

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

Reserved on: 27.02.2020

Date of decision: 29-04-2020

+ **CM(M) 1606/2019 & CM Nos.48550/2019, 50153/2019,
2281/2020, 6227/2020**

COL RAMNEESH PAL SINGH

..... Petitioner

Through:

Mr.Kirtiman Singh, Adv.
Alongwith Mr. Saurabh D.
Karan Singh, Adv. and the
petitioner in person (Mob.
No. petitioner- 9815114411)

versus

SUGANDHI AGGARWAL

..... Respondent

Through:

Respondent in person
(Mob.No.9891445445)

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. It is stated that parental love is the only love that is truly selfless, unconditional and forgiving, however, when the parents fight, they not only fight amongst themselves but create cracks in their children's psychological well being. This can be totally unintended, but is a harsh reality of life. The present case represents a similar circumstance.

2. The parties herein got married on 22.12.2002 and have been blessed with two children; a daughter born on 23.09.2008 and a son born on 01.12.2011. I have interacted with the parties and the children.

3. The disputes between the parties escalated in August 2015 with the petitioner accusing the respondent of having an affair with his fellow officer. The petitioner at that time, being an Army Man, was posted at Gulmarg. He took the children with him to Gulmarg, forcing the respondent to file a petition, being GP No. 75/2015, under Section 25 of the Guardians and Wards Act, 1890.

4. The present petition challenges the order dated 16.10.2017 passed by the learned Additional Principal Judge, Family Court, Tis Hazari Courts, Delhi in GP No. 75/2015, *inter alia* directing the petitioner herein to hand over the custody of the children to the respondent after the final examination of the children of the session 2017-18 is over.

5. Before filing the present petition, the petitioner had challenged the Impugned Order dated 16.10.2017 by way of an appeal under Section 19 of the Family Courts Act, 1984, being MAT.APP.(F.C.) 211/2017. Vide the judgment dated 01.10.2019, the said appeal was dismissed as not maintainable. At the same time, the learned Family Court was directed to dispose of the custody petition as expeditiously as possible.

6. Before considering the submission made by the learned Counsel for the petitioner and the respondent, who appears in person, it would be relevant to quote from the Impugned Order, the reasons given by the learned Family Court for granting custody of the children to the respondent:-

“13. Admittedly the respondent is an army officer and has transferable job. Although during the course of arguments it was submitted that he would be because of his family

circumstances always getting the family stations in future but there is no written assurance of the department of the respondent in this regard. The allegations of adulterous relations of the wife with Col Anil Kumar Gupta and other allegations and counter allegations by the parties are questions of facts and matter of enquiry/trial and at this stage is not relevant for the decision of the interim custody application under disposal. It is submitted by the petitioner that the kids were removed to Gulmarg the place of posting of the respondent which is not a family station but was field station and from Gulmarg, Kashmir, children were brought to Bikaner in special army train which took one week. There is no denial of this submission. Now, children are with the respondent at Mohali, Chandigarh, Punjab. It means that they will stay at Mohali so long as the respondent is posted there. The parents of the respondent reside with him who are elderly people. The nature of duties of the respondent is onerous. It is not expected from a highly placed army officer to keep his attention divided between the work front and the home front. Although he claims that his duty at Mohali is adjustable to the schedule of the kids and he is available to them for their care and protection and attend to their other needs but all these assertions are matter of fact and trial. The case is at PE stage. Both the kids are not mentally alienated from the petitioner and have been residing with her since their birth till 09-08-2015 when they came in the custody of the respondent. They are aligned to both the parents equally. The respondent has alleged that to extract money, the petitioner has filed this case. However, this is not the case of maintenance of the petitioner but is a guardianship petition. The respondent is apparently not allowing fruitful telephonic conversation of the petitioner with the kids and it can very well be noted that the programming of both the kids is being done as per the wishes of the respondent which is not good for healthy growth of both the kids who need the parental attention, love, care and warmth, physical presences in sufficient amount of both the parents to have actual impact of such attributes in their lives. The kids by the action of the respondent in not allowing access to the petitioner on regular basis on telephone

and by physical meeting will alienate physically and mentally from the petitioner which is not warranted for over all welfare of the kids.

14. The petitioner is Delhi based and kids were in joint custody of the parties at Delhi till 09-08-2015. Both the kids were staying in Delhi prior to coming in the custody of the respondent. If both the kids are allowed to resume their studies in Delhi from next academic year 2018-2019 onwards it will bring stability in pursuing their study at one place. On the other hand if the custody of kids is allowed to be continued with the respondent they will have to move on with the respondent to the place of his posting or in the alternative the respondent shall leave them with his parents to continue their study at Mohali which will also not be a favourable proposition for the kids as the parents of the respondent are old people.”

