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

+ MAT.APP.(F.C.) 153/2015

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Judgment dated 6th January, 2016

SANJEEV KUMAR

..... Appellant

Through : Mr.Lokesh Kumar with Mr. Harish
Nigam, Advocates

versus

CHANCHAL

..... Respondent

Through Mr. Vijendra Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

1. Challenge in this appeal is to the order dated 18.12.2015 passed by Family Court on an application filed by the appellant herein seeking interim custody of his two minor children during the winter vacations commencing from 24.12.2015.
2. Notice was issued in the matter. The parties are present along with their counsel.
3. Counsel for the appellant submits that the order passed by the Principal Judge is wholly erroneous and contrary to law and facts and the same has resulted in gross miscarriage of justice. Counsel submits that the Family Court has erroneously relied upon the observations made by its predecessor that the children seem reluctant to meet their father. Counsel submits that the appellant being the father of the children has a right over them and it would be desirable that the children have equal access to both the partents and thus, the Family Court should have focused on the welfare of the children and, therefore, the order of the Family Court cannot be held to be in the best interest of the minor children. Counsel contends that the father is the natural guardian and he has full right to

meet the children and the appellant cannot be deprived of his right to meet the children. It is submitted that the appellant was desirous to spend quality time during the winter vacation with his children, including taking them to some tourist place.

4. Counsel for the respondent submits that he has filed a reply in the Registry on 05.01.2016. The reply has been called to Court. Counsel for the respondent submits that the appellant has never thought of the welfare of the children nor acted in their interest. Moreover, till the time the children are comfortable, the appellant cannot be permitted overnight custody. He further submits that the past conduct of the appellant would show that the appellant had kidnapped/removed the children from the custody of the mother on 29.04.2011 as also on 08.05.2013 and for 20 days did not permit the minor children to meet their mother thereby traumatizing the children aged 06 and 04 years respectively. Counsel for the respondent further submits that the respondent was forced to file a *habeas corpus* petition W.P.(CrI). No.763/2014. Notice was issued and the appellant was directed to produce the minor children on 24.05.2013. Despite the direction, the appellant did not produce the children. The Court again adjourned the matter to 28.05.2013. Children were again deliberately not produced nor the appellant herein appeared in the matter and only after strict directions were issued, the children were produced on 29.05.2013 and the custody of the children was handed over to the mother.
5. Counsel further submits that the conduct of the appellant would further show that he despite an order of maintenance having been passed @ Rs.17,000/- per month, regular maintenance is not paid and has no concern about the wellbeing of his children as even as of today maintenance has not been paid for last four months.

6. Counsel further submits that since the children are not comfortable with their father, the Family Court has rightly rejected the application of the appellant for custody during the holiday including overnight custody. Counsel for the respondent further points out that the Family Court has granted meeting of one hour to the appellant on every 3rd Saturday of the month but the appellant has not been regularly meeting the children as per the order which would show that he is not interested in meeting his children. Counsel further submits that the sole aim and objective of the appellant is to harass the respondent which is evident from the fact that the respondent was residing in Delhi, children were studying in Delhi but the petition under the Guardianship Act was filed in Ghaziabad and when the respondent had approached the Hon'ble Supreme Court of India, the petition was withdrawn and refilled in Delhi.
7. Counsel for the appellant has strongly refuted all the allegations made by the counsel for the respondent. Counsel for the appellant submits that as of today almost Rs.11.0 lakhs have been paid towards maintenance for the respondent and the children. He further submits that the payment of maintenance cannot be linked to the meeting rights of the minor children. Counsel submits that the appellant had not removed the children from the custody of the mother and he further clarifies that he filed a petition in the Ghaziabad court as in the pleadings the respondent had averred that she is residing with her father and as per the information of the appellant, the father was residing at Ghaziabad and accordingly, a petition was filed in Ghaziabad. He further submits that he had approached the Guardianship Court at Ghaziabad and based on the order dated 18.04.2013, he had taken custody of the children. Counsel for the appellant has also canvassed hard before this Court that upto date maintenance has been paid and the statement made by the counsel for the respondent is factually incorrect

that maintenance is due for the past four months.

8. We have heard the parties in the Chamber, heard counsel for the parties in Court and examined the order passed by the Family Court and the pleadings filed.
9. In this case, the marriage between the parties was solemnized on 05.12.2004. Two children were born on 10.09.2005 and 22.06.2007 respectively. Further, as per the petition, the respondent had left her matrimonial home on 29.08.2010. Various *inter se* cases are pending. The petition also reveals the Family Court by an order dated 25.07.2014 allowed an application filed by the appellant for meeting his minor children for one hour on every third Saturday between 2:00 p.m. to 4:00 p.m.
10. We find that in paras 9 to 12, the appellant has made a specific averment that although the appellant has been permitted to meet his children for one hour in a month on every third Saturday, the respondent is not allowing the children to talk to the appellant. The children are pressurized. During the meeting, the respondent constantly stares at the children with anger and the children feel uncomfortable and have an indifferent behaviour towards the appellant. Thus, the meeting is a futile exercise and the object of the meeting is frustrated.
11. By the impugned order dated 18.12.2015, the Family Court has relied upon the observations made by the predecessor of that Court who had observed that though the children had been brought to Court, the petitioner(appellant herein) had tried to interact with them but they seem reluctant. The Family Court had also observed that the children are in the custody of their mother since 2010 and thus, the Family Court was not inclined to grant any interim custody of both the children during the winter vacations.

