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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CM(M) 1018/2010

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Judgment Delivered on: 21.02.2011

Shiwani Kabra

.... Petitioner

Through: Mr. Brijesh Kalappa, Mr. Gopal
Singh and Ms. Divya Nair,
Advocates

Versus

Shaleen Kabra

.... Respondent

Through: Ms. Priya Hingorani, Mr. Aman
Hongorani and Mr. Santosh Kumar,
Advocates

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

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

G.S. SISTANI, J. (ORAL)

1. The present petition has been filed by the petitioner mother and is directed against the order dated 19.07.2010 passed by the Learned Additional District judge whereby two applications of the Respondent father seeking modification of the custody arrangements of children in view of his transfer to J&K and for permission to take the transfer certificates of both the children from the school in Delhi have been allowed.
2. The brief facts that are necessary for disposal of this petition are that marriage between the petitioner and the respondent was solemnised on 14.02.1994. Two sons, presently of 13 and 8

years of age, were born out of the wedlock. The Petitioner and the Respondent have been living separately since 10.04.2007 and have been involved in various litigations since then. The respondent has filed a divorce petition under section 13(1)(i)&(1A) of the Hindu Marriage Act while the petitioner has initiated proceedings under the Domestic Violence Act.

3. The respondent father is an IAS Officer of J&K cadre and in view of his transfer to J&K, the respondent moved two applications dated 25.05.2010 and 22.06.2010 seeking modification of the custody arrangements of the two children and for granting permission to take transfer certificates from the schools in Delhi so as to complete the admission process of the two children in a school in Jammu. The learned additional district judge, after hearing both the parties allowed the applications of the respondent father which has led to the filing of the present petition. The trial court while allowing the applications issued the following directions:

“33. However he (respondent) shall be required to make necessary arrangements at school at Delhi to ensure that seats of both the children are kept reserved for the current academic year by payment of necessary fee, as had been undertaken by petitioner himself. Petitioner shall ensure that he gets a Government accommodation allotted in his name at the earliest and that he makes such arrangements that children are not left in custody of servants alone and that there is some family member of the petitioner available to supervise the children in his absence. Further, respondent shall have right to exclusive custody of children for two days in every fortnight and petitioner shall be required to bear the expenses and to make necessary arrangements for her travel from Delhi to J&K and back to Delhi as well as for her lodging and comfortable stay at J&K, in accordance with his own status and standing. In case, respondent is not able

to go for meeting with the children, during her fortnightly visit, for any reason, she shall inform petitioner in advance and shall be entitled to be compensated with exclusive custody of children during their holidays for days, she misses out on meeting with the children. During the long holidays, i.e., holidays for more than four days, respondent shall be permitted to take children to meet her relatives. However, such visits shall not be more than once in three months. In case respondent wants to take her relatives or parents to meet the children at J&K, she shall be required to bear expenses of travel of her relatives of her own. Petitioner and respondent may also mutually agree that petitioner shall bring children to Delhi for fortnightly meeting with the respondent, once in two months or earlier as agreed upon by them. Petitioner shall allow respondent to speak to children at least once a day.

34. This modification in order of custody and visitation of children shall be operational for a period of six months and shall be reviewed after six months subject to the conduct of the parties as well as performance of the children in school at J&K for further posting of petitioner whichever is earlier.”

4. The counsel for the petitioner submits that the learned additional district judge has failed to appreciate the fact that considering the age of the children the mother should be appointed as guardian of the children. The court has further failed to appreciate that Delhi is an education hub and that both the children are studying in Delhi Public School, RK Puram and Vasant Vihar respectively which are the most reputed schools of India. The Heritage School, Jammu in which the respondent has sought admission of the two children fades pale to the education standards of Delhi Public Schools since it has started only in the year 2005 and is untested in terms of its excellence and teaching. The said school is not even preferred by the locals of Jammu who rate Delhi Public School, Jammu or Army Public School at Nagrota or even the Kendriya Vidyalaya to be providing

a better and higher quality education. Removing the children from the rolls of a reputed school of Delhi would certainly be prejudicial to the educational interests of the children in the long run. It is further contended by the counsel that by reserving the seats of the children in the schools at Delhi, the trial court has reflected that it is uncertain of the arrangements made by the respondent in J&K.

5. The counsel for petitioner next submits that while the trial court has observed the fact that the respondent has tutored the children and that the children were left alone at J&K with the servants while the respondent was away at work, has erroneously allowed the applications of the respondent and that the trial court has been influenced by the fact that the respondent is an IAS officer occupying a high position in the government and thus would be in a better position to handle the children. It is next contended by the counsel that the trial court ought not to have granted the sole custody of the children to the respondent by allowing him to take the children to an altogether different state especially when the parents of the respondent also do not reside with him. It is further submitted that granting the custody of the children to the respondent would mean that the children would virtually live with the servants without any supervision of the family members. The counsel for petitioner further submits that the trial court has erroneously allowed the prayer of the respondent for absolute custody of the two children and to take them to a different state on the pretext that the

respondent got the two children admitted in a Jammu school in an utter disregard of the orders of the court.

