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

% *Date of Judgement: 18th February, 2019*

+ **MAT.APP.(F.C.) 298/2018**

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..... Appellant

Through: Mr. Sachin Chopra, Mr. S.S. Bhatia,
Mr. Karan Babuta & Ms. Astha
Gupta, Advocates.

Versus

M K B

..... Respondent

Through: Ms. Vijaya Lakshmi Jain, Advocate.

+ **MAT.APP.(F.C.) 299/2018**

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..... Appellant

Through: Mr. Sachin Chopra, Mr. S.S. Bhatia,
Mr. Karan Babuta & Ms. Astha
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Versus

M K B

..... Respondent

Through: Ms. Vijaya Lakshmi Jain, Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

1. Both the appeals are set down for final hearing and disposal. The aforesaid two appeals filed by the appellant arise out of a common order dated 10.09.2018 passed by the Family Court with respect to two applications filed by the appellant/wife; one under Section 24 of the Hindu Marriage Act (hereinafter referred to as 'HMA') seeking

interim maintenance and the other application was filed under Section 26 of HMA seeking custody/visitation rights for the two children aged about 13 years and 8 years at the time of the passing of the order.

2. Both the appeals have been heard together, as they arise out of a common order and are being disposed of by a common judgment.
3. The prayer made in MAT.APP.(F.C.) 298/2018 reads as under:

“It is therefore prayed that this Hon’ble Court may graciously be pleased to:

a) enhance the maintenance to Rs. 27,500/- per month to the appellant-wife apart from litigation expenses of Rs. 55,000/- as prayed in HMA No. 636/2018;

b) Pass such other order as this Hon’ble Court may deem fit and proper.”

4. The prayer made in MAT.APP.(F.C.) 299/2018 reads as under:

“It is therefore prayed that this Hon’ble Court may graciously be pleased to:

a) set aside the order dated 10.09.2018 passed by Madhu Jain, Judge Family Court (South East) Saket, New Delhi, declining the prayer of the appellant for custody and to meet the minor children in HMA No. 636/2018;

b) the appellant may be granted custody of the minor children so that she is able to meet them being their biological mother;

c) pass such other order as this Hon’ble Court may deem fit and proper.”

5. The necessary facts required to be noticed for the disposal of these appeals are that the marriage between the parties was solemnized on 12.02.2005 as per Hindu rites and ceremonies. One daughter was born in the year 2006 and a son was born in the year 2011 out of the said

wedlock. Both the children are in the care and custody of the husband/respondent. The parties have been residing separately since 12.03.2018. A divorce petition under Section 13 (1)(ia) of HMA was filed by the respondent/husband in the month of March, 2018 which is pending.

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6. Mr. Sachin Chopra, learned counsel appearing for the appellant/wife submits that the Family Court has lost track of the fact that the respondent/husband is a Gazetted Officer with the Government of India and working as a Private Secretary in the Parliament House. The counsel further submits that the Family Court has erred in awarding maintenance of Rs. 6,000/- per month while relying upon highly inflated deductions from his salary. Assuming the deductions to be true, the respondent/husband is left with an amount of Rs. 69,000/- per month which has been duly admitted by the respondent/husband in para 9 of the reply to the application under Section 24 of HMA. It has also been admitted in the reply to the said application that he is earning gross salary of Rs.1,11,793/- per month.
7. The counsel for the appellant/wife contended that the father of the respondent/husband is a retired Government Servant who is getting adequate Family Pension, and thus, his parents are not dependent upon the respondent/husband for their needs.
8. The counsel for the appellant/wife submits that she has no independent source of income and it would be difficult for her to find a job at this juncture, when she has turned 41 years of age. In this backdrop, the

award of maintenance to the tune of Rs. 6,000/- per month is highly dis-proportionate to the earnings of the respondent/husband. Reliance has been placed on the case of **Manish Jain vs. Akansha Jain** reported at **(2017) 15 SCC 801**, more particularly para 16 whereby the Hon'ble Supreme Court held that *'an order for maintenance pendente lite or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is no answer to a claim of maintenance that the wife is educated and could support herself. Likewise, the financial position of wife's parents is also immaterial. The court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual situation; the court should, therefore, mould the claim for maintenance determining the quantum based on various factors brought before the court.'*

9. The appeal is opposed by Ms. Vijaya Lakshmi Jain, counsel for the respondent/husband. She submits that the learned Family Court has rightly considered that both the children are in care and custody of the respondent/husband who is bringing them up single handedly. Both the children are studying in good schools in Delhi and after considering all the factors, the learned Family Court has awarded maintenance of Rs. 6,000/- per month alongwith the litigation expenses of Rs. 11,000/- to the wife.

