

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

% *Judgment Reserved On :February 16, 2017*
Judgment Delivered On : February 17, 2017

+ **MAT.APP.(F.C.) 67/2016**

SMRITI MADAN KANSAGRAAppellant
Represented by: Mr.A.S.Chandhiok, Sr.Advocate
instructed by Mr.P.Banerjee,
Ms.Shweta, Ms.Avveena,
Ms.Shreya Singhal and Ms.Mansi
Sharma, Advocates

versus

PERRY KANSAGRARespondent
Represented by: Mr.P.D.Gupta, Sr.Advocate
instructed by Mr.Inderjeet Saroop,
Mr.Raghav Saroop and Mr.Atul
Gupta, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J.

1. The issue of custody, including interim custody and visitation rights of the parents to a child becomes a source of continuous litigation when the litigating couple adopts hard postures. Often the innocent children are used as tools of vengeance by vindictive litigants who inflict severe emotional and psychological abuse on the child thereby seriously affecting the child in his/her later part of life. We have been noticing that in family disputes,

litigants often made false and vindictive allegations against each other, wasting and consuming enormous Court's time.

2. Depriving a child the love and affection of both parents is not in the interest of the child. The custodial parent who tries to alienate the child from the other parent does not realize the serious consequences caused in the later part of the child's life. It is the fundamental right of children to get love and affection from both parents. If efforts made by a Court to make the parties mutually agree upon a visitation schedule and interim custody period fail, the Court has to step in and pass suitable orders in the best interest of the child.

3. Visitation and interim custody is for the primary benefit of the child and cannot be viewed as a privilege to be exercised at the whim of either parent. It is a responsibility that should be fulfilled as a necessary cause. Over night access at home of the non-custodial parent needs to be encouraged at an early stage so that the child has a close and a continuing relationship and gets the love and affection of not only both parents but also the extended family comprising grand-parents, cousins, uncles and aunties. The healthy emotional development of children depends upon there early experience of a continuous, emotionally available care-giving relationship, through which relationship the child forms an organized attachment and develops human capabilities for thought and relationship building. A child has a right to childhood of hopeful existence and free from neglect. A child needs consistent support system as also love, hope and encouragement. A child should be so nurtured that he/she is fully prepared to live life in a society, in the spirit of dignity, tolerance, freedom and solidarity.

4. With the aforesaid preface we proceed to note the relevant facts. The appellant and the respondent have fallen apart. The respondent has filed a guardianship petition praying that he be appointed the guardian of the male child born to the parties on December 02, 2009. The respondent is a Kenyan citizen and holds a Kenyan as well as a British passport. The child had a Kenyan as well as a British passport. It is the case of the appellant that she and the child came to India as per the desire of the respondent who wanted the child to be brought up in an Indian environment with Indian value system imbibed by the child. In the guardianship proceedings and other connected litigation, visitation rights have been granted to the respondent to meet the child at a shopping mall.

5. The respondent desired over night custody of the child so that when in India with his parents, the respondent could ensure that the child spends quality time not only with him but even the grand-parents, and thus when the guardianship petition was listed before the learned Judge Family Court on May 04, 2016, a request was made by counsel for the respondent to the learned Judge that the child be directed to be produced by the appellant in Court so that the Court could interact with the child and ascertain the comfort level of the child. In spite of opposition by the appellant, the Court directed the child to be produced in Court on May 07, 2016. Thereafter, a second order was passed on the same date directing that in the presence of the Principal Counselor attached to the Court the respondent could meet the child for an hour in the evening.

6. Instant appeal was filed challenging the direction in the first order passed on May 04 2016, which directed the child to be produced in Court on May 07, 2016. On May 06, 2016, the Division Bench stayed the

direction issued by the learned Judge Family Court for the child to be produced in the Court. The order passed by the Division Bench evinces that the fear of the appellant was that the respondent may remove the child from India for the fact the Division Bench proceeded to note that as per the appellant the Kenyan passport of the child has been lost by her and that the respondent shall apply for and obtain a fresh Kenyan passport for the child and when the same is issued it shall be handed over to the Guardianship Court. The Division Bench referred the parties to mediation.

7. Technically speaking, the appeal became infructuous for the reason the direction in the impugned order for the child to be produced in the Court on May 07, 2016 effectively got annulled.

8. Order dated May 11, 2016 passed by the Division Bench records that the child had been produced before the Division Bench which had a long conversation with the child. The Division Bench noted that the child was comfortable while interacting with his father and grandparents and expressed happiness at this visitations with his father and grandparents. He remembered his relatives in Kenya and enthusiastically referred to his experiences in that country and unreservedly stated that he was looking forward to visitations by his father and grandparents. The Division Bench noted that the child was at the same time attached with his mother and his maternal grandmother. The Division Bench noted that the child must spend quality time with his father and constant presence of a counselor or an outsider at the meeting would hamper intimacy between the child and his father and grandparents. The Court allayed the fear of the appellant of the child being removed from India by directing that whenever the respondent comes to India to meet the child he would deposit the passport

in the Court before each visitation and would take it back after the visitation was over. The Division Bench also directed that if felt desirable, the Family Court could pass orders to the Border Control Authorities.

9. Nothing remained in the appeal because all directions by way of interim measures were put in place. But since the parties were referred to mediation, the appeal lingered on.

10. The mediation has failed.

11. But we are called upon to decide an important question concerning confidentiality of the mediation process for the reason on October 11, 2016 a report was received from the Mediator which was taken on record and copy given to both parties. The report of the Mediator refers to a child counselor being involved who had also given an independent report which was also taken on record.