6. Mr. Brijesh Kalappa, counsel for the petitioner, next submits that the respondent husband being posted as the Managing Director of Power Development Corporation, J&K, is ordinarily likely to remain as a resident of Srinagar where the headquarters of Power Development Corporation are situated. The Heritage School is situated in Jammu city which is 7-8 hours by road from Srinagar. While the respondent would be away at work, children would be staying mostly in the company of servants as the respondent would mostly be busy in work and at best be available on weekends. It is the contention of the counsel of the petitioner that the Respondent lives under administrative difficulties and is holding a sensitive post wherein liabilities of State fall upon him and he would not be able to take good care of the children.
7. The counsel for the petitioner further submits that the trial court has failed to consider that the petitioner is competent to take care of the educational needs of the children and to provide them with motherly love, care and protection. The petitioner is a graduate from the Vanasthali Vidyapeeth University, Udaipur and has done her specialisation in Home Science, Music and Social Science. It is further submitted that though the respondent father is very well educated, but the education of father alone is not imperative for the overall development of the children. It was further submitted that since the respondent, being an IAS officer, used to return late owing to his work

pressure he had no time for the children and it was the petitioner who has always taught the children and taken care of their needs and it is only after the initiation of the custody proceedings that the respondent has started taking interest in the children. The counsel for petitioner further contends that the petitioner has developed illicit relations with one Ms. X (name withheld) who is a journalist in Daily News Analysis and that she is the precipitating factor for all problems in the matrimonial life of the petitioner and the respondent.

8. Admittedly, there was no order of the court for dividing the time of the custody of children during the summer vacations, but there was a mutual understanding between both the parties since 2007 that the custody during the vacations was to be divided in equal proportions. The respondent in utter disregard of the aforesaid order dated 13.07.2007 and 10.06.2010 (by which the respondent had to hand over the custody of the children to the petitioner by 14.06.2010) fled from Delhi along with the two children on 21.05.2010 without even informing the petitioner and took them to Jammu. It has been contended by the counsel for the petitioner that the admission of the children in Heritage School, Jammu is a result of the contemptuous action of the respondent for which a contempt petition is pending before the learned metropolitan magistrate. The act of admission of children in a school in Jammu is without any permission of the court and without any information to the petitioner depriving her of the rightful custody of the children as per the custody arrangement agreed upon by the parties. The

counsel further drew the attention of the court on other instances when the respondent has flouted the orders of the trial court with regard to the custody of the children in view of his position as an IAS Officer.

9. It has been submitted by the counsel for the petitioner that the trial court has lost sight of the fact that while the elder son is in his transitional stage of physical and mental human development, the younger son is only 8 years of age and is too young to live without his mother and the welfare of the children lies in allowing them to stay with their mother. The counsel further submitted that the petitioner has already undergone the trauma of miscarriage of twins in the year 1994 and again she is being separated from both her children vide the order of the trial court.

10. The counsel for the petitioner places reliance on *Gaurav Nagpal v. Sumedha Nagpal* reported in (2009)1 SCC 42 and more particularly at para 42 which reads as under:

“42. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the “welfare of the child” and not rights of the parents under a statute for the time being in force”

11. The counsel for the respondent has reiterated the arguments raised before the trial court. Ms. Hingorani, Advocate, submits

that the trial court has considered all the orders which have been passed from time to time and while keeping the interest and well-being of the minor children, the trial court has passed the order modifying the custody arrangement and permitted the respondent to take transfer certificates of both the children from the school at Delhi for admission in school at Jammu. It is submitted by the counsel for the respondent that the fact that the respondent is serving in the State of Jammu & Kashmir should not come in the way of the respondent to perform his parental duties.

12. The Counsel for respondent submits that the petitioner is totally incompetent to provide academic guidance to the children. It is denied that the petitioner has done her specialisation in Home Science, music and social science. It is contended that the petitioner has no capability to meet the needs of modern education as her knowledge of subjects like English, Maths, Science, Social Studies, Computers etc is abysmal and that she only has the option of relying on tutors. It is further submitted that the tutors appointed by the petitioner were substandard and inefficient. The counsel for respondent has strongly urged before the court that respondent is in a better position to take care of the educational needs of the children as he has a meritorious educational background of being graduate from IIT Delhi, has pursued his MBA from FMS, University of Delhi and is an Indian Administrative officer of 1992 Batch. The parents of the respondent are also well known educationists who have retired from senior positions in education department, Rajasthan and