7. The learned counsel for the petitioner submits that in terms of Section 6 of The Hindu Minority and Guardianship Act, 1956, the father is the natural guardian of the children and as one is a boy child and the other is a girl more than five years of age, even entitled to their custody. He further submits that there was no reason for changing the custody of the children by way of an interim order when the Guardianship Petition itself was listed for recording of evidence. Relying upon the judgment of the Supreme Court in **Athar Hussain vs. Syed Siraj Ahmed and Others**, (2010) 2 SCC 654, he submits that in proceedings relating to the interim custody, there have to be sufficient and compelling reasons to persuade the Court to change the custody of the minor children; stability and consistency in the affairs and routine of the children has to be kept in mind by the Court in passing such orders. He submits that in the present case, the learned Family Court has drawn an adverse inference against the petitioner only because he is an Army Officer having a transferable

job. He submits that this can never be a criteria for passing an order for change of custody. He further submits that the learned Family Court has not considered that the respondent is unemployed and lacks the financial capacity to support the children. He further submits that as far as the petitioner is concerned, the petitioner has taken all necessary steps to ensure that the children are provided with the best of amenities and comfort. The petitioner's parents are presently staying with the petitioner and the children are studying in the Army Public School at Mathura and are performing well in their academics and extracurricular activities. The learned Counsel for the petitioner submits that on the other hand, the respondent would not be able to provide the children with such amenities and possibilities of extracurricular activities in Delhi.

8. On the other hand, the respondent submits that the children were forcibly taken away by the petitioner from her custody in August, 2015. After exploring the possibility of a settlement, she had immediately filed a petition seeking their custody and guardianship in November, 2015. She submits that merely because the petition is pending for some time, she cannot be denied the custody of the children only on the ground that this may involve change of custody in the interim. She further submits that the petitioner had taken the children forcibly to Gulmarg, which is a Field Station, and thereafter to Bikaner, and then to Mohali, and finally to Mathura. In this manner, the children have no stability in their lifestyle and schooling. On the other hand, the respondent is staying in Delhi, is highly educated and therefore, can provide stability to the children at their tender age. She further submits that the girl child is now

approaching the age of puberty and therefore, would require the support of the mother.



9. I have considered the submissions made by the parties. At the outset, it would be advisable to refer to various judgments of the Supreme Court which have laid down the law governing such disputes of custody of the children.

10. In ***Rosy Jacob v. Jacob A. Chakramakkal***, (1973) 1 SCC 840, the Supreme Court held that the Court's power under Section 25 of the Act is to be governed primarily by the consideration of the welfare of the minors concerned. Merely because there is no defect in the personal character of the father and he is otherwise not unfit to be a guardian, is not itself sufficient to grant the custody of the children to the father. The Court is to be governed only by the consideration of welfare of the children. I quote from the judgment as under:

“15..... The Court's power under Section 25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom — if ever — identical. The contention that if the husband is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading. It does not take full notice of the real core of the statutory purpose. In our opinion, the dominant consideration in making orders under Section 25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on

the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of their children, the approach has to be somewhat different from that adopted by the Letters Patent Bench of the High Court in this case. There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under Section 25 merely because there is no defect in his personal character and he has attachment for his children—which every normal parent has. These are the only two aspects pressed before us, apart from the stress laid by the husband on the allegations of immorality against the wife which, in our firm opinion, he was not at all justified in contending. Such allegations, in view of earlier decisions, had to be completely ignored in considering the question of custody of the children in the present case. The father's fitness from the point of view just mentioned cannot override considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute generally to be better fitted to look after the children — being normally the earning member and head of the family — but the Court has in each case to see primarily to the welfare of the children in determining the question of their custody, in the background of all the relevant facts having a bearing on their health, maintenance and education. The family is normally the heart of our society and for a balanced and healthy growth of children it is highly

desirable that they get their due share of affection and care from both the parents in their normal parental home. Where, however, family dissolution due to some unavoidable circumstances becomes necessary the Court has to come to a judicial decision on the question of the welfare of the children on a full consideration of all the relevant circumstances. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them. 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 a 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. The approach of the learned Single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us to have erred in reversing him on grounds which we are unable to appreciate.

