the consent terms in the First Appeal. According to the father, the marital discord between the parties was on account of “criminal antecedents” of the family of the mother and her continuous misbehaviour. The reason stated for filing of the consent terms was that, the daughter was more attached to the father and to her

grandmother. Secondly, the mother was in a hurry to marry another person.

7). The mother, on the other hand, alleges that the reason for the marital strain between the two, was the ignoring, battering and humiliating attitude of the father and the grandmother. She alleges that, she was assaulted on many occasions by both, on account of which she was constrained to complain to the police resulting into registration of FIR for the offence punishable under Section 498A Indian Penal Code against both. It is alleged that, though several attempts at reconciliation were made by her parents, the same had failed on account of the adamant attitude of the father and the grandmother, who is herself a divorcee. The father was a divorcee when he married her. Later, he contracted a third marriage which also has ended in divorce. The mother denies that, she was divorced by the petitioner in December, 2010 as alleged by the father. According to her, she received Talaqnama by post sometime in mid, 2011. As regards the reason for filing the consent terms, the mother alleges that whenever the father was to have access to the child, he would visit the residence of the mother accompanied by grandmother and create a ruckus so as to embarrass and harass the mother. She was threatened that, if she did not handover custody of the daughter, she and her family members would suffer dire consequences. The threat was actually put into practice by the father. On 6<sup>th</sup> May, 2012 when the father and the grandmother had visited the residence of the mother for picking up the child for weekly access, the child in the presence of the father, had wished Hadi, the brother of the mother “best of luck”

as he was to appear for an interview at the airport on the next day. After hearing this, the father and the grandmother went to the local police station and lodged a frivolous complaint against the mother, her brother Hadi and her mother. The police picked up Hadi and detained him in custody for the whole night. With great difficulty, the mother got him released in the morning after which he went for the interview.

8). Over the period of time, the nuisance created by the father and the grandmother increased to such an extent that even the neighbours of the mother started complaining after each visit for the access, making the mothers' life miserable. The father called up the relatives of the mother and threatened that if he did not get custody of the daughter he would make the life of the mother and her family more miserable. He would spoil the career of Hadi, and not spare even the distant relatives and neighbours. When the things went beyond the capacity of the mother, she succumbed to the pressure and the consent terms came to be filed.

9). The acts of contempt alleged by the mother are that, after the initial few occasions when the father adhered to the consent terms, he gradually stopped permitting the daughter to talk to the mother over phone. Even when the daughter came over the phone, the mother could make out that she was talking under pressure. The father did not hand over custody of the child for weekly access in the months of September and October without any explanation. Pursuant to the directions of the Court, the father had furnished two cell numbers to the mother to enable her to contact

him or the daughter for the purpose of access. But whenever the mother gave a call, the cell phone was either switched off or was not picked up by the father. The mother, at times, was constrained to take help of local police station to contact the father. In the third week of October, when the mother was looking forward to meeting the daughter she received letter dated 15<sup>th</sup> October, 2013 from the father stating that the daughter will not be dropped for the weekly access as she had examination from 21<sup>st</sup> October, 2013. The letter also suggested that, the mother should take vacation access in the second half of the vacation as the child needed some dental medical attention. The father suggested that, he would drop the child on 8<sup>th</sup> November, 2013 and pick her up on 17<sup>th</sup> November, 2013. The mother was reluctant to accept the change since the father had already flouted the order for weekly access on four previous occasions. Only because she had no will to fight, she accepted the change. But the father failed to drop the child even on 8<sup>th</sup> November, 2013. When the mother tried to contact him on the two cell numbers, he did not pick up the phone. The mother then tried to contact him through her Advocate. The clerk of the Advocate when sought to serve a letter upon the father, his premises were found locked and the letter could not be delivered. The mother then became anxious and approached Bandra Police Station with the help of Bhiwandi Shaher Mahila Adhyaksha and requested the local police authorities to accompany her for getting access to the daughter. When the mother reached the residence of the father, he and the daughter were not at home. The grandmother who was present in the house scolded the mother and the constable and

asked them not to visit the house again.