would be able to provide educational help to the children whereas the petitioner has a poor academic record and the father of the petitioner is also just 10th pass and is facing serious criminal charge. The counsel for respondent next submits that the custody arrangements vide order dated 24.04.2010 brought smiles back on the children's face and there was great improvement in their academic record. The children followed a regular routine with extracurricular activities, studies, visiting parks and a healthy food regime. It is next submitted that since December 2008, the responsibility of the education of the children has been shouldered on the respondent. It is further alleged that the petitioner is extremely incompetent and careless towards the children; she does not attend the parent teacher meetings of the children and does not take interest in the progress of the children. The extra-curricular activities of the children had also come to a standstill and the academic performance had deteriorated.

13. It is also contended by the counsel for the respondent that the petitioner has also been totally uncaring towards the medical needs of the children and is so indisciplined that right dosage of medicine at right time are never administered to the children. The counsel for respondent further submits that the younger child has been sent to school in unclean and stinking school uniform. On various occasions, the school tiffin given by the petitioner to the children did not prescribe to the healthy nutritious eating regime prescribed by the school but instead the

children were sent to school with biscuits and other unhealthy tiffin.

14. The counsel for the respondent next submits that the petitioner has a loose moral character and she did not take care of the children since she was involved with a servant (name withheld) that she had no time to look after the children. The counsel for respondent relies on certain audio and video tapes and also call records of the petitioner in support of the allegation that the petitioner has illicit relations with the servant. Further, the counsel submits that the respondent caught the petitioner alongwith her paramour (name withheld) red handed on 08.04.2007 at his home. It has also been alleged by the counsel for the respondent that prior to the said servant the petitioner had illicit relations with another man (name withheld) during their stay in Udaipur when the respondent caught the petitioner red handed.
15. The counsel for the respondent next submits that the conduct of the petitioner and her father is such that it would be prejudicial to the welfare of the children if the custody is granted to the petitioner. The counsel contends that the father of the petitioner had married a second time in 1987 in desire of a male child who was born in 1995. The aforementioned fact came to the knowledge of the respondent only in the year 2003. The petitioner's father threw out his second wife and son in 2005 and is presently facing trial under section 406, 498-A IPC and also under the Domestic Violence Act. The petitioner's father is also paying maintenance to his illegitimate son and second wife

under the orders of the court. It is contended by the counsel for the respondent that home influence plays an important role in developing the personality of the children and in the circumstances mentioned above, the educational qualification of the petitioner and her father and also the conduct of the petitioner and her father would not be conducive to the welfare of the two children in case their custody is granted to the petitioner mother.

16. It is further submitted by the counsel for the respondent that all arrangements have been made by the respondent for the stay of the children in Jammu and the parents of the respondent have also shifted with the respondent. As per the respondent, the children would be under the supervision and control of their grandparents and not in the custody of the servants alone as has been alleged by the petitioner. In contrast, the counsel for the respondent contends that the petitioner stays alone and there is nobody to take care of the children other than the petitioner herself.
17. The counsel for the respondent next contends that on all occasions the two children have shown a strong desire to stay with the respondent father only. Reliance is placed upon *Nil Ratan Kundu and Another v. Abhijit Kundu* reported at (2008)9 SCC 413 and more particularly at para 52 which reads as under:

“52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided *solely* by interpreting legal provisions. It is a human

problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising *parens patriae* jurisdiction and is expected, *not* bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

18. Reliance has also been placed on *Mausami Moitra Ganguly v. Jayant Ganguli* reported at (2008)7 SCC 673 and more particularly at paras 10, 19 and 26 which read as under:

"10. Taking into account the material on record, the High Court found that: (i) the respondent is financially sound and able to cater to all the needs of the child for his development whereas the appellant is unable to provide the same since she is living all alone; (ii) the child is not able to reconcile with his uprooting from Allahabad and denial of love and affection of the father; and (iii) the questions which were put to the child and answers thereto indicate that the child wants to study at Allahabad. Having regard to the prevalent circumstances and the fact that the child had received his education from primary stage with his father at Allahabad, the Court came to the conclusion that the welfare and development of the child and his future would be best served at present at Allahabad in the hands of the father. Accordingly, the High Court set aside the order passed by the Family Court and granted the custody of Master Satyajeet to the respondent, with the following directions:

"1. The appellant shall make arrangement for Master Satyajeet to continue his studies in best schools of Allahabad and will ensure the development and welfare of the child in the best way possible.

2. The respondent mother Ms Mausami Moitra shall be at liberty to visit the child either in the appellant's house or in the premises of mutual friend or at an agreed place at any point of time and the appellant father shall not object to her meeting with the child.