10. We may note that the current pay slip of the respondent/husband for the month of January, 2019 has been placed on record. Reading of the same would show that the respondent/husband is earning monthly gross pay of Rs.1,22,637/-.The net salary after deductions comes out to be Rs. 71,461/- per month.
11. Applying the law laid down in the case of *Manish Jain (supra)*, to the facts and circumstances of the present case, we are of the view that the Family Court has taken into account all the factors, but has failed to consider that the maintenance so awarded should not be so low as to make the order meaningless. Taking into consideration the settled position of law and having regard to the fact that it is not disputed that the respondent/husband is getting salary of Rs. 71,461/- per month, the impugned order dated 10.09.2018 is modified to the extent that the respondent/husband will pay maintenance to the appellant/wife @ 10,000/- per month. All arrears will be cleared by the respondent/husband within three months from today.

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12. Mr. Sachin Chopra, counsel for the appellant/wife submits that since the respondent/husband is taking care of all the needs of the children who are economically dependent upon him and thus, more beholden towards their father. The counsel further submits that custody or visitation of the children is necessary for the proper growth of the children including physical as well as mental development, and thus, the counsel prays for the custody or visitation rights of the minor children. It is also submitted by the counsel that the children should

not be deprived of the love and affection of their mother-appellant herein. Mr. Chopra submits that the mother/appellant is willing to undertake to the Court that she will not talk ill before the children during the visitation, if granted to her.

13. Ms. Vijaya Lakshmi Jain, counsel for the respondent/husband has strongly opposed the prayer made in the appeal seeking custody/visitation rights of the children aged 12 years and 07 years and has taken us through the impugned judgment dated 10.09.2018 passed by the learned Family Court to show that there is no infirmity in the same and the appeal is without any merit.
14. We have heard the learned counsels for the parties and carefully examined the order of the Family Court. The relevant portion of para 10 of the impugned order dated 10.09.2018 reads as under:

“10.....There are two children born from this wedlock, namely the daughter Ujjaini aged about 12 years studying in class 8th in Carmel Convent School Chanakyapuri and son Master Mehul studying in Air Force Bal Bharti School Lodhi Colony. Both the children were called by the court and I talked to both of them in the chamber. During interaction with the children, both the children had many complaints against the applicant/mother and they stated that she is very abusive and quarrelsome in nature and even during their examinations she disturbs them and does not let them sleep and she picks up quarrels on petty issues. They both stated that they do not want to meet their mother. Daughter Ujjaini stated that after her mother has left the house, her performance in the school and marks in the examinations have improved. Both the children showed their immense reluctance to meet with the respondent/mother and when the respondent was called in the chamber to talk with the children, it may be mentioned that this case was fixed on 04.08.2018 and on that date, initially the

respondent came late after lunch to meet with the children despite the fact that she herself has moved the application for custody and visitation of the children. Thereafter in the chamber also, the respondent did not show any inclination to talk with her children and rather it was the undersigned who persuaded her to talk with the children and thereafter also she did not inquire from them about their well being and rather was complaining against the petitioner to the children like 'papa aise hein, papa waise hei' Though at this stage, the court is not required to go into the merits of the case and without going into the merits of the case, it would be suffice to say that at present it will not be in the interest and welfare of the children that the respondent be given visitation right of the children, as after talking with the children as well as with the respondent, it does not seem that at present it will be in the interest and welfare of the children that they are made to meet the respondent. It is said that a daughter is the best friend of the mother, but in this case it was complete opposite. Both the children were so enthusiastic and were telling the school instances when the respondent was not present in the chamber and after lunch when the respondent came and the children met her, then they did not show any inclination even to talk to the applicant/mother, what to talk about telling their school instances to her. In these circumstances, at this stage, it will not be in the interest and welfare of the minor children, rather it will be exercising force upon them if they are told to meet their mother regularly in the Children Room Family Courts, Saket, New Delhi."