10). The mother became desperate and visited the school of the daughter, only to be told by the School Principal that, the father had given instructions, not to permit the mother to meet the daughter. The Principal on noticing the distraught condition of the mother called the father on his cell phone and informed him of the incident. The father then visited the school and the mother was permitted to meet the daughter only in his presence. In that meeting, the daughter repeated three times that, "Papa aur dadi ne aap se milne mana kiya hai, woh mareng". When the mother tried to handover a gift to the daughter, she again repeated "Dadi mareng, Papa gussa karenge". She hugged the mother very tightly and started crying. But as soon she saw the father, she removed the hands from the mother's shoulder. She appeared very depressed and scared. In the contempt petition, in addition to the prayer for committal of the father, the mother sought return of custody of the daughter by setting aside the consent terms.

11). The acts of contempt alleged by the father, on the part of the mother are, (i) willful and deliberate violation of the consent terms and the undertakings therein, more particularly, Clause-7 thereof, (ii) false and contumacious statements in Contempt Petition No. 509 of 2013 which are allegedly contrary to the record of the case and have the effect of lowering the esteem of the Court in the eyes of law and (iii) not permitting the father to fetch the child after completion of access on scheduled time, at times not remaining present at the house when the child is taken to the

residence of the respondent.

12). The father has filed in all six affidavits to reply the petition. The first affidavit is dated 4<sup>th</sup> December, 2013 in which he denies the conduct alleged against him. Instead, he alleges the very conduct against the mother and her family, of creating ruckus at the time of access. He further alleges that, the mother and her family have a criminal background. As regards the failure to maintain schedule of access, he claims that the access which was to be given on 10<sup>th</sup> May, 2013 was given on 12<sup>th</sup> May, 2013. Similarly access of 15<sup>th</sup> June, 2013 was alleged to have been given on the next weekend. The access on 17<sup>th</sup> August, 2013 was not given because the house of the mother was allegedly found locked. The access on 21<sup>st</sup> August, 2013 and 5<sup>th</sup> October, 2013 was not given for the reason that the Saturday was declared as working day by the school and the daughter was to participate in a competition. But no explanation is offered for not sending the daughter for Sunday. On 19<sup>th</sup> October, 2013 the child who was then studying in I<sup>st</sup> Standard, was not sent because her terminal examination was to commence on 21<sup>st</sup> October, 2013. No access was given during Diwali vacation on the pretext of appointment with dentist and receipt of letter dated 2<sup>nd</sup> November, 2013 from one, Ramesh Patil. According to the father, by that letter he was warned that his life and the life of the grandmother would be in danger if they met the mother. As regards the incident in the school, the father denies the same.

13). The second affidavit dated 26<sup>th</sup> June, 2014, as stated at para 7 thereof, is to bring on record the alleged harassment suffered

by the father while collecting the daughter at the International Airport on 7<sup>th</sup> June, 2014. The third affidavit dated 21<sup>st</sup> August, 2014 is to allege perjury against the mother for failure to withdraw criminal complaint bearing No.1605/PW/2010 pending in the court of Metropolitan Magistrate 12<sup>th</sup> Court at Bandra.

14). The next affidavits of the father dated 10<sup>th</sup> November, 2014, 11<sup>th</sup> November, 2014 and 25<sup>th</sup> February, 2016 concern the orders dated 14<sup>th</sup> September, 2014 and 5<sup>th</sup> November, 2014 passed in these petitions and the explanations offered by him. The contents of these affidavits would be discussed later. The last affidavit is a joint affidavit of the father and the grandmother.

15). During the pendency of these petitions, several orders were passed relating to the access to the daughter. Some of these orders, would also throw light upon the allegations and counter allegations made by the parties. The relevant orders are dated 18<sup>th</sup> July, 2014, 14<sup>th</sup> October, 2014, 5<sup>th</sup> November, 2014, 10<sup>th</sup> November, 2014 and 11<sup>th</sup> November, 2014.