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17. The respondent's contention that the Court under the Divorce Act had granted custody of the two younger children to the wife on the ground of their being of tender age, no longer holds good and that, therefore, their custody must be handed over to him appears to us to be misconceived. The age of the daughter at present is such

that she must need the constant company of a grown-up female in the home genuinely interested in her welfare. Her mother is in the circumstances the best company for her. The daughter would need her mother's advice and guidance on several matters of importance. It has not been suggested at the bar that any grown-up woman closely related to Maya alias Mary would be available in the husband's house for such motherly advice and guidance. But this apart, even from the point of view of her education, in our opinion, her custody with the wife would be far more beneficial than her custody with the husband. The youngest son would also, in our opinion, be much better looked after by his mother than by his father who will have to work hard to make a mark in his profession. He has quite clearly neglected his profession and we have no doubt that if he devotes himself wholeheartedly to it he is sure to find his place fairly high up in the legal profession."

11. In ***Dhanwanti Joshi v. Madhav Unde***, (1998) 1 SCC 112, the Supreme Court held that no undue importance may be given to the superior financial capacity of the husband as compared to the wife while determining the question of the custody of the children.

12. In ***Mausami Moitra Ganguli v. Jayant Ganguli***, (2008) 7 SCC 673, the Supreme Court reiterated that better financial resources of either of the parent or their love for the child may be one of the relevant consideration but cannot be the sole determining factor for the custody of the child. The Court has to exercise the judicial discretion in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

13. In *Nil Ratan Kundu & Anr. v. Abhijit Kundu*, (2008) 9 SCC 413, the Supreme Court, on an exhaustive comparison of the English, American and Indian law, held 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, nay 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.

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55. We are unable to appreciate the approach of the courts below. This Court in a catena of decisions has held that the controlling consideration governing the custody of children is the welfare of children and not the right of their parents.

56. In Rosy Jacob [(1973) 1 SCC 840] this Court stated: (SCC p. 854, para 15)

“15. ... The contention that if the husband [father] is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading.”

It was also observed that the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The father's fitness cannot override considerations of the welfare of the minor children.

57. In our opinion, in such cases, it is not the “negative test” that the father is not “unfit” or disqualified to have custody of his son/daughter that is relevant, but the “positive test” that such custody would be in the welfare of the minor which is material and it is on that basis that the court should exercise the power to grant or refuse custody of a minor in favour of the father, the mother or any other guardian.”

14. In ***Gaurav Nagpal v. Sumedha Nagpal***, (2009) 1 SCC 42, the Supreme Court reiterated as under:

“48. Merely because there is no defect in his personal care and his attachment for his children—which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield 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 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.

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50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mausami Moitra Ganguli case [(2008) 7 SCC 673 : JT (2008) 6 SC 634] , the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word “welfare” used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.”

15. On the facts of that case, the Supreme Court further observed as under:

“52. The trump card in the appellant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very

significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments.

53. The conclusions arrived at and reasons indicated by the High Court to grant custody to the mother do not in our view suffer from any infirmity. It is true that taking the child out of the father's custody may cause some problems, but that is bound to be neutralised.

54. Learned counsel for the appellant submitted that the child's education is of paramount importance and the father is spending good amount of money for providing him excellent education, and the mother does not have the financial affluence as the appellant claims to have. But that can be taken care of if father is asked to pay the educational expenses of the child in addition to the maintenance being paid to the respondent. But at the same time it cannot be overlooked that the father needs to have visitation rights to the child.”

16. In **Athar Hussain v. Syed Siraj Ahmed & Ors.**(supra), the Court held that the question of custody of the minor is different from the question of guardianship. The father can continue to be natural guardian of the child, however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better. The welfare of the child is the sole and single yardstick to assess comparative merit of the parties contesting for custody of the children. It was further held that the custody orders by their nature can never be final, however, before a change is made it must be proved to be in the paramount interest of the children. There have to

sufficient and compelling reasons to persuade the Court to change the custody of the minor children with immediate effect.

17. In **Vivek Singh v. Romani Singh**, 111(2017) SLT 5, this Court, while dealing with almost similar circumstances as in the present case, held as under:

“16. The aforesaid observations, contained in para 31 of the order of the High Court extracted above, apply with greater force today, when Saesha is 8 years' old child. She is at a crucial phase when there is a major shift in thinking ability which may help her to understand cause and effect better and think about the future. She would need regular and frequent contact with each parent as well as shielding from parental hostility. Involvement of both parents in her life and regular school attendance are absolutely essential at this age for her personality development. She would soon be able to establish her individual interests and preferences, shaped by her own individual personality as well as experience. Towards this end, it also becomes necessary for parents to exhibit model good behaviour and set healthy and positive examples as much and as often as possible. It is the age when her emotional development may be evolving at a deeper level than ever before. In order to ensure that she achieves stability and maturity in her thinking and is able to deal with complex emotions, it is necessary that she is in the company of her mother as well, for some time. This Court cannot turn a blind eye to the fact that there have been strong feelings of bitterness, betrayal, anger and distress between the appellant and the respondent, where each party feels that they are ‘right’ in many of their views on issues which led to separation. The intensity of negative feeling of the appellant towards the respondent would have obvious effect on the psyche of Saesha, who has remained in the company of her father, to the exclusion of her mother. The possibility of appellant's effort to get the child to give up her own positive perceptions of the other parent, i.e. the mother

