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Ct-08

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FMA 1204 of 2022

with

I.A No. CAN 1 of 2022

Sri Pranab Krishna Chakraborty

Vs.

Smt. Annapurna Chakravorty

Mrs. Shohini Chakraborty

Mr. Arijit Sarkar

... For the Appellant

Mr. Loknath Chatterjee

Mr. Sukanta Ghosh

... For the Respondent

The final report of mediation dated 1st November, 2022 is taken on record. The report shows that the mediation proceeding has failed.

We have heard the learned counsel appearing for the parties.

The custody of a minor child is an issue.

The appeal is arising out of the order passed by the learned Additional District Judge, 4th Court, Howrah, in connection with an application under Section 10, 11 and 12 of the Guardian and Wards Act, 1890.

The parties are separated over a period of one year and the child is presently under the custody of the respondent/mother. She is staying with the child at Varanashi.

The appellant wants to reunite with his child and wife and he has filed an application for restitution of conjugal rights.

In the best interest of the welfare of the child we sent the matter to mediation. However, the mediation has failed. There cannot be any doubt that for the welfare of the child, the involvement of the parents and their grandparents is required. The child should not be used as 'pawn'

in the hands of either of the parties. The bonding of the child with his father and grandparents is essential. The grandparents and the father want to meet with the child. The visitation right was allowed in a limited way by the learned Trial Judge.

A child of a broken marriage is a sufferer. The child requires mother as well as father. The sex of the parents cannot be the sole criteria. Stability of the child's home is considered an important factor. The child's psychological balance is deeply affected due to marital discord. As observed in ***Lahari Sakhamuri v. Sobhan Kodali*** reported in **2019 (7) SCC 311** per Ajay Rastogi, J,

“52. Divorce and custody battles can become quagmire and it is heart wrenching to see that the innocent child is the ultimate sufferer who gets caught up in the legal and psychological battle between the parents. The eventful agreement about custody may often be a reflection of the parents' interests, rather than the child's. The issue in a child custody dispute is what will become of the child, but ordinarily the child is not a true participant in the process. While the best-interests principle requires that the primary focus be on the interests of the child, the child ordinarily does not define those interests himself or does he have representation in the ordinary sense.

54. The judicial resolution of a custody dispute may permanently affect or even end the parties' legal relationship but the social and psychological relationship will usually continue and it seems appropriate that a negotiated resolution between the parents is preferable from the child's perspective for several reasons. A child's future relationship with each of his parents may be

better maintained and his existing relationship is less damaged by a negotiated settlement than by one imposed by a court after adversarial proceedings.”

It is the duty of the Court to ensure that the child is required to be kept away from negative influences and stressful atmosphere. In a catena of decisions it has been held that 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. [See: ***Sheoli Hati v Somnath Das***, reported in **2019 (7) SCC 490**].

In ***Gaurav Nagpal v Sumedha Nagpal***, reported in **2009(1) SCC 42** at paragraph 28, the Hon'ble Supreme Court has lucidly explained the word “welfare” in the following words:

“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, 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. 15 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."

Every time a child is born human-kind itself takes rebirth. We are witnessing an unprecedented increase in marital discord and disharmony along with family structure disruption. Most often the worst sufferer of this marital disruption is the helpless child, who are entrapped in this bitter feud between two warring couple without any fault of their own. A child is expected and should grow up in a family environment and in an atmosphere of happiness, love and understanding. There is a need for shared parenting. The father has legitimately claimed interim custody of the child during the weekend at Varanashi at least twice in a month and we do not find any unreasonable prayer of the appellant.

We modify the impugned order to the extent that the grandparents and the appellant shall be allowed to interim custody of the child during the weekend with an assurance to return the child by Sunday early evening and shall take care of the child

during such period. The mother may also accompany the child during such interim custody. However, in the event of any difficulty due to examination or other health-related issue, the respondent shall communicate the same to the appellant so as to enable the appellant and grandparents to arrange their visit suitably.

In the event, the appellant desires long interim custody of the child during annual vacation, the appellant may approach the trial court before whom the restitution proceeding is pending. It is needless to mention that in deciding the said matter the welfare of the child should be kept in mind.

We hope and trust that the parents shall take serious note of our observations and try to bury their differences in the interest of the child.

In view thereof, FMA 1204 of 2022 stands disposed of along with CAN 1 of 2022.

There would be no order as to costs.

(Uday Kumar, J.)

(Soumen Sen, J.)

