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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: February 22, 2010

Date of Order: April 08, 2010

+ CM(M) 429/2009

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08.04.2010

Dr. Sonia Sahaye

...Petitioner

Through: Ms. Kamini Jaiswal, Ms. Shomila Bakashi & Mr. Divyesh Pratap Singh, Advocates

Versus

Vikramajit Singh Sahaye

...Respondent

Through: Mr. K.T.S Tulsi, Sr. Advocate with Mr. Gaurave Bhargava and Mr. R.S. Chauhan, Advocates

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. This legal battle carried to this Court is in respect of interim custody of minor girl child Riddhi Sahaye born to the parties on 26th November 2004. The mother Smt. Sonia Sahaye is a doctor (dentist) and is employed with NTPC at Badarpur Thermal Power Station. Both the parents of child were working and it looks she was under the care of grandparents, more particularly the paternal grandmother.

2. The parties had married on 2nd December 2002 and as is evident, they could not pull on together for long. In 2008 their relationship broke down and a divorce petition was filed by husband and a petition for custody of the child was filed by the wife. Since the matter before this Court is only in respect of interim custody of the child and the learned Guardianship Judge is yet to decide the petition filed by the petitioner regarding custody, it would not be appropriate and relevant to discuss about the attitude of the parties inter se, as that is not the subject matter of consideration by this Court. The only thing to be considered by this Court is whether it would be appropriate to accede to the request of the petitioner as made in this

petition.

3. The petitioner is aggrieved by order dated 6th May, 2009 passed by learned Guardianship Judge whereby he disposed of an application under Section 151 CPC made by the petitioner seeking interim custody of the child during summer vacations, 2009 observing that vide his earlier order dated 7th February 2009, the petitioner was granted interim custody of the child on very 3rd and 4th Friday evening of every month to Sunday evening. After passing of that order, he had occasion to see the attitude of child and conduct of parties. Looking at the attitude of the child and the fact that the child was not yet comfortable with petitioner and the welfare and interest of the child being the dominant consideration, he did not think it proper that the child should be forced to spend part of vacations with the mother. He had taken into account the mental stress, through which the child had to go and the report of a Board of Doctors of AIIMS advising for not forcing the child to spend night stay with the mother. However, the learned Guardianship Judge gave liberty to the petitioner to make similar application for sharing the holidays in future when the comfort level of the child with the mother had increased.

4. When the petition was listed before this Court, the parties were referred to Mediation Cell but without any fruitful results. Since the summer vacation was ensuring, this Court passed an interim order for sharing of summer vacation and custody of the child was directed to be given to the petitioner during summer vacation for about 12 days, in a broken manner. Looking at the fact that the parties were not seeing eye to eye with each other, this Court passed an order that the child, for the sake of even weekend interim custody, shall be handed over to the petitioner before the learned Duty Metropolitan Magistrate, Tis Hazari Courts, Delhi and the child would be returned on the weekends at McDonald, Connaught Place. 26th November was the birthday of the child and for that day, the Court had given directions that the custody of the child be handed over to the petitioner on 1430 hours at D-Block, McDonald, Connaught Place and the child shall be returned to the custody of respondent at 1630 hours on the same day. The Court sought assurance

from the parties that they would maintain cordiality on the occasion of the birthday of the child and the father would not remain present at McDonald, Connaught Place when the mother intends to be with the child. During ensuing winter break, this court granted custody of the child to the mother from 25th December to 29th December 2009, however, observed that this shall not be constituted as precedence.

5. It is argued by the counsel for the petitioner that the interim custody of the child should be handed over to the petitioner who is the mother of the child. One of the reasons for not giving custody of the child to the petitioner was that the place of work of the petitioner was far away from her house and she would not be at home most of the time and the child in any case had to spend her time with her grandmother. She was brought up by her parental grandmother and then she would be spending time with maternal grandmother. It is submitted that to meet this objection the petitioner's mother had taken a house near the school of the child and there was no ground now to deny the custody of the minor child to the petitioner. The minor child was deliberately being kept away from the petitioner by the respondent and the trial court had not considered the welfare of the child while passing the order dated 7th February 2009 or 6th May, 2009. The learned Guardianship Judge wrongly took into consideration the medical report and the report of psychologist while deciding the custody of the child. There was nothing wrong with the minor child, neither there was any direction of the Court to take the child to a psychologist. The allegations were also made against paternal grandmother of the child that she used to leave the child alone at home alone with maid and enjoyed kitty parties and playing cards during day. Thus the child was not in the right hands. It was also denied that the child was extremely attached to her father.