12. The prayer of the appellant stands declined on the ground that the predecessor of the Family Court had interacted with the children but they seemed to be reluctant to meet their father and by an order dated 25.07.2014, the predecessor the Family Court while disposing of an application under Section 12 of the Guardian and Wards Act, 1890 observed that the children have been in the custody of their mother since 2010.
13. The learned counsel for the appellant had strongly urged before this Court that the Family Court has erroneously relied upon the observations made by the predecessor court in the order of 25.07.2014. We find no force in this submission made by counsel for the appellant for the reason that the appellant himself in the petition has admitted that his meeting with the children is a futile exercise and frustrating and the children feel uncomfortable and have an indifferent behavior towards the appellant on account of the actions of the respondent in not allowing the children to meet the father in a congenial atmosphere. It is not unusual for parties to use the children to settle scores with each other. While deciding any application for custody, interim or otherwise, the paramount interest is that of the children. It is not in dispute that barring 20 days when the children were removed from the custody of the mother, the children have been in the exclusive custody of their mother and it is only on 25.07.2014 that the Family Court has allowed the father to meet the children for one hour in a month which order has attained finality. In our view, the reluctance of the children to meet their father is understandable on account of the time gap between 2010 and July, 2014. The appellant, at the first instance, should himself make every endeavour to meet the children as per the order of the Family Court dated 25.07.2014 and after the children feel comfortable, he can always make a fresh application for

seeking custody during holidays.

14. Although, we find some force in the submission made by the learned counsel for the appellant that the payment of maintenance should not be linked to interim custody, but we cannot close our eyes to the fact that the appellant has not paid maintenance, which although the counsel disputed but when the matter was taken up in the matter, the appellant admitted to the same but explained that he has been issuing cheques in the name of Ms. Chanchal and the bank has not cleared the same as the account is in the name of Smt. Chanchal Sarohi. The respondent had then stated before us that she had provided the first page of the passbook to the appellant to enable him to deposit the cheque in her account and knowing fully well that the account is in the name of “Chanchal Sarohi”, only with a view to harass the respondent he issues the cheque in the name of Ms.Chanchal or there is overwriting, thus the payments are delayed and she has received no payment for the maintenance for the past four months. We had, at that stage, requested the appellant to clear the maintenance in the next few days. The appellant had then stated that he would require time to clear the arrears as he has not been paid salary for two months. We had then asked the appellant that in case he did not have the money in his account, how did he expect the cheque to be encashed, to which he had no answer.
15. Counsel for the appellant had also strongly urged before this Court that the submission of the learned counsel for the respondent regarding his conduct of removal of the children should not be believed by the Court. We find that along with her reply, copies of orders passed in W.P.(Crl).No.763/2013 dated 10.05.2013, 24.05.2013, 28.05.2013 and 29.05.2013 have been placed on record and we have no reason to disbelieve the order sheets of the High Court. Order of 10.05.2013 shows that notice was issued and a direction was issued to the appellant herein to

produce the children in Court on the next date of hearing, *i.e.*, 24.05.2013. On 24.05.2013, the respondent(appellant herein) was represented. He placed reliance of an order dated 18.04.2013 passed by the Guardianship Court, Ghaziabad pursuant to which he had taken custody of the two children. The Court again directed the respondent(appellant herein) to produce the children on the next date, *i.e.*, 28.05.2013. On 28.05.2013, none appeared and the Division Bench of this Court listed the matter on 29.05.2013 and made it clear that in case the respondent no.3(appellant herein) did not appear tomorrow with Master Nakul and Master Piyush, appropriate orders would be passed. The appellant appeared on 29.05.2013 and produced the children. On 29.05.2013, the custody of the children was handed over to the mother. It is in the light of the order sheets that we find the submission made by the learned counsel for the respondent to be *prima facie* correct. Be that as it may, we find no infirmity in the order passed by the Family Court. At the first instance, the appellant would make sincere efforts to build an understanding with his children and after the children are comfortable, he may seek appropriate relief. We also hope that the respondent would allow the children to meet their father as per the directions of the Family Court one hour in a month on every third Saturday and make the meeting meaningful.

16. The petition is accordingly dismissed. No costs.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

JANUARY 06, 2016

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