3. The appellant will also allow the child to live with the mother during school vacations or on appropriate occasions.

4. Master Satyajeet shall be allowed to attend and participate in family functions/festivities subject to his school attendance and examinations, etc. which are held in the family of his mother or during any other occasions as jointly agreed to by both the appellant father and the respondent mother.

5. Any other further arrangements mutually agreed to between the appellant father and the respondent mother in the interest of the child.”

Consequently, the custody of the child was restored to the father. It is this order of the High Court which is under challenge in the present appeal.

19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child’s interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained. We feel that the visitation rights given to the appellant by the High Court, as noted above, also do not require any modification. We, therefore, affirm the order and the afore-extracted directions given by the High Court. It will, however, be open to the parties to move this Court for modification of this order or for seeking any direction regarding the custody and well-being of the child, if there is any change in the circumstances.”

19. The counsel for the respondent, while relying on the facts of the case of *Tara Chand Mavar v. Basabti Devi* reported in I (1989) DMC 402, submits that the petitioner has poor educational background and no independent source of livelihood. The

petitioner is totally dependent on her father and the maintenance awarded for the upbringing of the two children and on the tutors to meet their educational needs whereas the respondent is a reputed officer in the Indian Administrative Service who has a keen desire that his children receive good education and are brought up in an atmosphere which allows an overall development of the child's personality. The Counsel for the respondent draws the attention of the court to the observation in para 14 of the above case which reads as under:

“14. The trial court thought it fit to allow the child Rinku in the custody of the mother on the sole sentimental consideration that as the child has been living with his mother since his birth and the child also wants to live with his mother. The learned Judge thought it fit to allow the child to remain in custody of his mother. In our considered opinion no sentimental consideration should come in the way of deciding the custody of the child where the sole and only consideration is welfare of minor child. Minor child of 7 years cannot form any intelligent opinion about his own welfare and to give preference in whose custody the child wants to live. Therefore, merely because the minor child Rinku expressed preference to live with his mother, this cannot be said to be a proper consideration for allowing the child to remain in custody of his mother. The Court has carefully to see that sentimental consideration should not prevail over obvious welfare of a minor. The expression "welfare of the minor" has very wide meaning. It has several facts including financial, educational, physical, moral and religious welfare. Therefore, due regards should also be given to the affection and capacity for building up a good career for the child.”

20. It is strongly urged by the counsel for the respondent no question of contempt of the orders of the court arise as there are no orders of the court restraining either party from taking the children out of Delhi during vacations nor was there any order by court or arrangement between the parties by virtue of which the vacations were to be divided equally between the parties. The

order dated 13.07.2007 is completely silent in relation to vacations. The counsel for the respondent further contends that the respondent took the children to J&K only on 05.06.2010 and not on 25.05.2010 as has been alleged by the petitioner. It is further contended that the petitioner procured the order dated 10.06.2010, whereby the respondent was directed to handover the custody of the children to the petitioner by 14.06.2010, by misrepresentation and suppression of facts and the respondent learned about the said order only on 18.10.2010. The counsel further submits that the children while in J&K, completed their holiday homework, visited various tourist spots and were always under the supervision of the respondent or the respondent's relatives visiting J&K.

21. As far as the plea of having illicit relations with the servant (name withheld) is concerned, the counsel for the petitioner submits that the allegation is patently wild, baseless and false and has been levelled only with a view to prejudice the rights of the petitioner and also with a view to deprive the petitioner of the custody of her children. The counsel for petitioner further submits that the respondent on one hand levels allegations of adultery against the petitioner with the said servant in the present petition whereas in the petition for divorce, the respondent has alleged adulterous relationship of the petitioner with another man (name withheld). Refuting the allegation of the respondent, the counsel for the petitioner submits that the respondent is involved in an extra marital relationship with a lady journalist Ms. X (name withheld). It is further contended by

the counsel for the petitioner that the respondent and his mother are personalities with distorted psychology and the respondent has also placed spy cameras all over the matrimonial home and has invaded the petitioner's right to privacy.

22. As regards the audio and video tapes and the call records relied upon by the counsel for the respondent, the counsel for the petitioner submits that they are false and fabricated. Various discrepancies have been pointed out in the said call records. The counsel for the petitioner has also contended that the petitioner is very much able to teach the children and has relied on work sheets of Manu and Pranshu showing their excellent performance in all subjects.
23. The counsel for the petitioner submits that on all occasions the food sent by the petitioner prescribed to the class menu but since the younger child complained of not liking certain foodstuff prescribed in the class menu, the petitioner found it better to give something to the child that he is fond of so that he does not return from school on an empty stomach.
24. I have heard the counsel for the parties and have carefully perused the entire material on record. The arguments of the counsel for the petitioner can be summarized as under :
 - Keeping in view the age of the children, the mother is the right choice as guardian of the children and competent to take care of the educational and other needs of the children.