and change her to agree with the appellant's viewpoint cannot be ruled out thereby diminishing the affection of Saesha towards her mother. Obviously, the appellant, during all this period, would not have said anything about the positive traits of the respondent. Even the matrimonial discord between the two parties would have been understood by Saesha, as perceived by the appellant. Psychologists term it as 'The Parental Alienation Syndrome' The Parental Alienation Syndrome was originally described by Dr Richard Gardner in "Recent Developments in Child Custody Litigation", The Academy Forum, Vol. 29, No. 2: The American Academy of Psychoanalysis, 1985.) . It has at least two psychological destructive effects:

- (i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.*
- (ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality.*

17. The aforesaid discussion leads us to feel that continuous company of the mother with Saesha, for some time, is absolutely essential. It may also be underlying that the notion that a child's primary need is for the care and love of its mother, where she has been its primary care giving parent, is supported by a vast body of psychological literature. Empirical studies show that mother-infant "bonding" begins at the child's birth and that infants as young as two months old frequently show signs of distress when the mother is replaced by a substitute caregiver. An

infant typically responds preferentially to the sound of its mother's voice by four weeks, actively demands her presence and protests her absence by eight months, and within the first year has formed a profound and enduring attachment to her. Psychological theory hypothesises that the mother is the centre of an infant's small world, his psychological homebase, and that she "must continue to be so for some years to come". Developmental psychologists believe that the quality and strength of this original bond largely determines the child's later capacity to fulfil her individual potential and to form attachments to other individuals and to the human community.

18. No doubt, this presumption in favour of maternal custody as sound child welfare policy, is rebuttable and in a given case, it can be shown that father is better suited to have the custody of the child. Such an assessment, however, can be only after level playing field is granted to both the parents. That has not happened in the instant case so far.

19. It is also to be emphasised that her mother is a teacher in a prestigious Kendriya Vidyalaya School. Saesha is herself a school-going child at primary level. If Saesha is admitted in the same school where her mother is teaching, not only Saesha would be under full care and protection of the mother, she would also be in a position to get better education and better guidance of a mother who herself is a teacher.

20. We, thus, find that the factors in favour of respondent are weightier than those in favour of the appellant which have been noted above. It is a fit case where respondent deserves a chance to have the custody of child Saesha for the time being, i.e. at least for one year, and not merely visitation rights.

21. New academic session would start in April 2017. At this time, the process of fresh admissions in schools is underway. We are confident that the respondent shall be able to have Saesha admitted in her school where she is teaching inasmuch as wards of the teachers are accorded such preferences. Therefore, the respondent is allowed to process

the case of admission of Saesha in Kendriya Vidyalaya, INA Colony, New Delhi and for this purpose the appellant shall fully cooperate. In case she is able to secure the admission, custody of Saesha shall be handed over to the respondent by the appellant one week before the next academic session starts. The custody shall remain with the respondent for full academic year. The matter shall be listed in the month of March 2018 for further directions when this Court would assess as to how the arrangement devised above has worked out. We, however, give liberty to both the parties to move application for variation of the aforesaid arrangement, in case consequences of the aforesaid arrangements turn out to be such which necessitate alteration or modification in the aforesaid arrangement.”

18. From the above judgments, it is clear that while considering the claim of custody of a child, the Court acts in *parens patriae* jurisdiction and is to be governed solely by the consideration of the welfare of the child. In claim of custody of a child, the claim of Guardianship under Section 6 of the Act or better financial resources of a parent or lack of any adverse material against a parent or the fact that the parent truly loves the child and has the welfare of the child in mind, though relevant, cannot act as sole criteria for determining the welfare of the child and consequently the claim of the custody of the child.

19. It is notably sad that in the present case, though the parties truly love the children and have the welfare of the children as prime consideration, they have rather left the issue of determination of the welfare of the children to the Court as they could not themselves reach a consensus over the same.