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(Emphasis Supplied)

15. In the case of ***Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*** reported at (1982) 2 SCC 544, the Hon'ble Supreme Court held that while dealing with the custody of the minor, the only consideration of the Court should be the welfare of the child. The relevant para 17 reads as under:

"17. The principles of law in relation to the custody of a minor appear to be well-established. It is well-settled that any matter

concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

(Emphasis Supplied)

16. Having regard to the observations made by the Family Court in para 10 of the impugned order, which we have extracted in para 14 aforegoing, we are of the view that it may not be possible to allow the mother/appellant herein to meet the children outside the Court premises or unsupervised till the children accept their mother and agree to meet her without convincing them.
17. We have been, in our orders, discouraging the visitation in the Court premises as we are of the considered view that while fixing the venue with regard to visitation, the Court must take into account the comfort level of child/children. The Court must also carefully examine as to whether the child/children in fact are not comfortable meeting the mother/father or whether the child/children have been brainwashed by the mother/father. Wherever there is resistance, it may be advisable to fix the meeting in the Court premises and supervised. In case the Court is satisfied that the children are comfortable/happy to be with the mother/father, in our view, visitation in Court premises is not desirable. The meeting as far as possible and with the consent of the parties should be fixed at a place of interest of the child/children as it would serve a dual purpose. *Firstly*; the child/children would be happy

as it would be a place of his/her interest and liking which would automatically make the child/children look forward to the meeting and *secondly*; the meeting would be fruitful. Care should be taken that the meeting is not at a time when the child/children spend (s) time with his/her friends or is forced to miss a birthday party or some school function or outing. However, there are some cases where supervised visitation is necessary. There are also cases where the parties may not have sufficient means to meet the child/children outside the Court premises. In order to make the visitation meaningful, of course, depending on the age of the child/children, an important factor is the comfort level of the child/children. Children are more comfortable in play areas, be it public parks or designated play areas in malls etc. We have seen that in one of the matters, where a child resisted meeting his father and on learning that he enjoys reading books, when we offered the venue of the meeting to be a book store, he readily agreed. Court must not lose track of the fact that the interest of the child is often lost among the warring parents. The aim and objective of the Family Court should be to balance the meeting rights keeping the interest of the child/children at the highest. In the present case, since the children are showing resistance in meeting the mother for whatever reason, to make a beginning, we direct that the children would meet the mother for two hours in the Children Room, Family Court, Saket Courts, New Delhi at the first instance. Thereafter, the Family Court, depending on the comfort of the children, may consider variation of the order and enlarge the period of visitation and vary the place of meeting, which would best suit the interest of the children.

18. Taking into consideration the aforementioned judgment and the observations made by the Family Court, we are of the view that during infancy, the children are of impressionable age and the care and warmth of both the parents is required for the welfare of the children. We do not want the children to grow up being deprived of the love and affection of their natural mother who too has a role in the children's upbringing. We are of the view that although the custody of the minor children is with the respondent/husband, both the children should also get sufficient exposure to their natural mother and accordingly, we direct that at the first instance, the appellant/mother shall meet the children twice a month in the Children Room, Family Court, Saket Courts, New Delhi.
19. We may note that we have been discouraging Family Courts from passing orders regarding parents meeting the children in the Court as realistically it does not serve any purpose and remains only a paper order. Neither the parents nor the children would ordinarily gain from such meeting. Courts should allow and encourage parents meeting the children at venues as far as possible at place (s) of their liking and instead of Children Room.
20. This arrangement would be effective after 09.03.2019, keeping in view the exams of the children. We also direct that the visitation shall be for one hour for two months in the beginning. The appellant/wife is also directed not to talk ill against the respondent/husband or his family members before the children.

21. For the above reasons, we modify the impugned order passed by the Family Court in the aforestated terms. Resultantly, both the appeals are disposed of.

G.S.SISTANI, J.

JYOTI SINGH, J.

FEBRUARY 18, 2019
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