- Delhi is an education hub and the children currently are studying in one of the best schools of India.
- Respondent lives under difficult administrative conditions and would not have much time for the children. Children would be left at the mercy of the servants.
- The respondent in a contemptuous act has got the children admitted to Heritage School, Jammu without informing the court and the petitioner.
- The trial court is influenced by the fact that the respondent occupies a high post in the administration.
- Merely because the respondent is well qualified from IIT, FMS and is an IAS officer by itself cannot lead to the conclusion that petitioner is unfit to look after the children.
- Petitioner's father has engaged the best tutors for teaching both the children.
- Children are at a tender age when they need the love and care of the mother and not the status and position of the father which will only spoil the children.

25. The arguments of the counsel for the respondent are summarized as under :

- Petitioner is incompetent to meet the educational requirements of the children as she is only a graduate in Home science, music and social science.
- Petitioner is in an adulterous relationship with one servant (name withheld) and has neglected the children

- Since December 2008, educational responsibilities of the children have been entrusted upon the respondent and the children have shown marked improvement in their studies.
- Respondent, being a government employee, can provide all the facilities to the children.
- Petitioner's father is facing criminal trial which will cast a bad influence on the children.
- The children have shown a keen desire to stay with the respondent.
- School record would show that the mother is disinterested in studies of the children and does not even provide proper tiffin or send the children in clean clothes.

26. The law with regard to deciding application with regard to custody of children is well settled. It would be useful to refer to some of the judgments of the Apex Court on the subject. In the case of Anjali Kapoor v. Rajiv Bajjal, reported at (2009) 7 SCC 322, it has been held:

“15. Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. [See *Sumedha Nagpal v. State of Delhi*¹ (SCC p. 747, paras 2 & 5).]

16. In *Rosy Jacob v. Jacob A. Chakramakka*² this Court has observed that: (SCC p. 847, para 7)

“7. ... the principle on which the court should decide the fitness of the guardian mainly depends on two

¹ (2000) 9 SCC 745

² (1973) 1 SCC 840

factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors."

This Court considering the welfare of the child also stated that: (SCC p. 855, para 15)

"15. ... The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society...."

17. In *Elizabeth Dinshaw v. Arvand M. Dinshaw*³ this Court has observed that whenever a question arises before court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

18. At this stage, it may be useful to refer to the decision of the Madras High Court, to which reference is made by the High Court in the case of *Muthuswami Moopanar*⁴ wherein the Court has observed, that, if a minor has for many years from a tender age lived with grandparents or near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance, having bearing upon the question of the interest and welfare of the minor and on the bona fides of the petition by the father for their custody. In our view, the observations made by the Madras High Court cannot be taken exception to by us. In fact those observations are tailor-made to the facts pleaded by the appellant in this case. We respectfully agree with the view expressed by the learned Judges in the aforesaid decision.

19. In *McGrath (infants), Re*⁵ it was observed that: (Ch p. 148)

"... The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-

³ (1987) 1 SCC 42

⁴ AIR 1935 Mad 195

⁵ (1893) 1 Ch 143

being. Nor can the ties of affection be disregarded.”

20. In *American Jurisprudence*, 2nd Edn., Vol. 39, it is stated that:

“... An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of ³²⁷ the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment.”

21. In *Walker v. Walker & Harrison*⁶ the New Zealand Court (cited by British Law Commission, Working Paper No. 96) stated that:

“Welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. *However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child’s own character, personality and talents.*”

(emphasis supplied)”

27. In the case of *Vikram Vir Vohra Vs. Shalini Bhalla* (2010) 4 SCC

409, the Apex Court has held as under:

“12. In a matter relating to the custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final.

⁶ 1981 New Ze Recent Law 257

They are capable of being altered and moulded keeping in mind the needs of the child.

13. In *Rosy Jacob v. Jacob A. Chakramakka*⁷ a three-Judge Bench of this Court held that all orders relating to the custody of minors were considered to be temporary orders. The learned Judges made it clear that with the passage of time, the Court is entitled to modify the order in the interest of the minor child. The Court went to the extent of saying that even if orders are based on consent, those orders can also be varied if the welfare of the child so demands.

14. The aforesaid principle has again been followed in *Dhanwanti Joshi v. Madhav Unde*⁸.

15. Even though the aforesaid principles have been laid down in proceedings under the Guardians and Wards Act, 1890 these principles are equally applicable in dealing with the custody of a child under Section 26 of the Act since in both the situations two things are common; the first, being orders relating to custody of a growing child and secondly, the paramount consideration of the welfare of the child. Such considerations are never static nor can they be squeezed in a straitjacket. Therefore, each case has to be dealt with on the basis of its peculiar facts.