16). The order of 18th July, 2014 was passed on the Civil Application filed by the father for modification of the consent order dated 17th April, 2013 in the First Appeal contending that when the consent terms were entered between the parties, the daughter was studying in a school at Bhiwandi. She was thereafter shifted to a school at Bandra. This resulted in change in the school schedule for the daughter. This Court, disapproved the shifting of the daughter to another school by the father without consulting the mother but

modified the order to suit the new schedule by keeping all the terms intact. On 10th October, 2014 the mother had complained to the Court that the father was not complying with the order of access passed earlier. On 13th October, 2014, Advocate Mr. Shafiq appearing for the father had made a statement that, the daughter was with the grandparents. Then an order was passed directing the father to produce the daughter in the Court i.e. 14th October, 2014. Instead of bringing the daughter to the Court, on that day, the father produced Certificate dated 11th October, 2014 from one, Dr. Yaseen D. Mirza certifying that the child was under his treatment for Exacerbation of Bronchitis Allergic and was advised bedrest atleast for one week. The Court refused to believe the Certificate. It observed that the order dated 18th July, 2014 was not being complied with by the father since 17th August, 2014. The further orders passed dated 1st October, 2014 and 13th October, 2014 were also not complied with for no genuine reason. It expressed a categorical opinion that the father apparently is a habitual contemnor and has no regards for the orders of the Court. The order permitted the mother to have access to the child at the residence where it was residing, by taking assistance of the police. The Court also suo-moto issued notice for contempt to the father calling upon him to show cause why action be not initiated against him for deliberate non-compliance of the court's orders.

17). On the next date of the mater i.e. 5<sup>th</sup> November, 2014 the father was absent. The mother informed the Court that, she had, with the help of Bandra Police Station visited the residence of the father on 16<sup>th</sup> October, 2014, 18<sup>th</sup> October, 2014 and 1<sup>st</sup> November,

2014. On all the dates, though the house was not locked from outside and the sounds of television were heard from inside, nobody had opened the door. The mother and the police had confirmed from the neighbours that the father and his family were inside the house. They had deliberately not opened the door. This fact was evidenced by the Station House Diary of the Bandra Police Station. This Court then directed Senior Inspector of Bandra Police Station to visit the father and verify whether the daughter is staying in the premises or not. It also gave direction to the father to bring the daughter to the Court on 10<sup>th</sup> November, 2014. On the adjourned date, the child was present alongwith the father and the grandmother. The mother was also present. The Learned Judge presiding over the Bench, then interviewed the child. In it's order passed on that date, the Bench observed that, the child was completely tutored against the mother. The child had on her own told the Court that, in the month of December she was not available as the family was going out and on Sundays she cannot be available because she had to meet her friends. She also mentioned that, when she was five years old the younger brother of the mother used to pinch her all over the body and also the private parts and this fact was known to the mother. The child also said that, she does not love her mother but loves only "her papa" and "grandma". But at the same time, the learned Judge noticed that the child was very comfortable with the mother. The Court also took notice of the fact that the mother had not met the daughter for two months and warned the father that he was being given one opportunity to obey the orders of the Court. It then adjourned the petitions to the next

day i.e. 11<sup>th</sup> November, 2014, so that the mother could meet the daughter at least in the court. On the adjourned date, the father through his Advocate tendered unconditional apology for non-compliance of the orders of the court and expressed his readiness and willingness to obey the same in future. He however broke his word on the very next date of the access. He preferred Special Leave Petition to the Apex Court against the order and took the daughter alongwith him to Delhi.

