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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 21.01.2020

W.P. (CRL) 1757/2019, Crl. M.A. 12631/2019, 12684/2019 & 12950/2019

ASHISH DUBEY

..... Petitioner

versus

THE STATE (GOVT. OF NCT OF DELHI) & ORS. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. N. Hariharan, Senior Advocate with Mr. Tanmaya Mehta, Mr. Gaurav Kejriwal, Mr. Sanjay Abbot, Mr. H. Pillai, Mr. Siddharth Singh Yadav and Mrs. Vandana Kejriwal, Advocates with petitioner in person
For the Respondents : Ms. Kamna Vohra, ASC with SI Mahipal Singh, PS Hauz Khas. Ms. Priya Hingorani, Senior Advocate with Mr. Sarvesh Chowdhry and Ms. Ayushi Nagar, Advocates with respondent No.3 in person.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE I.S. MEHTA

J U D G M E N T

SIDDHARTH MRIDUL, J (OPEN COURT)

1. The present petition under Article 226 of the Constitution of India, essentially prays for a direction to Ms. Sara Carriere Dubey, respondent No.3 (hereinafter referred to as the 'mother'), the wife of Mr. Ashish Dubey, the petitioner herein, (hereinafter referred to as the 'father'), to produce Ms. Ananya Dubey and Master Nathan Karttikeya Dubey, the minor children of the estranged couple, aged about 10 years and 8 years respectively, before this Court or the

Family Court, so as to prevent them from being removed from the territorial jurisdiction of this Court, as is alleged to have attempted in the past.

2. Mr. N. Hariharan, learned Senior Counsel appearing on behalf of the father invited our attention to the decision rendered by the Coordinate Bench of this Court in W.P. (Crl.) No.357/2018 titled as '**Kiran Lohia vs. The State Govt. of NCT of Delhi and Ors.**'; decided on 01.05.2018, to urge that, although, the present habeas corpus petition can not ordinarily be converted into a custody proceeding in respect of minor children; and the said question would statutorily and necessarily have to be determined by the Family Court concerned in an appropriate proceeding; however, an interim arrangement *qua* the visitation of the minor children, can in view of the said decision, be directed by this Court in the present proceeding.
3. In this behalf, our attention is further invited to the recent decision of the Hon'ble Supreme Court of India in Crl.A. 127/2020 titled as '**Yashita Sahu vs. State of Rajasthan & Ors.**', decided on 20.01.2020; to urge that, the role of the High Court in examining the aspect of custody of minor children, is premised on the touchstone of the principle of *parens-patriae*, and that the latter's welfare, is axiomatically the paramount consideration.
4. It is, in this behalf, and backdrop that Mr. N. Hariharan, learned Senior Counsel appearing on behalf of the father submits that, during the pendency of the proceedings before the Courts of Competent Jurisdiction, including the Family Court-in relation to the custody of the children-in view of the best interest of the children, an interim

arrangement *qua* their visitation be directed, till such time that, the guardianship petition instituted on behalf of the mother, being G.No.15/19 titled as '*Sara Carriere vs. Ashish Dubey*' pending adjudication before the learned Principal Judge, Family Courts, South, Saket, is adjudicated, in accordance with law.

5. As eloquently observed by the Hon'ble Supreme Court of India in *Yashita Sahu*, (supra), **the child is the victim in custody battles. A child requires the love, affection, company and protection of both parents. This is not only the requirement of the child, but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the love, affection and care or protection of any of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every re-union, may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to the one parent, the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with anyone of the two parents.**
6. We hasten to add, however, that one parent may in the facts and circumstances of a particular case, be denied visitation rights or contact with the child but only for substantial and for compelling reasons. In this behalf, we must also observe that, it is the case of Ms.

Sara Carriere Dubey, the mother of the minor children of the estranged couple that, Mr. Ashish Dubey, the father is violent and abusive. It is in this context that, it is urged by Ms. Priya Hingorani, learned Senior Counsel appearing on behalf of the mother that, although, she does not oppose supervised visitation of their minor children by the father, she is vehemently opposed to unsupervised or overnight visitation being granted to the latter.

