

NON- REPORTABLE**IN THE SUPREME COURT OF INDIA****CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO. 4308 OF 2012**

(Arising out of Special Leave Petition (C) No. 13254 of 2011)

Shaleen Kabra

Appellant

Vs.

Shiwani Kabra

Respondent

With

CIVIL APPEAL NO.4309 OF 2012

(Arising out of Special Leave Petition (C) No. 15819 of 2011)

JUDGMENT

ANIL R. DAVE, J

1. Leave granted.
2. Being aggrieved by the judgment of the High Court of Delhi dated the 21st of February, 2011 in CM(M) 1018 of 2010, these appeals have been filed by the parties before the High Court, who are parents of two children, whose custody is the subject matter of these appeals.

3. As the impugned order is challenged in both these appeals, both the appeals were heard together and they are being decided by this common order. For the sake of convenience, parties to the litigation have been referred to hereinbelow as arrayed in Civil Appeal arising out of Special Leave petition No. 13254 of 2011.
4. The marriage of the appellant and the respondent was solemnized on 14.02.1994. From the wedlock, two sons were born, who are approximately 15 and 9 years old. The appellant and the respondent have been living separately since 10.04.2007, and have been involved in various litigations since then, including a petition for divorce under Section 13(1)(i) & 1A of the Hindu Marriage Act, 1955 filed by the appellant-father and also proceedings under the Protection of Women from Domestic Violence Act, 2005, initiated by the respondent-mother. The appellant, who is an IAS officer, stationed at Jammu at present, had sought certain modifications in the arrangement of custody of the children, and also permission to take transfer certificates of the children from Delhi and complete their admission in a school in Jammu, and in this respect, moved applications dated 25.05.2010 and 22.06.2010 before the Additional District Judge. The Learned Additional District Judge, vide order dated 19.07.2010 was pleased to allow the applications moved by the appellant-father.

5. Being aggrieved by the above-mentioned judgment delivered by the Trial Court, the respondent preferred CM(M) No. 1018 of 2010 before the High Court. By virtue of the impugned judgment, the High Court partly allowed the petition filed by the respondent whereby the respondent was permitted to have custody of the younger son, whereas the appellant was to have custody of the elder son.
6. While coming to the above conclusion, the High Court has cited various decisions in support of the contention that while deciding the issue about custody of children in a matrimonial dispute, the paramount consideration is that of welfare of the child. Thereafter, on the basis of interaction with the children in the Chambers, the learned Single Judge was of the view that the elder son had a strong desire to stay with the appellant-father. He also found that there was also an admission by the respondent-mother that she would not be able to adequately handle the educational needs of the elder son without tutors. For the aforesaid reasons, the learned Single Judge ordered that custody of the elder son should remain with the appellant-father.
7. In the case of the younger son, the learned Single Judge observed that he, being of a very tender age, was incapable of forming a definite preference as to with whom he wanted to stay. In the circumstances, the learned Single Judge ordered that the custody of the younger son should be given to the respondent-mother, as she would be in a better

position to understand the needs of such a young child. On this basis, the custody of the younger son was directed to remain with the respondent.

8. The learned Single Judge also recorded a finding to the effect that both the children appeared to be very happy in the company of each other as there was a strong bonding between them.
9. Being aggrieved by the said judgment, both the parties have come before this Court vide the present appeals.
10. We heard the learned counsel for the parties, and also spoke to the children at length.
11. The counsel appearing for the appellant-father, at the outset, submitted that the High Court ought not to have directed separation of two children, in view of the close relationship between them and he further submitted that there could be disastrous effect of such a separation on them. Thereafter, the learned counsel made further submissions about the poor academic performance of the younger son while in the custody of the respondent-mother, and also regarding the alleged adulterous conduct of the respondent-mother, which was said to have a severe adverse effect on the children. The learned counsel further added that the father of the appellant, i.e. grand father of the children, is staying with the appellant and he, being a very educated person,

would be in a position to take good care of the children. On these grounds *inter alia*, the learned counsel argued that both the children ought not to have been separated, and that custody ought to have been granted to the appellant-father.

12. On the other hand, the learned counsel appearing for the respondent-mother submitted that looking to the service condition and status of the appellant-father, occupying a stressful position in the state of Jammu & Kashmir, he would not have sufficient time to give adequate attention to the children and if custody of the children is given to him, the children would be taken care of only by servants and that would not be in the interest of the children. Further, the learned counsel argued that as the children were already in a very good school in Delhi, it would not be just and proper to move them to another school in Jammu & Kashmir which might be of an inferior standard. For the aforesaid reasons, the learned counsel argued that custody of even the elder son ought to have been granted to the respondent-mother.

13. On hearing the learned counsel and also upon talking at length with the children, we find force in the arguments of the counsel for the appellant-father.

14. Upon speaking to the children personally, we also found that they are indeed very much attached to each other. This fact was also noted by the learned Single Judge of the High Court in the impugned judgment,

and is also admitted by both the parties in their respective written submissions. Looking to the overall peculiar circumstances of the case, it is our view that the welfare of both the children would be best served if they remain together. In our view it would not be just and proper to separate both brothers, who are admittedly very close to each other.

15. If we are of the view that both the brothers should not be separated and should be kept together, the question would be as to who should be given custody of the children.

16. We are of the view that the children should be with the appellant-father. The respondent-mother is not in a position to look after the educational need of the elder son and as we do not desire to separate both the brothers, in our opinion, looking to the peculiar facts of the case, it would be in the interest of the children that they stay with the appellant-father.

17. We are sure that the appellant- father, who is a member of Indian Administrative Service and is a well groomed person, with the help of his father, who was also a professor, will be able to take very good care of the children. Their education would not be adversely affected even in Jammu and Kashmir as it would be possible for the appellant-father to get them educated in a good school in Jammu. We do not believe that the children would remain in company of servants as

alleged by the learned counsel appearing for the respondent-mother. Father of the appellant i.e. the grandfather of the children would also be in a position to look after the children and infuse good cultural values into them. Normally, grandparents can spare more time with their grand children and especially company of well educated grandparents would not only help the children in their studies but would also help them to imbibe cultural and moral values and good manners.

18. So as to see that the respondent-mother is also not kept away from the children, she shall have a right to visit the children atleast once in a month. The appellant –father shall make arrangements for A.C. First Class railway ticket for the respondent-mother or shall pay the railway fare to her so as to visit the children once in a month at a weekend and the appellant-father shall also make arrangements for stay of the respondent-mother either at his own residence, if the respondent-mother agrees to that, otherwise the appellant-father shall make arrangements for suitable accommodation for the respondent-mother when she comes to Jammu to visit the children.

19. During the period of vacation exceeding two weeks, the appellant-father shall send the children to Delhi so that the children can stay with the respondent-mother atleast for three days. We are sure that the appellant and the respondent shall determine the modalities as to

during which portion of the vacation, the children should visit the respondent-mother as almost both the parents are interested in having the company of the children.

20. For the aforesaid reasons and looking to the peculiar facts of the case, we quash and set aside the impugned order passed by the High Court and restore the order of the trial court, subject to modification of conditions-arrangements, recorded hereinabove. The custody of both the children shall be given to the appellant-father before 15th May, 2012 and the arrangements with regard to visit of the children etc. shall take effect from 1st June, 2012, the respondent-mother shall do the needful to send the younger son to the residence of the appellant-father before 15th May, 2012.

21. The appeals are accordingly allowed with no order as to costs.

JUDGMENT

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(D.K. JAIN)

.....J

(ANIL R. DAVE)

NEW DELHI

May 8 , 2012