18). In his last two affidavits i.e. the affidavit dtd. 10<sup>th</sup> November, 2014 and the joint affidavit dtd. 25<sup>th</sup> February, 2014, the father made certain serious allegations against the mother and her brother, Hadi. He baldly, without stating details, alleged that in the months of June-July, 2014, the daughter started complaining and showed disturbed behaviour. Therefore, he took her to Psychologist and Counsellor namely "Maan" at Bandra (West), where the daughter was subjected to psychological tests on 7<sup>th</sup> July, 2014. The impression gathered by the psychologist from the tests as mentioned in the report annexed to the affidavit reads as under:

"Impression: Clinical synthesis directs towards anxiety due to physical harm and affective disturbances that interferes in her attention process and expressed through somatic problems. She needs behaviour modification for deconditioning aggressive behaviour."

The report further recommended (i) medication, (ii) parental counselling and (iii) individual counselling. The affidavits do not disclose whether the recommendations were adhered to by the father.

19). The affidavits further allege that on 20<sup>th</sup> August, 2014, the daughter confided in the grandmother that whenever she went to the residence of the mother, her maternal uncle Hadi would “unclothe her, remove her undergarments inside bathroom and further used to pinch on her private parts.” She had allegedly reveal this fact to her mother and also her maternal grandmother, who not only did not take the same seriously but instructed the daughter not to disclose it any body. Then the father accompanied by the grandmother approached Bandra Police Station and on 22<sup>nd</sup> August, 2014, F.I.R. bearing C.R. No. 00 of 2014 was registered against Hadi for having committed offence punishable under Section 354 Indian Penal Code read with Section 8 of the Protection of Children from Sexual Offences Act, 2012 (“POCSO Act”), on the basis of the information given by the grandmother. The relevant portion of the statement of the grandmother recorded by Police reads as under :

“We have sent her to her mother's place on 16/08/14 to 17/08/14. After returning at home, I asked Reeba with confidence on 20/08/14, then she told me that, at & when Reeba went to her mother's house, at that time her uncle namely Abdulhadi Vinchu used to pinch and rotated hand on front and back side of personal part by removing her underwear when she went into the bathroom, so she used to suffer by the said fact. Since she was afraid on this incident, so she did not tell anything about the said matter. When she informed the said matter to her mother, then her mother told her not to tell this fact to me and her father, as such informed me by Reeba, hence, today, I have come at Police Station for filing complaint.”

On 23<sup>rd</sup> August, 2014, the F.I.R. was transferred to Shanti Nagar Police Station, Bhiwandi at Thane. During the course of investigation, on 25<sup>th</sup> August, 2014, the daughter was subjected to medical examination at Bhabha Municipal Hospital. The description of the incident narrated by the grandmother at that time, was different from that in the F.I.R.. The narration of the description of the incident to the doctor, is recorded at para 15(A)(vii) of the Medico Legal Examination Report. It describes a much graver incident. The narration reads as follows:

“Survivor is their daughter 7½ years Name: Reeba Shafeeq Pagarkar d/o Shafeeq Pagarkar. Her father and mother divorced and custody of child is given to father by court order and visits mother's house at Bhiwandi every weekend (Saturday and Sunday) as per history given to Informant. Her mama (mother's brother) 'Abdul/Hadi Ajmal Vinchu' aged 25 years staying at mother's place sexually assaulted her by inserting fingers in survivor's Vagina and Anus repeatedly since last 1 year. Last date of incidence 17/8/2014 Survivor revealed about this to her grandmother and father on 20/8/2014 that Accused used to remove survivor's undergarments and put finger in survivor's vagina and anus since last 1 year at mother's place. Accused used to threaten not to reveal about it to anybody. So parents (father) brought survivor to the hospital for medical examination and treatment.”

The difference in the two narrations was not just of the gravity of the actual act but also of the duration of the offending act. The extent of medical examination of the daughter required for the two narrations was obviously different. On the same day, the police recorded the statement of the daughter in question and answer form. Perusal of

that statement shows that several leading questions had been put to the daughter and she was led into saying the allegations against the maternal uncle. She was specifically asked as to what did the maternal uncle do to her.