16. In this connection, the principles laid down by this Court in *Gaurav Nagpal v. Sumedha Nagpal*⁹ are very pertinent. Those principles in paras 42 and 43 are set out below: (SCC p. 55)

“42. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the ‘welfare of the child’ and not rights of the parents under a statute for the time being in force.”

That is why this Court has all along insisted on focussing the welfare of the child and accepted it to be the paramount consideration guiding the court’s discretion in custody order. (See *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*¹⁰, AIR p. 1289, para 17.)”

⁷ (1973) 1 SCC 840

⁸ (1998) 1 SCC 112

⁹ (2009) 1 SCC 42

¹⁰ (1982) 2 SCC 544

28. It has been repeatedly held that while considering an application for custody of the children the Court must *primarily* look into the welfare and interest of the child, which is of paramount importance. But it is also well settled that while passing an order, the Court must also give due consideration to the wishes of the child if the child is mature enough to make an intelligent preference though the final decision is of the court to see what is conducive to the welfare of the child. In *Thriety Hoshie Dolikuka v. Hoshian Shavaksha Dolikuka* reported in (1982)2 SCC 544, the Apex Court has observed as under:

“25. We may, however, point out that there cannot be any manner of doubt as to the court’s power of interviewing any minor for ascertaining the wishes of the minor, if the court considers it so necessary for its own satisfaction in dealing with the question relating to the custody of the minor.”

29. A similar view has been expressed in *Nil Ratan Kundu v. Abhijit Kundu (supra)* which reads as under:

“Apart from the statutory provision in the form of sub-section (3) of Section 17 of the 1890 Act, such examination also helps the court in performing onerous duty, in exercising discretionary jurisdiction and in deciding the delicate issue of custody of a tender-aged child. Moreover, the final decision rests with the court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. *Normally*, therefore, in custody cases, wishes of the minor should be ascertained by the court before deciding as to whom the custody should be given.”

It was further observed that

“If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision

should rest with the court as to what is conducive to the welfare of the minor.

30. The present petition is to be decided on the touchstone of the law laid down by the Hon'ble Supreme Court.

31. The learned trial court has been totally guided by the fact that both the children have shown a strong desire to stay with the respondent father since despite taking note of the fact that the respondent has tutored the children by taking them to J&K and also that the children were left at the mercy of the servants, the trial court has allowed the applications of the respondent. The trial court has not stated any reason for allowing the two applications. It would be useful to reproduce the observation of the trial court which is as under :

"29. The children Pranshu and Manu appeared before the Court on 08.07.2010 and were heard at length in the chamber it appears that petitioner (respondent herein) has made concerted efforts to mould the thinking of two children after taking them away with him on 05.06.2010 to J&K. From the audience given to the children, it appears that both the children were staying in a Guest House with the petitioner and were told that their friends, children of another officer from J&K cadre who had been transferred back to J&K along with the petitioner, would also be staying at J&K. While the petitioner was away at work, the children stayed at the guest house and were left by themselves to spend their day as per their wishes. The petitioner took them to the school, where he had made arrangements for their provisional admission, and made the children understand that they would be continuing their further studies in the school at J&K. The younger child Manu, however, appeared to be less tutored as he in his innocence said that he had been told that they, i.e. he and Pranshu, would then return back to Delhi. He also said that he would miss his friends at Delhi but since he would be returning back, he was not feeling much bad about it and that during vacations, his other friends had also gone away for holidays. On the other hand, Pranshu appeared to be taken into the thought of independence; he would have while staying in J&K, especially in the absence of the petitioner. The period which Pranshu and Manu had spent at J&K appeared to have given them a feeling of immense

independence without any check on their wishes and desires as to time schedule they would be required to follow, food they were to take etc. The children also mentioned that both their grandparents, i.e., parents of the petitioner were not staying with them at that time and had gone to stay at Jaipur. Thus, it is obvious that children were without supervision of any family member, while petitioner was away for work and children were left with servants."

32. The respondent has made serious allegations against the petitioner that the petitioner is in an adulterous relationship with the said servant and has placed on record certain audio-video tapes and call records in support of the contention. The petitioner has refuted the aforementioned allegation and submitted that the said allegation have been made only with a view to prejudice the court and to deprive the petitioner of the custody of her children. The counsel for the petitioner further contends that the respondent is himself in an extra marital relationship with a lady journalist (name withheld). During the course of proceedings on being asked about the whereabouts of the servant (name withheld), it was revealed by counsel for the respondent that from the past 3 years, the whereabouts of the said servant are not known. Various material discrepancies have also been pointed out in the call records relied upon by the counsel for the respondent. Though a faint impression has been created to show that a large number of phone calls were made from a cell number which was being used by the petitioner to a cell number being used by the said servant but since this issue is not to be decided by this court and any impression or opinion in this regard shall cause serious prejudice to the rights of the parties, it would not be appropriate to give any opinion except

that in the absence of concrete evidence, this court shall refrain itself from making any observation on the aforementioned contention of the counsel for the respondent since the issue has a material bearing on the final outcome of the cases pending between the parties. I also find force in the submission of the counsel for the petitioner that some of the call records show phone calls being made at odd hours which would be impossible while staying in a small flat. Even otherwise, the whereabouts of the servant (name withheld) are unknown who was stated to be only 17 years of age at the relevant time.

