

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Judgement delivered on :September 04, 2015.**

+ MAT.APP.(F.C.) 41/2014 & CM APPL. Nos. 3241 & 8858/2015, 13424, 19093, 19546-19547/2014 & 8925 - 8926/2015

MR SOUMITRA KUMAR NAHAR ..... Appellant  
Through Ms. Geeta Luthra, Sr. Advocate with Mr.  
Attin Shankar Rastogi, Advocate  
alongwith appellant in person

versus

MS PARUL NAHAR ..... Respondent  
Through Mr. Salman Khurshied, Sr. Advocate  
with Mr. Alok Bhachawat, Ms. Swati Jha  
& Mr. Rajnish Jha, Advocates alongwith  
respondent and children in person

**CORAM:**  
**HON'BLE MR. JUSTICE KAILASH GAMBHIR**  
**HON'BLE MR. JUSTICE P.S TEJI**

**JUDGEMENT**

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**KAILASH GAMBHIR, J**

1. By way of the present appeal, the appellant has questioned the tenability of the order dated 21<sup>st</sup> March, 2013 passed by the learned Family Court, Saket, whereby the learned Family Court has declined his request for grant of visitation rights to meet his children and the appellant prays for the grant of visitation rights in terms of the consent order dated 1<sup>st</sup> March, 2013.

2. The brief facts of the case at hand are as follows, that the appellant and the respondent got married on 10.12.2001 at New Delhi according to Hindu Rites and Ceremonies. That the marriage between the appellant and the respondent was a love marriage. That the minor children Sanjana and Shravan were born out of the wed lock on 24.05.2005 and 10.10.2008 respectively. Due to disharmony between the appellant and the respondent, their marriage culminated in a divorce. That with the ongoing divorce proceedings, the appellant filed an application for visitation rights, which, as per the order dated March 01, 2013 was granted by the Division Bench of this court in FAO (OS) 129/2013 wherein both the parties arrived at certain mutual terms in order to settle the matter. One of the terms of the settlement was with regard to the visitation right of the appellant to meet his children. As per the order dated 1<sup>st</sup> March, 2013, the respondent had agreed to make available the children to the appellant herein on every Saturday at 10:00 a.m. to be brought back at 10:00 a.m. on the following Sunday. As per the appellant, the respondent is in complete breach of the order dated 1<sup>st</sup> March, 2013 as she failed to vacate the house of the father of the appellant which led to filing of an application for clarification by the appellant's father and, thereafter, the consent terms were reiterated on 2<sup>nd</sup> April, 2013. It is also the case of the appellant that vide order dated 5<sup>th</sup> April, 2013, a Division Bench of this Court directed the parties to approach the Mediation Centre to facilitate the implementation of the directions

only qua visitation rights and while directing so , the Mediation Centre was given the liberty to take assistance of a Child Psychologist. As per the appellant, he had fully complied with all the directions given by the Division Bench as well as the terms of the consent order. The respondent, on the contrary, deliberately violated the consent terms, one of them being to facilitate the meeting of the children with the appellant in terms of the consent order. Due to non-compliance of the terms of the consent order, the appellant had filed an application dated 16<sup>th</sup> November, 2013 seeking direction to expedite the main proceedings and also to facilitate the visitation rights in terms of the order dated 1<sup>st</sup> March, 2013 read with order dated 2<sup>nd</sup> April, 2013.

3. This application moved by the appellant has been dismissed by the learned Family Court and to challenge the legality and correctness of the said order, the appellant has preferred the present appeal.

4. Ms.Geeta Luthra, learned Senior Advocate appearing for the appellant stoutly contended that the impugned order passed by the learned Family Court is in complete disregard of the aforesaid orders passed by the Division Bench of this Court and as per the counsel, the Family Court in fact has exceeded its jurisdiction by rejecting the application of the appellant. Counsel further argued that the impugned order in fact has rendered the appellant completely remediless as the same totally deprives the appellant to meet his children and shower his love and affection on them, in the absence of which the welfare and

interest of the minor children shall be adversely affected . Counsel further argues that the learned Family Court has not appreciated the well settled principles of law as enumerated by the Hon'ble Supreme Court time and again that father cannot be deprived of the visitation rights to meet his children. Counsel also argued that the learned Family Court failed to appreciate that it is in the interest and welfare of the minor children and pivotal for their growth as the children at such tender age should get the love and affection of both the parents. Counsel also argued that the Family Court also failed to appreciate the fact that a party cannot be allowed to enjoy the benefits of consent order yet wriggle out of its obligation which were part of the same consent order.