7. We have, on previous dates of hearing, had occasion to interact with the minor children at length in Chambers and consequently, issued directions, with the consent of the parties to provide appropriate counseling to them, in order to secure their emotional well-being. It is further pertinent to observe that Ms. Swati Shah, the Counsellor attached with the Delhi High Court Mediation and Conciliation Centre, was appointed vide our order dated 05.12.2019, in the presence of and with the consent of the parties, for the said purpose.
8. The Counsellor's report dated 13.01.2020, is on record and copies thereof, have been provided to the parties.
9. A perusal of the Counsellor's report reveals that although, there was some initial hesitation on the part of the minor son-although the minor daughter was comfortable with her father from the very beginning-during the course of three meetings, the children have readily and comfortably interacted with him; and in fact, have enjoyed playing board games with him.
10. The Counsellor has further expressed the view that, during the three meetings, there was some composite interaction between the family; and although the children were meeting their father after a gap of

almost six months, there existed a latent bond between them, which came alive once they met him and that they got along well with each other. The Counsellor also opined that the children are willing to meet their father and look positively forward to such meetings.

11. Serious objections have been articulated on behalf of the mother to the Counsellor's report, *inter alia*, on the premise that the same was one sided, without due consideration of the mother's concerns and a complete mis-representation of what transpired at the meetings.
12. It has been urged by Ms. Priya Hingorani, learned Senior Counsel appearing on behalf of the mother that, the Counsellor is not adequately qualified to counsel the minor children and that the latter are already undergoing treatment from a qualified Psychologist.
13. Umbrage also expressed on behalf of the mother, at the purported alarming circumstance that, during one of the meetings, the father forced his minor son to sit on his lap, and the latter was exceedingly uncomfortable and disturbed at the prospect.
14. We do not propose, in view of the limited jurisdiction proposed to be exercised by us, to dwell at length on the above objections articulated hereinabove; save and except to observe that, in terms of the ratio of the decision of the Hon'ble Supreme Court of India, in Civil Appeal No.1694/2019 titled as '**Perry Kansagra vs. Smriti Madan Kansagra**', reported as **2019 SCC online SC 211**; the present Counsellor having been appointed by a Committee of the High Court, and entrusted by this Bench to assist in counseling the minor children of the contesting parents with the latter's consent; ought not to be disparaged in this manner. We do not, therefore, see any reason why

the Counsellor's report ought to be eschewed from consideration.

15. In view of the foregoing discussion and without expressing any view on the merits of the case and further clarifying that, it is neither appropriate nor feasible to determine the respective claims for custody of the minor children in the instant case, and simultaneously directing the concerned Family Court to expedite the hearing of the Guardianship petition bearing No.15/19 pending adjudication before it, in particular, any application for visitation that may be caused to be filed by either of the parties; we are of the view that, it would imperative in order to secure the paramount welfare of the minor children of the parties, to direct as under:

- (i) The father is permitted to have visitation rights of his minor children between 11:00 am and 04:00 pm on every Saturday and Sunday, so as to ensure that they remain in touch with him socially, physically and psychologically;
- (ii) The mother, needless to state, shall continue to have their custody, till the present direction is modified or altered by the Court of Competent Jurisdiction, in accordance with law, after affording a hearing to the parties.
- (iii) The mother shall handover the custody of the minor children to the father each succeeding Saturday at Sowgood Learning Farm, F-20, Ansal Villas, Sat Bari, New Delhi, Delhi 110074, at sharp 11:00 am; and the father shall return the custody of the children to the mother, at the reception of the Siri Fort Sports Complex, August Kranti Marg Khel Gaon, Delhi 110049, at 04:00 pm on the same evening.

(iv) Similarly, on every succeeding Sunday, the mother shall handover the custody of the minor children to the father, at the reception of the Siri Fort Sports Complex at 11:00 am, and the father shall return the custody of the children to the mother at the said reception of the Siri Fort Sports Complex, at 04:00 pm on the same evening.

16. It is made clear that, during the time when the father is visiting with the children, he shall do so, without being hindered or supervised by the mother in any manner.

17. It is further directed that, the father shall ensure that the minor children are escorted to all the classes and birthday parties and extra-curricular activities, as intimated to him by the minor children, without demur.

18. No other directions are prayed for. With the above directions, the present writ petition is partly allowed and disposed of accordingly. Pending applications also stand disposed of.

19. A copy of this order be given *dasti* under signature of Court Master to the learned counsel appearing on behalf of the parties.

SIDDHARTH MRIDUL
(JUDGE)

I.S. MEHTA
(JUDGE)

JANUARY 21, 2020/as/d