20). Hadi, the brother of the mother then filed application for anticipatory bail being Application No. 1782 of 2014 before the Sessions Court. After taking into account the entire background, the Sessions Court allowed the application, by its detailed order dtd. 15<sup>th</sup> September, 2014. In the same month, the mother has filed Civil Application No.3447 of 2014 for setting aside the consent terms dtd.17<sup>th</sup> April, 2013 and for handing over custody of the daughter to the mother, which application is pending. In that application, she alleged that the criminal complaints made by the father are false. She has sought to demonstrate therein that on the alleged dates and times of the incident, her brother Hadi was not even at home. As regards the allegations of criminal antecedents of her family by the father and the list produced by him of the offences registered against Hadi and other family members, the mother, on the basis of the information received under Right to Information Act from the concerned police station, has stated in the application that Hadi is not concerned with four of the offences from the list. He has been honourably acquitted in the fifth offence registered and the sixth offence is pending for consideration of the court.

21). On 24<sup>th</sup> September, 2015, on the information of the grandmother, second complaint came to be filed, which was registered as C.R. No.231 of 2015 against the mother as well as her

brother Hadi under Section 354 read with 34 of Indian Penal Code and Sections 4, 8, 10 and 21 of Protection of Children from Sexual Offences Act, 2012 ("POCSO Act" for short). The grandmother in her statement alleged that the daughter disclosed to her on 22<sup>nd</sup> September, 2015 that on the earlier access to the mother i.e. on 19<sup>th</sup> September, 2015, the mother had made her sleep in another room. When the daughter was sleeping, her maternal uncle, Hadi went near her, removed her knicker, pinched her private parts and inserted his finger in her private parts. When the daughter woke up and shouted, the maternal uncle ran away. The daughter had immediately revealed the incident to the mother, who did not pay any heed to it. Instead she asked the daughter to allow the maternal uncle to do whatever he was doing. In the morning, the daughter allegedly disclosed the incident to her elder maternal uncle but he also laughed off the complaint.

22). After registration of the second complaint, the daughter was once again subjected to the medical examination, on the same day i.e. 23<sup>rd</sup> September, 2015. As per the affidavit of the father, the statement of the daughter was recorded by police on 24<sup>th</sup> September, 2015 at Bhabha Municipal Hospital, Bandra (West). That statement was video recorded, and it's C.D. kept in the safe custody of the police. Then the statement of the daughter was recorded under Section 164 Cr.PC. Armed with the two FIRs, the father had again refused access to the mother, which had to be restored by the orders passed from time to time in various proceedings, including the present proceedings.

23). The mother and her brother had filed Criminal Writ Petition 225 of 2016 for quashing of the above mentioned two FIRs registered with Shanti Nagar Police Station, Bhiwandi, which was heard by the Division Bench of this Court. In its order dtd. 15<sup>th</sup> September, 2016, the Division Bench recorded the statement of the learned APP on instructions of the concerned police officer that the statement of the daughter was recorded under Section 164 Cr.P.C., in which she has specifically denied all the allegations made in the two complaints. The learned APP had placed the statement of the daughter for perusal of the court. After going through the statement, the Division Bench observed that the statement supported the contentions of her mother and her brother. It has categorically held that the two complaints had been filed with an ulterior motive to deprive the access to the mother. After these observations, the Division Bench adjourned the petition in view of the statement made by the learned APP that the investigation was almost complete and appropriate report would be filed before the concerned Magistrate within eight days. The learned APP also stated that in the event the allegations made in the FIR were found to be false, appropriate action would be taken against the complainant under the relevant provisions of the Indian Penal Code. The Division Bench accepted both the statements. On the next date i.e. on 25<sup>th</sup> February, 2016, the learned APP on instruction of the concerned officer present in the court made a statement that the investigation in the two FIRs was complete and report under Section 169 Cr.P.C. was filed. The Division Bench accepted the statement and observed that in that circumstance the grievance of the petitioners did not

survive any more and disposed off the petition accordingly. In another petition i.e. Writ Petition No. 791 of 2016 filed by the father and grandmother seeking directions to the police for furnishing them with the copies of the statements of the daughter recorded during investigation, the learned APP had informed the Division Bench that report under Section 169 Cr.P.C. in the two complaints had been filed with the learned Magistrate and a notice had been issued to the first informant. She had however avoided to remain present before the learned Magistrate. In view thereof, the Division Bench refused to entertain the petition and dismissed it. Mr. Sasi, the learned Advocate for the father does not dispute receipt of notice from the concerned Magistrate by the grandmother. He however claims that the grandmother is scared to attend to the court because she had received threats to her life.