33. It has also been contended by the counsel for the respondent that the respondent being an IAS officer and with a meritorious educational background, is more competent to look after the modern educational needs of the children whereas the petitioner, being only a B.A. (Pass), is totally incompetent to cater to the educational needs of the children. As far the present contention is concerned, it did not find favour with the trial court and I concur with the view of the learned trial court since educational qualification of the parents alone cannot have any material bearing on the issue of custody of the children. Although in today's day and age what is really required is proper guidance which can be provided by mother or the father. It has been rightly observed by the learned trial court:

“the repeated assertions of petitioner that he is more qualified than the respondent to teach children does not inspire much confidence as children of less educated or uneducated parents also do exceptionally well in present times. Even otherwise, both the parties ought to have made joint efforts to make necessary arrangements for

education and extra coaching of the children in coordination. “

34. I do not find force in the submission that simply because the father is very well qualified and only he can cater to the educational need of the children and thus he must be given custody of the children.
35. To show the indifference of the petitioner towards the children and her careless and negligent attitude qua them, counsel for the respondent has highlighted various instances like a note from the class teacher wherein the class teacher has remarked that the child is not being sent with the food prescribed in the class menu nor any seasonal fruits are being sent; another note from the class teacher wherein the class teacher remarked that the child is being sent to school in unclean uniform due to his habit of bedwetting; failure to attend the parent teacher meetings of the children; sending the younger child to school in unclean school uniform; neglecting the medical needs of the children by not paying heed to the complaints of the younger child of pain in his ear for two days who was later taken to AIIMS by the respondent when the child started bleeding from his ear wherein he tested positive for the initial tests for dengue. It is contended by the counsel for respondent that the petitioner further neglected the medical needs of the child by not administering him the right dosage of medicine at the right time. The counsel further drew the attention of this court to the almanac of both the children wherein the petitioner has failed to fill in the details of medical history of the children nor has she

provided details like blood group, family doctor etc which might be required at the time of any medical emergency. It is next submitted that the petitioner used to send the elder child Pranshu to pick the younger child Manu from the bus stop. While some of these instances do appear to be glaring, but I do find some force in the contention of counsel for petitioner that to deal with the child of such tender and impressionable age, she would rather encourage the child to eat rather than to return home on an empty stomach which only a mother's heart can appreciate and one does not need to be an IIT graduate or an IAS Officer to appreciate this.

36. The counsel for the petitioner contends that the trial court was itself uncertain of the welfare of the child in the hands of the respondent father and thus directed to reserve seats of both the children in the school in Delhi. I find no merit in this contention of the counsel for the petitioner as it is settled law that an order of custody is never final but an interlocutory order capable of being modified keeping in mind the needs of the child. In my view what must have prevailed upon the trial court in reserving the seats of the children is the ultimate welfare of the child and that their academic year is not be wasted.
37. Both the parties have drawn the attention of the court to the progress report of the children and the remarks given by the class teacher. While, counsel for the petitioner has relied upon the progress report of the younger child to show that petitioner is fully competent and capable to teach him and the good report cards are on proof of the same; counsel for respondent, on the

other hand, has placed reliance on the report cards of the elder son to show that at the time when he was with the mother the elder son's progress has declined and as and when the father has been teaching both the child, his grades have improved. The elder son has accorded the views of his father in the Chamber meeting. The elder son has also repeated the incidents of negligence of the mother, or her manhandling the children, or sending the elder son to the bus stop to pick up the younger son, all of which may not strike a 13 year old child, which would show the extent of influence of the father on the elder son. While during the course of hearing, learned counsel for the respondent had admitted that whereabouts of the servant (name withheld) are not known for the past three years and the alleged incident would be minimum years old, the elder son did not hesitate in referring to the incident in the Chamber meeting.

38. I have met both the children separately in the chamber. I have also met the parties in chamber. The elder child Pranshu is 13 years of age and appeared to be tutored by the respondent father and also swayed by the luxuries and independence he would have in his stay with the father. He has stated in clear terms that he does not want to stay with his mother. He further said that the respondent father helps him in his studies and there has been improvement in his performance only because of the respondent. During the meeting in the chamber with the elder son, Pranshu categorically stated that he wants to stay with his father in Jammu and showed extreme hostility towards his mother. The mother, in a separate chamber hearing, has also

reconciled with the fact that she is not able to handle the elder child and his educational needs and thus, will only rely on tuitions to cater to his academic needs.