6. In response to this, the father/ respondent placed on record the sequence of events. It is submitted that the learned Guardianship Judge had called the child for interview in presence of both the parties and at that time, the child on seeing the mother had started crying and she clung to the lap of her grandmother with the

result that learned Guardianship Judge could not interact with the child as the child was under the fear. The learned Guardianship Judge on 20th September 2008 observed, *"she started crying bitterly and was not ready to leave the company of her father and her paternal grandmother"*. It is submitted that the child was earlier taken to Dr. Rippan Sippy, Psychologist who had many sittings with the child and concluded, *"Riddhi is intelligent, emotionally strong, looks forward to stay with her father and paternal grandmother where she is more secure and happy"*. The child was examined by another consultant Dr. Neena Bohra, a Neuro-psychiatrist on 3rd October 2008 who observed, *"...the child is comfortable in present environment. She is enjoying her family life and school. She is possessive about her father. Any change against her wish might adversely affect her psyche."* He further submits that the child was examined by Dr. R.P. Beniwal of RML Hospital who observed, *"she is very much attached to her grandmother and father, emotionally comfortable with them and change in environment may develop detrimental effect on emotional and psychological development of the child."*

7. It is submitted by counsel for the respondent that due to the parties having bitterness, the custody of child was always handed over to mother before the Metropolitan Magistrate and on 20th February 2009, when the custody was handed over before the Duty MM, the duty MM observed, *"...while handing over the custody (from father to mother) the child is weeping"*. When on 22nd February 2009 the child was handed back to respondent, the Duty MM observed, *"At the time of handing over (back from mother to father) the child is found to be weeping and willing to be handed over to her father immediately"*. On 1st March, 2009, the Duty MM at the time of handing over of the child observed, *"At the time of handing over of the child by the mother to her father, child was crying and saying that she does not want to go to her mother again"*. On 15th March, 2009, the Duty MM observed, *"The mother has handed over the custody of the child to the father before me today, as the girl was found to be willing to accompany her father"*.

8. It is submitted by counsel for respondent that after two days interim custody given to the petitioner, the child was handed back on 15th March, 2009. The child was visibly at unrest apparently after excessive pressure and weeping, very weak and drowsy in the court while willing to be immediately handed over to her father. She had been vomiting since morning without proper medical attention and was in a very fragile state of health. Looking at the serious medical condition of the child and being a holiday (Sunday), she was rushed to the childcare emergency ward at AIIMS (All India Institute of Medical Sciences). She was given medicines and observed for a while. During the course of treatment at AIIMS, the child was referred to the child Psychologist and was examined by Board of Doctors at AIIMS who opined as under:

“Ridhi is very intelligent and spontaneous in her behavior. She is very attached to her father and grandmother. Child has very unpleasant memories about her mother. She has anxiety and unwillingness to interact with her mother. Due to high anxiety in Ridhi, it is advised that she should not be forced to spend night stay with her mother. At the current developmental period of the child, change in environment causes insecurity and may give rise to further maladaptive behavior. She may be given opportunity to spend only few hours with her mother, later when she grows up and if her relationship improves she may spend more time”.

9. It is submitted by respondent that every time when the child was handed over to the mother before the Duty MM, the child had gone to the mother unwillingly because of the court order. On 27th March, 2009, she addressed Duty MM and told, “Aunty Mujhe Nahin Jana”. Even on 10th March, 2009, the Duty MM observed at the time of handing over the custody of the child, the child had cried. He submits that consistently Duty MMs have observed that the child was quite uneasy with mother and it was clear that the child was being pushed to a corner and was being subjected to mental trauma. He further submits that even after this Court had given 12 days interim custody during summer vacation to the mother, the child was not comfortable with the mother and on 28th August 2009, the learned MM before whom

the custody was again handed over observed, *"Ms. Ridhi i.e. the child is crying while her custody is being handed over."* In October, 2009 when the child was handed over for weekend custody to the petitioner (mother), the duty MM observed, *"Baby is crying and states that she does not want to go to her mother."* Similarly on 23rd October 2009, the Duty MM again observed, *"The child is crying while the custody is being handed over."* On 26th November 2009, i.e. on birthday of the child, when the child was to be handed over under the Court's directions to the petitioner (mother), the respondent (father) had taken leave from the office and brought the child from school directly to the designated place i.e. McDonald. The child was still in school uniform and father was there at McDonald ten minutes before schedule and on seeing him, the mother came to them and without a word, suddenly started violently pulling away the child, who was still in the lap of the petitioner-father. As a result the child started crying. The father requested the mother (petitioner herein) to take it easy and not to use force and to give the child a moment to ease, while he too would persuade the child. However, the respondent was furious and in no mood to relent and had an ulterior motive to create a scene. In a rage of anger and frustration she clawed the little child on her cheek making the child scream, who started crying inconsolably. The child, with a wound on her face, inflicted by her mother, clung to the father and refused to go to the mother at all. The petitioner (mother) accompanied by her sister Dolly, started hitting and slapping Ms. Renu who had accompanied father on her head and pulling her hair. When the father intervened, while still having the child in his lap, the mother clawed his right hand, which started bleeding instantly. The father respondent was threatened and made to follow the petitioner (mother) to Police Station Connaught Place where complaints were made by both the parties. Thereafter they were taken to RML Hospital for MLC examination of the child which revealed abrasion over right cheek, superficial about 1 cm long. Further, as the child was visibly terrified and shaken, it was advised by the attending doctor that the child be consulted to psychologist and follow up in OPD on Monday (30.11.2009) at 9 am. The follow up treatment was duly completed by the father (respondent herein). Similarly, abrasion over right hand and right