5. Counsel also argued that the Family Court failed to appreciate that the respondent has deliberately and contumaciously violated the orders passed by the Division Bench and it is sheer vindictiveness of the respondent who has brainwashed, tutored and poisoned the minor children against the appellant. Counsel also contended that the respondent, in fact, has been using the minor children as a pawn to settle her course in the litigation. Counsel also argued that the Family Court failed to appreciate the fact that the appellant has taken the minor daughter alone for a trip to London and, thus, he had been travelling with the minor children without there being any sort of grievance or complaint against him.

6. Counsel also argued that the observations made by the learned Trial Court in the impugned order dated 21<sup>st</sup> December, 2013 are based on the brief interaction with the children without appreciating the fact that the children were completely coerced and brainwashed by the respondent for over a period of two years.

7. Based on the above submissions, counsel for the appellant strongly urged for setting aside the impugned order passed by the Family Court and to permit the appellant the visitation rights to meet the children in terms of the consent order dated 1<sup>st</sup> March, 2013.

8. In support of her arguments, counsel for the appellant placed reliance on the following judgments:-

*(a) Gaurav Nagpal v. Sumedha Nagpal, AIR 2009 SC 557*

*(b) Suryavardhan v. State of Tamil Nadu & Ors., 2015 (5) SCC 450*

*(c) Dr.V. Ravi Chandran Vs. Union of India, (2010) 1 SCC 174*

*(d) Aviral Mittal v. State, 163 (2009) DLT 627*

*(e) Aman Oberoi v. Tina Oberoi, (2008) 153 DLT 358*

9. The present appeal is strongly opposed by the counsel for the respondent who submitted that the order passed by the learned Family Court is well reasoned and detailed order and the same has been passed after the Court had examined the children for nearly thirty minutes. Counsel further argued that the

appellant is a person who has thrown the children out of the house and has left them to live on the help and mercy of the relatives and friends of the respondent. He further argued that the appellant has not even bothered to wish the children on their birthdays or on any festival days. Counsel also argued that in the proceedings related to custody and visitation rights of the minor children, the interest and welfare as well as the desire and decision of the minor children is of paramount concern and should not be based on the ego satisfaction of the warring parents.

10. Counsel also argued that in the order dated 5<sup>th</sup> April, 2013 passed by the Division Bench, it was clearly observed that there was some problem in implementing the clause pertaining to the visitation rights due to the negative approach of the children and in this background, the direction was given to the Delhi High Court Mediation & Conciliation Centre to facilitate implementation of the earlier directions given by this Court for visiting rights. The Mediation Centre was also directed to take the assistance of a Child Psychologist in this regard. Counsel further argued that in compliance with the said directions, the proceedings took place before the Mediation Centre where the children were analysed by the Child Psychologist and during all the hearings, the children had shown their displeasure in meeting the appellant and the grandmother.

11. Counsel also argued that the Division Bench in their order dated 29<sup>th</sup> October, 2013 after having made observations with regard to the problem being

faced to implement the said clause, gave a direction to the Family Court to take a decision on the aspect of facilitating the visiting rights as indicated in the earlier orders. Counsel further submitted that in compliance of the said direction given by the Division Bench, the Family Court had examined the children and thereafter, formed an opinion that the minor daughter is an intelligent girl, capable of taking a decision and she had shown her complete discomfiture in meeting the appellant because of the cruelty and atrocities committed by him when they were living together.

12. Counsel, thus, submitted that the wishes of the children cannot be ignored as their wishes are supreme at least in those cases where the children are intelligent enough to form their own opinion in view of the various judgments passed by the Apex Court. Counsel also emphatically denied that the respondent had brainwashed, tutored or poisoned the mind of the children, rather the children themselves have shown their reluctance to meet the appellant after having themselves seen his conduct in the past. Counsel also argued that the respondent, in fact, made her best efforts to convince the children to visit the appellant but since the children have seen themselves, the behavioural pattern of the appellant qua them; therefore, they are not inclined to meet their father.