24). Ms. Farhana Shah, the learned advocate appointed to appear for the mother points out that viciousness of the father and the grandmother is such that the grandmother had written to the employer of Hadi about the criminal complaints filed by her against him and also about some other criminal complaints. Ms. Shah produced copies of the correspondence by the paternal grandmother, the result of the correspondence was loss of the employment of the brother. Ms. Shah submitted that the result of the correspondence and the complaints was not just loss of job by him but on account of the allegations, he has been compelled to stay away from the family. The correspondence by the grandmother is sought to be explained by Mr. Sasi saying that it was an act of socially conscious person, who was concerned about the safety to

the general public, since the brother was working with an Airlines.

25). The facts narrated above indicate that he has been even subsequently violating the orders of the court with impunity, time and again and for that purpose, he has unfortunately used the daughter as a tool. Nevertheless, in this Contempt Petition, the court is required to restrict itself to the lapses referred to in the petition. In his affidavit-in-reply to the Contempt Petition, the father has in terms admitted lapses on his part in giving access to the mother. He has, however, offered explanation by way of justification for the lapse. In the circumstances, the court is required to consider the justification offered for the lapses. If the justification can be accepted, the lapse on the part of the father cannot be said to be willful and deliberate. However, if the justification is not acceptable, the lapse would automatically become willful and deliberate. The admission as regards the lapses is on following occasions i.e. the access for 17<sup>th</sup> August, 2013, 21<sup>st</sup> August, 2013, 5<sup>th</sup> October, 2013, 19<sup>th</sup> October, 2013, 31<sup>st</sup> October, 2013 and 8<sup>th</sup> November, 2013. The justification for 17<sup>th</sup> August, 2013 is that when the father took the daughter to the residence of the mother, her house was locked. This allegation is denied by the mother. There is nothing brought on record by the father to support his claim. As regards the weekend access for 21<sup>st</sup> August, 2013 and 5<sup>th</sup> August, 2013, the excuse given is for one day i.e. Saturday. There is no reasons stated as to why the daughter could not be taken to the residence of the mother on the evening of the Saturday for the purpose of access on Sunday. The excuse given for not taking the daughter for access on 19<sup>th</sup> October, 2013 is her terminal

examination commencing from 21<sup>st</sup> October, 2013. The very fact that the daughter was studying in 1<sup>st</sup> standard is sufficient to hold that the excuse is without any substance. Thus, it is clear that there is willful and deliberate violation of the orders of the court by the father by not handing over custody of the daughter for weekly access in the months of September and October.

26). The mother has also alleged that she had with the help of police authorities visited the residence of the father, when the access was not provided during this period. The mother has next alleged the incident of her school visit by way of a desperate attempt at access. She has given details of the entire incident, which have not been dealt with specifically by the father in his reply. He has merely denied the incident. Thus, the material on record establishes that the father has willfully and deliberately violated the consent terms dtd. 16<sup>th</sup> April, 2013 and consent order dtd. 17<sup>th</sup> April, 2013 passed in First Appeal No. 108 of 2010.