39. The welfare of the child cannot be measured merely on the basis of the position of the father, his social status, or the academic degrees, or the fact that the physical comfort, which he may be able to provide to his children. It is the duty of the Court while considering, what is the welfare of the child, to consider the same in the widest sense. The younger son is barely eight years of age and is at the most impressionable age of his life and definitely the mother would have the interest of the minor most at heart. His tendered years would need the care, protection and guidance of a person, who has most interest in his welfare and who has the time to lend her years to her younger son and allow him to rest his head on her shoulders when he needs at the most. He would need his mother and it is the heart of the mother, which can read the mind of the child at that age.
40. It has strongly been argued before this Court that the younger child despite being eight years of age is in the habit of bedwetting and the mother has not been able to consider his bedwetting. Such psychological disorders are only a small example of the price paid by children for the fighting of their parents. To pull the child out from the lap of the mother, which is known as a natural cradle, to a distant place from Delhi to Jammu in the supervision of old grand-parents and a busy father, would certainly not be in the welfare of the younger son. The younger son is to be brought up in the ordinary comfort, in

an atmosphere of contentment and favourable surroundings and only a mother at that age can put moral and ethical values in the mind of the younger child. Hence, in the interest of the elder son, Pranshu, he shall remain in the custody of the respondent father.

41. The younger son Manu is just 8 years old. During the chamber meeting, he appeared to be less tutored and has shown a keen desire to stay with his elder brother. He also showed some inclination to stay with his father as he gets to eat non-vegetarian food during his stay with the father and never gets any scolding from his father. The child showed no animosity towards his mother and seemed open to stay either with the father or the mother. He appeared to be very tender and incapable of forming an intelligent preference as to whom he wants to stay with. In any case, he is too young to take care of his own needs. At such an impressionable age, the child does not require only food and shelter but also motherly love and affection to meet his emotional needs since his psychological and emotional approach to life is still to be nurtured. Further, there is no clinching material on record to show that the welfare of the younger son Manu would be at peril in case the custody is granted to the petitioner. Hence, in the interest of the younger son, I deem it appropriate that his custody be granted to the petitioner mother.

42. During the course of hearing, various permutations and combinations were proposed, but were accepted by neither of the parties. While, both the parties had agreed that more than

anything else, the children are happy to be in each others company, generally for the present, it does not seem to be possible for the reasons stated above with regard to younger son. However, as far as the elder son is concerned and the fact that he has shown a clear inclination not to stay with the mother in future, his attitude may be hostile towards her mother and on the other hand a fair admission on the part of the mother that she would be unable to teach her elder son but would be able to provide good tutors, I am of the view that it would be in the best interest of the elder son to stay with the father, who would be able to guide him and teach him as he is in any case more confident of the two children. In the fitness of things, it is directed that the younger son shall remain in the custody of the mother; and the elder son shall remain in the custody of the father.

43. At this stage it is agreed between the parties that both the children will celebrate *HOLI* with the father this year and in the next year the children will celebrate *HOLI* with the mother. For this year the children will celebrate *DIWALI* with the mother and accordingly in the next year *DIWALI* will be celebrated with the father. It is further agreed that the father will meet his younger son once a month with liberty to keep him during the weekend; and the mother will meet the elder son once in a month when both the brothers will stay together with the mother. It is further agreed that in case where the holidays are of 9 days or more than 9 days the same shall be equally shared between the parents, and the father/ mother will ensure that the child

reaches back to the other parent in whose custody the child is well before time that is to say at least one day prior to the reopening of the school after vacations, in order to make the father/ mother to prepare the child for going to school. The child will be handed over by 11:00 a.m. and will be returned before 7:30 p.m.. This arrangement is made for the present, having regard to the fact that father will meet the children in Delhi. But in case the child/ children are to be taken at the place of posting of the father, the father agrees to bear all expenses of travel. Both the parties agree that children will be free to talk to each other on telephone and to the parents for unlimited period and none of the parents will cause any unnecessary hindrance or obstruction. On the occasion of birthday of any child, it will be open for the parent to meet the child at the place of residence of the child. In case either of the parent wants the child/children to accompany them at family functions, weddings, ceremonies, promotions etc., the parties shall mutually decide the modalities from time to time.

44. Accordingly the petition stands disposed of in above terms. Needless to say any observations made in this order are only for the purpose of deciding the present petition.

G.S. SISTANI, J.

February 21, 2011
'msr'