13. Counsel also argued that the children had refused to meet the appellant in the proceedings taken place before the Mediation Centre of this Court. Counsel also argued that the appellant was approached by his daughter on 3<sup>rd</sup>

April, 2013 at the time of vacating the house No.B-197, Greater Kailash-I, New Delhi to allow her to take her toys and Barbie pillow but the appellant in a most blatant manner, refused to hand over the same by saying that “you cannot take anything from the house”. Counsel further submits that the children are quite scared from the behaviour and attitude of the father as he is in the habit of adopting harrying methods and is aggressive by nature. Based on the above argument, counsel for the respondent strongly pray for dismissal of the present appeal.

14. In support of his arguments, counsel for the respondent placed reliance on the following judgments:-

- (a) ***Gaytri Bajaj v. Jiten Bhalla, AIR 2013 SC 102***
- (b) ***Mausami Moitra Ganguli v. Jayant Ganguli, AIR 2008 SC 2262***
- (c) ***Vikram Vir Vohra v. Shalini Bhalla, AIR 2010 SC 1675***
- (d) ***Rosy Jacob v. Jacob. A Chakramakkal, AIR 1973 SC 2090***
- (e) ***Gaurav Nagpal v. Sumedha Nagpal, AIR 2009 SC 557***

15. We have heard the learned counsel for the parties and have also perused the order under challenge.

16. The only aspect which is of a major concern in the present appeal is the grant of visitation rights to the appellant and the binding effect of the consent order dated 01.03.2013. Undoubtedly due to the matrimonial discord between

the parties, multiple litigations have been faced by the parties. In one of the petitions filed before this court being FAO (OS) 129/2013 by the respondent herein against an ad interim mandatory injunction granted to the father in law, as per which the respondent herein was directed to vacate the property of appellants father. In the said order, the division bench of this court succeeded in bringing about the parties to settle their issues therein. One of the terms wilfully settled between the parties was that, *“the appellant therein and respondent no.2 have settled the issue of visitation rights and it was agreed that the appellant therein will make available the children to respondent no. 2 on every Saturday at 10. a.m. to be brought back at 10. a.m. on the following Sunday.”* The respondent herein filed a clarification application , which was taken into consideration and the division bench of this court clarified that *“...the object of the consent order is quite clear i.e. it brings to rest all other issues other than the divorce proceedings which the parties want to litigate as there are extreme postures on both the sides on that issue, each side having its own story....All the other issues of maintenance , domestic violence etc. as also matters of custody and visiting rights stands resolved by the consent order dated 01.03.2013”*. But there was some problem in working out the visiting rights in view of the stated approach of the children and due to this very reason, the matter was referred to the Delhi high Court Mediation and Conciliation centre and the court further directed that the assistance of a child psychologist may

also be taken. The order dated 05.04.2013 passed by the division bench of this court is reproduced as under:

*"...Both the parties and the counsels agree that this aspect can be facilitated by reference to the Delhi High Court Mediation & Conciliation Centre (for short 'the centre'), which may take the assistance of a child psychologist to facilitate the implementation of the directions of this Court qua visiting rights.  
.."*

17. Mediation with regard to visitation rights of the appellant herein in so far as the two children are concerned also failed. Thus the division bench of this court held that the family court shall take a decision on the aspect of facilitating the visitation rights.

18. The Id. Judge, family Courts after looking at the various aspects and having an interaction with the children especially the girl child arrived to a conclusion that it is a well settled law that while deciding the issue of visitation rights of the children the court will take into consideration the welfare and interest of the children involved and that no order of visitation can be passed against the wishes of the children. The relevant extract of the same is herein below:

*"The perusal of the file indicates that vide order dated 01.03.2013, both the parties agreed on the issue of visitation rights and the respondent agreed to make available the children to the petitioner on every Saturday at 10 AM to be brought back at 10 am on the following Sunday. The order dated 05.04.2013 of Hon'ble High Court further indicates that there was some problem in working of the visitation rights in view of the stated approach of the children. To*

*facilitation visitation, the matter was referred to Delhi High Court Conciliation Centre with permission to have assistance of child Psychologist to implement the directions of Hon'ble High Court in respect of visitation rights. However, no settlement was arrived at on this aspect and the Hon'ble High Court was informed that mediation with regard to visitation has failed. The Hon'ble High Court vide order dated 29.10.2013 directed this court to take a decision on the aspect of facilitating of visitation rights as indicated in the orders of Hon'ble High Court.*