27). Mr. Sasi, relying upon the decisions of the Apex Court in (i) **Niaz Mohammad vs. State of Haryana**, reported in **1994 Dg Law (Supreme Court)**, page 1995, (ii) **Kanwar Singh Saini vs. High Court of Delhi**, dtd. 23<sup>rd</sup> September, 2011 in **Criminal Appeal No. 1798 of 2009**, (iii) **Kapildeo Prasad Sah vs. State of Bihar**, reported in **1999 DgLaw (Supreme Court)**, page 2404 and (iv) **Ashok Paper Kamgar Union vs. Dharam Godha**, reported in **2003 DgLaw (Supreme Court)**, page 1653 sought to submit that for an action to be taken for

contempt, there must be willful, disobedience of the orders of the court. Willful means an act or omission which is done voluntarily and intentionally and with specific intent to do or not to do something, which the order requires a person to do or not to do.

28). The proposition of law canvassed by Mr. Sasi is not only undisputable but the facts of the present case perfectly fit into the proposition. It is seen that the father willfully, deliberately and intentionally avoided to give access to the mother. He not just avoided to give access, but planned and schemed to deny the access. He did not hesitate to use the daughter as a tool in his schemes. He filed false criminal complaints of sexual assault on the 8 years old daughter, exposed her to police investigation, got her statement recorded and subjected her to medico-legal examination regardless of the impact of such activities on her. Unfortunately and shockingly in all these schemes, he was actively supported by his own mother, the grandmother of the child. As has already been observed by another Bench, the father is a habitual contemnor and has no regard whatsoever to the orders of the court. Therefore he is liable for action for contempt. In the facts and circumstance of the case, not just the action for contempt but he must also be subjected to punitive costs.

29). As regards the contempt petition, wherein the father alleges that the mother has committed breach of clause (7) of the consent terms by not withdrawing the complaint filed against him and his mother for commission of the offence punishable under

Section 498-A I.P.C. it been rightly pointed out by Ms. Farhana Shah that the offence punishable under Section 498-A I.P.C. being not compoundable it was necessary for the father to file appropriate proceedings for putting an end to the same and in those proceedings the mother to have supported the father in view of clause (7) of the consent terms. The other two allegations of making false and contumacious statements in her contempt petition and not permitting the father to fetch the child after completion of access on scheduled time, are without any material to support and as such baseless. It is obvious that, the contempt petition filed by the father is nothing but a counterblast to the contempt petition filed by the mother. The same is liable to be dismissed with costs.

30). In the shocking and serious facts of the case, continuing the custody of the daughter with the father is not only not in the welfare of the daughter but it would be harmful to her. The father has proved himself to be unworthy of custody of the daughter. The custody must immediately be transferred to the mother. She has already filed Civil Application No. 3447 of 2014 for modification of the consent order and for custody of the daughter. Until that application is decided on merits, the custody must remain with the mother until such time as the application is decided for it's merits.

31). Despite the abovementioned conduct, the father was asked, by way of an opportunity to purge the contempt, whether he was willing to handover custody of the daughter to the mother. Mr. Sasi, on instructions from the father, who is present in the Court,

states that the father is not willing to handover the custody to the mother.

32). In the circumstances and for the reasons stated above, the following order is passed :-

**(i)** The notice issued for contempt in Contempt Petition No. 509 of 2013 is made absolute. The respondent to that petition, Shafeeq Abdul Rahim is sentenced to civil imprisonment for a period of three months. The sentence shall start running on expiry of period of four weeks from today.

**(ii)** Mr. Shafeeq Abdul Rahim shall pay costs of the petition quantified at Rs.5,00,000/- (Rs. Five Lakhs only) to the petitioner Smt. Tabassum Shafeeq Rahim. The costs shall be paid within four weeks from today. If the costs are not paid within the time granted, the petitioner Smt. Tabassum Shafeeq Rahim will be at liberty to recover the same as arrears of land revenue. The petitioner, Tabassum shall thereafter deposit the subsistence allowance for Shafiq.

**(iii)** Shafeeq Abdul Rahim shall hand over custody of the daughter Reeba to the mother within one week from today. In the event he fails to hand over custody of the daughter, the petitioner mother may take assistance of Bandra Police Station for the purpose.

**(iv)** Contempt Petition No. 211 of 2014 is dismissed with costs.

(SMT. R. P. SONDURBALDOTA, J.)