12. On August 11, 2006 when this was done, no protest from either side was made to take on record the report of the mediator or the counselor.

13. The report of the child counselor is to the effect that the child was normal and in spite of being happy with his mother he seem to idolize his father and affectionately remembers his house in Kenya; about which house he loved talking with the counselor. The affection and the bond of the child with the father was commended as the positive attitude of the appellant who, obviously was not tutoring the child. The child showed his love, affection and comfort for the appellant, evidenced by he fondly and happily talking about a recent vacation in Kashmir with his mother. The child was not uncomfortable with the idea of making a trip to Kenya.

14. Sh.Amarjeet Singh Chandhiok, learned Senior Counsel for the appellant urged that Section 89 was inserted in the Code of Civil

Procedure, 1908 with a purpose to enable the parties to resolve their disputes through method of Alternative Dispute Resolution. The vires of the Section was upheld by the Supreme Court in the decision reported as 2003 (1) SCC 49 Salem Advocate Bar Association's case. Learned Counsel drew attention of the Court to conciliation (a synonym for mediation) enshrined under the Arbitration and Conciliation Act, 1996. Learned Senior Counsel urged that mediation was a process in which the mediator functions as a neutral person and imposes no decision on the parties. It's a proceedings in which the parties are encouraged to resolve their disputes themselves. Therefore, confidentiality of information during mediation proceedings has to be maintained. Learned Senior Counsel drew attention of the Court to the Delhi High Court Mediation and Conciliation Rules, 2004 which highlight the requirement of maintaining confidentiality. Learned Senior Counsel urged that confidentiality extends to all aspects of mediation, meaning thereby, the mediator cannot submit any report to the Court other than, if the mediation fails, to so report; and if succeeds, to place before the Court the agreement between the parties. Learned Senior Counsel urged that similar was the provision in the UNCITRAL Conciliation Rules. Learned Senior Counsel drew attention of the Court to the decision of the Supreme Court reported as (2011) 1 SCC 466 Moti Ram (Dead) through LR & Anr. vs. Ashok Kumar & Ors. in which decision, in para 2, the Supreme Court observed:-

“In this connection, we would like to state that mediation proceedings are totally confidential proceedings. This is unlike proceedings in Court which are conducted openly in the public gaze. If the mediation succeeds, then the mediator should send the agreement signed by both the parties to the Court without mentioning what transpired

during the mediation proceedings. If the mediation is unsuccessful then the Mediator should only write on sentence in his report and send it to the Court stating that the “mediation has been unsuccessful”. Beyond that, the Mediator should not write anything which was discussed, proposed or done during the mediation proceedings. This is because in mediation, very often, offers, counter offers and proposals are made by the parties but unless and until the parties reach to an agreement signed by them, it will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process.”

15. Learned Senior Counsel refers to judgments of the Courts in America where report of a psychologist concerning information passing between the parties before a marriage was relied upon by the Court of Original Jurisdiction, with the Appellate Court frowning upon the same, on the reasoning that if this was permitted confidentiality which was the essence of mediation would be severely damaged and in future parties would be hesitant to volunteer information.

16. Section 12 of the Family Courts Act, 1984 reads as under:-

“12. Assistance of medical and welfare experts –

In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Court.”

17. There can be no quarrel with the proposition that mediation proceedings are confidential proceedings and anything disclosed, discussed or proposed by the parties before the mediator cannot be recorded, much

less divulged. The reason being that very often during mediations, offers, counter offers and proposals are made. The ethos of mediation would bar disclosure of specified communications and writings associated with mediation. Parties are encouraged during mediation to engage in honest discussions as regards their problems and in matrimonial disputes these honest discussions many a time give rise to a better understanding between the couple. Such an approach encourages a forget and forgive attitude to be formed by the parties. If either spouse is under an apprehension that the well-meant deliberations might subsequently be used against them it would hamper an unreserved consideration of their problems. The atmosphere of mutual trust during mediation warrants complete confidentiality.

18. But where the scope of mediation is the resolution of a child parenting issue, report by a mediator or a child counselor concerning the behaviour and attitude of the child would not fall within the bar of confidentiality for the reason no information shared by the couple is being brought on record. The mandate of Section 12 of the Family Courts Act, 1984 cannot be lost sight of.

19. In the instant case, what has been taken on record during mediation proceedings is the report of the Child Counselor and the mediator, which we find are reports commending the good attitude of both parents who, unlike many other couples, are not using the child as a tool to take revenge against the other. As noted above, the interaction by the previous Division Bench with the child has been recorded in the order dated May 11, 2016 i.e. the child being equally comfortable with both parents and having a desire to spend quality time with not only his mother and relatives from the maternal side but even with the father and relatives from the paternal

side. Such reports are a neutral evaluation of expert opinion to a Court to guide the Court as to what orders need to be passed in the best interest of the child. These reports are not confidential communications of the parties.

20. Having answered the issue which incidentally arose, and noting that otherwise the appeal has been rendered infructuous, we terminate further proceedings in the appeal inasmuch as no orders are now warranted to be passed in the appeal.

21. The learned Judge Family Court would consider granting over night interim custody to the respondent when he is in India by imposing such terms and conditions which would ensure that the child is not removed from the territory of India. The issue concerning the appellant claiming that she has lost the Kenyan passport of the child and a fresh passport being issued in the name of the child would also be looked into by the learned Judge Family Court.

22. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(YOGESH KHANNA)
JUDGE

FEBRUARY 17, 2017

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