shoulder, tenderness was observed by the attending doctor upon examination of the father. On the other hand, no physical injury whatsoever was recorded on the person of the mother. However, the child was kept in hospital under observation upto 12 midnight. On the very next day, the mother preferred a contempt petition in respect of occurrences of 26th November 2009 before this Court being CCP No.895 of 2009. It is stated that as a result of assault on the child, the child could not sleep the entire night showing unusual symptoms like unexplained extreme stomach ache, nausea, restlessness and had to be taken to the emergency ward at AIIMS on 27.11.2009. Looking at the condition of the child, respondent gave a telegram to the petitioner on 27th November 2009 informing that the visitation schedule for the week be deferred. It is stated that the application made before the Guardianship Judge for sharing winter vacation was denied by the Guardianship Judge looking into all the circumstances. However, this Court in CM (Main) petition made by the petitioner (mother) modified the order of learned Guardianship Judge.

10. It is apparent from the entire circumstances that both the parents being working used to leave the house and the child was under care and company of grandmother during day time. The child was getting company of her father and mother only in the evening, till they lived together. After May, 2008 since both the parties started living separate, the child totally became dependent on her grandmother. I also find that the allegations leveled against the grandmother by the petitioner (mother) are not in good taste. If the grandmother was a "*Kitty Party Bird*" and was not taking care of the child, the petitioner/ mother has not specified as to who was taking care of the child during day time right from the age of infancy till the parties separated since the petitioner herself was busy with her job. If she had spent enough time with the child and had played her role, the child would have rushed to her and longed for her company the moment she had seen her in the Court. However the attitude of the child soon after the parties separated (mother filed petition for custody of the child before the Guardianship Court soon after separating) showed that the child was not prepared to leave the lap of her

grandmother and this attitude of the child continued right from mid 2008 till end of 2009 despite the fact that the child under the directions of the Court, was handed over to her time and again on alternative weekends.

11. The mother has placed on record photographs showing that the child was playing with her when the custody was given to her. No gainsaying that she was mother of the child and once the custody of the child was given to her for a period of two days, the child would not keep weeping all along. It is the fate of the child that she has to be with her mother under the orders of the Court. The child herself had not shown a desire to be with the mother. Moreover, the photographs do not reflect anything except that at times the child was in happy mood with the petitioner. Similarly, respondent (father) has also placed on record the photographs showing how the child was being forcibly taken away and got trapped in this dispute between petitioner and respondent and had to undergo trauma because of the attitude of the parties. The Court also cannot ignore the observations made by learned MMs every time whenever the child was handed over to the mother. Neither the Court can ignore the report of psychologist on the ground that the Court had not given any direction that the child be taken to psychologist. If the child is in custody of the father and grandmother, it cannot be said that father had no right to take care of the child according to his best judgment and cannot take the child to a consultant for the welfare of the child.

12. While considering the welfare of the child, the Court has to keep in mind all aspects of well being of the child including emotional, psychological, educational, social, physical, health etc. In the counter affidavit filed by the father, the father has narrated the instances showing the attitude of the mother to the child was not good. He narrated in detail the attitude and behavior of the petitioner towards the child. In rejoinder affidavit, the mother has denied all these allegations. This Court need not go into these allegations and counter allegations since this Court is not deciding the guardian petition filed by the parties. It would be a matter of evidence for the trial court to go through these allegations and counter allegations and come to a

conclusion as to whether there was any truth in them or not but suffice it would to say that the child has not been brought up in normal and healthy circumstances and it also seems that both the parents used to quarrel with each other and the child became more and more dependent on her grandmother. I, therefore, consider that it would not be appropriate that even during pendency of the petition before guardianship court, the custody of the child should be handed over to the mother who has little time to spare for the child due to her job compulsions. I, therefore, consider that the interim order passed by learned Guardianship Court for alternative weekends is perfectly justified and this much interim custody shall continue despite the fact that the child has shown unwillingness, so that the child may get some love and affection of her mother and later on can make an independent choice. Regarding sharing of holidays, the child was made to stay with the mother during some part of summer vacation and some part of winter vacation. I also consider it appropriate that the child should spend part of long vacation with her mother. Hence, it is directed that out of the summer vacations, the child should spend two weeks with the mother and in winter vacations, which are normally of ten days, the child should spend around four days with the mother. These four days shall be in the beginning of winter vacation and the two weeks' time of summer vacation shall also be at one go in the beginning of summer vacation. The respondent (father) shall inform the Guardianship Court, where the petition is pending, the schedule of summer and winter vacation in advance and the learned Guardianship Court shall fix the schedule of custody according to this order for sharing of winter and summer vacations.

13. With above directions, the present petition stands disposed of.

April 08, 2010
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SHIV NARAYAN DHINGRA J.