20. In the present case, the girl child is around 11 ½ years old while the boy is aged about 8 years. They both are school-going and after having interacted with them, I find them to be confident and well groomed. I further find that they do not prefer one of the parent over the other. It is also evident from the record that till August, 2015, they were in the custody of the respondent at Delhi, while the petitioner was posted at Gulmarg. It is also evident that the respondent had filed the petition seeking their custody almost immediately on them being taken away by the petitioner. Merely because there was delay in adjudication of the application for interim custody of the respondent by the Court, it cannot be said that the petitioner acquired a better right over the respondent due to such delay.

21. It is further evident from the record that on removing the children from the custody of the respondent, the petitioner took them away to Gulmarg, which was a Field Station and certainly was not conducive for the welfare of the children. Thereafter, the children were shifted to Bikaner, Rajasthan, thereafter to Mohali, Punjab and finally to Mathura, Uttar Pradesh. In this manner, the children have not had a stable environment. While this may not be the fault of the petitioner as being an Army Man this is the requirement and the nature of the job, it is an important consideration to be kept in view while determining the welfare of the children. It is also relevant to note that the petitioner submits that his next posting is due sometime in October, 2020 and he has been assured that the same will be again at a peace station. However, the fact that the posting is imminent and barring the word of the petitioner that he

has been assured of a posting at a peace station, there is no assurance from the Authorities proved on record to that effect, in my opinion, would again be relevant consideration tilting the balance of the custody of the children towards the mother.

22. It is also important to keep in view the age of the girl child who is reaching the age of puberty and would require the support and guidance of her mother. Though it may be true that the grandparents of the children are staying with the petitioner and therefore, the grandmother could also provide psychological support to the girl child, in my view, there can be no better support than from the mother.

23. As far as the facilities that are available in the Cantonment area are concerned, there is no reason to presently presume that the respondent would not be able to provide the same to the children. In any case, though relevant, they cannot outweigh the fact that the petitioner may again be transferred, as per his own admission in October, 2020, and there is no manner of knowing to which place.

24. The submissions of the petitioner that the respondent is presently not working and therefore is not financially independent, again, as held by the Supreme Court in the above referred judgments, cannot be a criteria for determining the issue of the custody of the children.

25. The allegation of the petitioner that has led to the matrimonial discord between the parties, is again not a matter that would presently govern the issue of the custody of the children.

26. The respondent, on the other hand, has submitted that if the custody of the children is granted to her, she has no objection if the petitioner is granted full visitation right to the children during their holidays as also the holidays of the petitioner, provided that the same do not in any manner prejudice the education of the children. In my opinion, this would fairly ensure that the children are not deprived of the love and affection of the petitioner and the joint parenthood of the parties.

27. The submission of the petitioner that the change of the custody of the children could wait till the petitioner is transferred from Mathura, also does not persuade me to defer the change of custody. October, 2020 would be in the middle of the academic session and would therefore certainly cause inconvenience to the academic well-being of the children. It would be very difficult to find an appropriate school for them at that stage. At present, the new academic session in the schools is yet to start and therefore, it would be advisable that if the schools of the children are to be changed, it is done now rather than later.

28. It is also to be kept in view that this Court is exercising its jurisdiction under Article 227 of the Constitution of India. Unless the order of the learned Family Court is found to be perverse or beyond its jurisdiction, this Court cannot substitute its opinion for that of the learned Family Court. No such case is made out by the petitioner.

29. This judgment was ready for pronouncement, however, due to the lockdown declared by the Government of India because of COVID-19 pandemic, was not pronounced earlier. This necessitated some change in the final directions issued in this order as well.

30. In view of the above, while upholding the order passed by the learned Family Court, it is directed that the petitioner shall handover the custody of the children to the respondent immediately on the opening of schools for admission/transfer once the lockdown that has been declared because of COVID-19 pandemic is lifted. It would be for the respondent to inform the petitioner when she will like to take the custody of the children and her decision in this regard shall be final as she can keep the custody of the children only for a limited period as is provided hereinafter. The petitioner shall also handover to the respondent all such certificates as may be required by the respondent for the purpose of securing admission of the children to a new school in Delhi. If the respondent for any reason is unable to secure the admission of the children in a new school, the respondent shall handover the custody of the children back to the petitioner within a period of two weeks of obtaining their custody, for them to attend their present schools without any further loss of studies. The respondent shall also remain bound by the statement that the petitioner shall be allowed unrestricted visitation rights, including overnight custody of the children, during their vacations and during the holidays of the petitioner. The parties shall be free to move an appropriate application before the learned Family Court for further directions with respect to the visitation rights and the custody of the children, including for variation of the present arrangement in case for any reason, the same requires any alteration or modification.

30. The petition is disposed of in the above terms, with no order as to costs.

NAVIN CHAWLA, J

April 29, 2020/rv/Arya