*During the course of disposal of the present application, the court directed the respondent to produce both the children for interaction in the chamber and to know the wishes of the children.*

*The court had the opportunity to meet both the children on 18.12.2013. The girl Sanjana during interaction appeared to be quite intelligent and capable of making her own decisions. She categorically stated that she did not want to meet the petitioner at all and rather she hated the petitioner who had already committed cruelties and atrocities on them when they were living together. Master Shravan aged 5 years, was so attached to the mother that he kept on visiting his mother after short intervals during interaction in the chamber.*

*It is now well settled law that while deciding the issue of visitation of the children, the court will take into consideration the welfare and interest of children because it is not the rights of the parties to meet the children but the interest and welfare of the minor children. Though, it is desirable that for proper development of personality of the children of warring parents, both parents should have equal access to the children, however, in the instant case, it has not been possible for this court to facilitate visitation rights because of the reasons stated above.”*

19. Aggrieved by the said order, the appellant herein filed the present appeal.

This appeal was taken up by this court for consideration and vide order dated 26.08.2015, we requested the Medical Superintendent AIIMS to depute a child psychologist to have an interaction with the children on 28.8.2015. On

28.08.2015 the matter was renotified for 31.08.2015. On the said date, the child psychologist Dr. Renu Sharma had a detailed interaction with the children. It was informed to the court by Dr. Renu Sharma that during the course of their interaction which went along for about fourteen minutes, the female child aged about 10 years blatantly refused to meet his father and expressed her hatred for him and the male child Shravan being a small boy of 5 years of age was busy in his own and was negligent towards the discussion, he only nodded to what his sister was submitting. In furtherance to their interaction, we also personally interacted with the children and the girl Sanjana clearly stated that I hate three things which are, *“1. drinking milk, 2. If anyone does not let me watch t.v and 3. I hate my father, the appellant herein and that she does not want to meet her father.”*

20. It has come on record that Sanjana aged 10 years, a student of Modern School, a sprightly young girl who is well aware and smart. Even the Court below has noticed that the girl is intelligent and capable of making her own decisions. Indisputably, the respondent herein has shown her willingness to make the children meet their father, but it is the children who are adamant, especially the girl Sanjana to not to meet her father in any case. The girl simply states that she does not intend to meet her father due to his conduct in the past and the atrocities that he has committed on them. On several occasions in the past, the court has given directions in this regard but to no avail. The settlement

agreement is binding upon the parties and it is for the parties involved to make all possible efforts and restrict themselves to the binding terms. But despite arduous efforts of the court, the mediation centre, the psychologist, the children especially the girl Sanjana is not willing to meet the father and she can't be compelled under the vice of any law to go against her resolve. Children are not any kind of objects in the hands of their parents and it is well known that it is their well being that is the prime concern of the court.

21. It is trite that when the court is confronted with conflicting demands, it has to look out for ways to justify the demands. The Court does not only have to look at the issue on legalistic basis as in custody matters or issues covering visiting rights, the human angles are more relevant for deciding such issues. The court then does not lay emphasis on what the parties say, rather the paramount consideration is the welfare of the minor. Indubitably both father and mother have a crucial role to play in a child's life but the court cannot overlook the wishes of a child especially when the child is not gullible and does not get influenced by others and has her own decision making abilities. The child's wishes are thus of key concern and the court always gives primacy to the child. The question of welfare of the minor child is to be considered in the background of relevant facts and circumstances. Each case has to be decided on its own merits.

22. The Hon'ble Supreme Court time & again has held that welfare of the child is of paramount importance in order to determine that who between the two parents would take better care of the children. Welfare of a child has a primacy even over statutory provisions. In the latest judgement of the Hon'ble Apex Court in the case of **Roxann Sharma V. Arun Sharma AIR 2015 SC 2232**, the Hon'ble Supreme Court poignantly held as under:

*".....It is only the child's welfare which is the focal point for consideration. Parliament rightly thinks that the custody of a child less than five years of age should ordinarily be with the Mother and this expectation can be deviated from only for strong reasons. The need to have a continuity in adjudication ought to have persuaded the second learned Single Judge to have recused himself in preference to his learned Brother who decided the previous Writ Petition."*

23. In **Rosy Jacob v. Jacob A.Chakramakkal, (AIR 1973 SC 840)** , a three-Judge bench of this Court in a rather curt language had observed that *"the children are not mere chattels; nor are they mere play-things 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 normal balanced manner to be useful members of the society and the guardian Court in case of a dispute between the mother and the father, is expected to strike a just and proper*

*balance between the requirements of welfare of the minor children and the rights of their respective parents over them.”*

24. In Halsbury’s Laws of England (Fourth Edition, Vol.13), the law pertaining to the custody and maintenance of children has been succinctly stated in the following terms:

*“809. Principles as to custody and upbringing of minors. Where in any proceedings before any Court, the custody or upbringing of minor is in question, the Court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same right and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other.”*

25. With the aforesaid dicta it is quite clear that the word ‘welfare’ must be understood in a wider sense. It casts an arduous duty on the court to decide the best that fits the child. A judge in chamber performs by far the most onerous task when deciding such issues where a guardian, a parent seek permission to meet his own children. Therefore, the bonafides can’t be seen from what is said but are to be seen based on the record and personal interaction with the parties. The presumption is that minor’s parents would do their best to promote their children’s welfare if necessary and they would not grudge any sacrifice of their own personal interest and pleasure. This arises out of the natural selfless affection normally expected from the parents of their children.

26. Looking at the current state of affairs we are saddened to say that even after being so well educated and well read, the parents embroil in matrimonial litigations and in their quest to outdo each other, they forget about the plight of the innocent child who is made to suffer for no folly of his. A child is not an article which can be distributed. This sensitive issue involves the care and affection that a child needs in her growing stages of life. From a very young age if the kids grow up watching their parents fight, their innocence somewhere gets lost and they grow up too soon and their outlook towards life become harsh. It is the parents who are duty bound, as they have arrived to a mutual consent between them to counsel their children, to make them understand how important it is to have involvement of both the parents in your life.

27. Adverting to the case at hand, there can arise no doubt that the terms of the mutual settlement arrived at between the parties are of binding effect and it is for both the parties to abide by these terms which they have voluntarily and consciously agreed upon. However, we are confronted with a peculiar situation where it is not the parties but the children who have shown their reluctance to honour the terms of the settlement with regard to visitation rights agreed upon by their mother and the father. In such a situation, the question that triggers our conscious is that can we force the children to meet their father even though they hate their father for various reasons? If we do so, the Court would have a retrograde effect on them and the same would amount to playing with the

emotions and sentiments of the children besides interfering in their freedom of expression and their right to decide with whom they feel more secure and happy in order to stay. As already stated above that the child psychologist Dr. Renu Sharma had a detailed interaction with both the children and thereafter, the Court had also interacted with both the children in the presence of the child psychologist. The girl Sanjana showed her utmost reluctance and under no circumstances she seemed to be interested to have even a glimpse of her father and therefore, we feel that any harsh or coercive direction towards this aspect would cast a negative image in their tender minds. Sanjana who seems to be quite smart and discerning, cannot be forced into meeting her father because of the sad image that has been etched in her mind. However, so far as the boy Sharvan is concerned, he being of a tender age seemed to be toeing the stand of his sister without having any views of his own. The boy is gullible and thus can be easily influenced and tutored by either side. We therefore, cannot attach importance to the discrimination shown by him to meet his father as the same was primarily because of his endorsement to the stand taken by his sister. The boy was also not found much attentive during the course of interaction and was just moving here and there.

28. Thus in view of the aforesaid discussion, the appellant partly succeeds in his appeal. We accordingly direct the respondent to comply with the terms of the mutual settlement in so far as the visitation rights of the father appellant

herein to meet Master Shravan is concerned and in so far as granting visitation rights to meet the daughter Sanjana is concerned, the same cannot be allowed in the light of the aforesaid peculiar circumstances. It is, however, made clear that nothing will come in the way of the daughter, if she wishes to meet her father at any time or even to visit him or stay with him as per her own wish and desire.

29. We are not inclined to delve into the legalities of the case and neither do we feel the need to discuss the judgments relied upon by both the parties as in the facts and circumstances of the present case, a specific issue of visitation rights requires consideration, and thus we are not limiting ourselves to legalistic aspects.

30. Hence the petition stands disposed of. It is ordered accordingly.

**(KAILASH GAMBHIR)**  
**JUDGE**

**(P.S TEJI, J)**  
**JUDGE**

**SEPTEMBER 04,2015**