

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

Date of Decision: 18.12.2013

+ **MAT. APP. (FC) NO.29/2013, CM APPL.12745/2013**

LT COL MANISH SEHGAL Appellant
Through: Mr. Vikas Tomar, Advocate
along with appellant in person.

versus

MRS MEENU SEHGAL Respondent
Through: Mr. Akhil Sibal & Mr. Bharat Arora,
Advocates

**CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI**

% **MR. NAJMI WAZIRI (Open Court)**

1. This is a father's appeal against an order of 5th August 2013 by the Family Court granting custody of his two minor daughters to their mother – the respondent. The respondent/mother had earlier been granted interim custody by the same court for the Diwali vacations and the school winter holidays last year i.e. on 14th and 15th November, 2012 and also from 29th December, 2012 to 6th January,

2013 respectively. The couple had separated on 16th August, 2012. The mother had filed the application for guardianship and interim custody of the minor children on 1st November, 2012.

2. Upon being permitted by the Court, the mother met the children Sana and Sarah (aged 7 and 9 years) during the Diwali festival in Lucknow, where they are studying in classes 4 and 6 respectively in City Montessori School. However for the winter vacations, she was not given their custody by the father. Pursuant to the proceedings of non compliance of the latter order, the Family Court directed the Commissioner of Police to depute a person not below the rank of ACP / a lady officer to accompany the petitioner to Lucknow and bring the children along with the respondent to the Family Court. The father and the minor children appeared in Court and the application of the mother was disposed off on 18th May, 2013. Against this order both parents appealed to the High Court. The appeals were disposed off on 29th May, 2013 with a direction to the Trial Judge to consider afresh the statements of the parties before it for an interim arrangement not only for the summer vacations but also interim arrangements during the pendency of the proceedings before the Trial Judge. The High

Court made it clear that the Family Court would not be affected by the opinion expressed by it for the fresh reconsideration while giving directions which the Trial Court may be required to give.

3. Both parties moved applications for modification of the order dated 18th May, 2013. The application moved by the mother sought two reliefs: i) grant of temporary custody of the minor girls for the ensuing summer vacations from 1st to 25th of June 2012 and ii) a decision afresh for their interim custody during the pendency of the petition. She claimed that she had been unduly deprived of the society of the children although she had taken care of them and that such deprivation had caused her immense mental agony and irreparable loss. She also highlighted the fact that the father had not handed over the custody of the children during the winter vacations despite clear Court orders in that regard. In response the father stated that the mother was only concerned about her personal care and career and that it was, in fact, he who had been taking care of the children since their birth as the mother had shown no such interest in their upbringing. He further contended that the children were emotionally attached to him and had categorically expressed their preference of

not wanting to be with their mother.

4. The Trial Court considered the contention of the parties. The mother's allegations and evidence was regarding alcoholism of the father, his alleged extra material relationship with another lady, (who the wife contended) was contemporaneously going through her own divorce proceedings, letters between her and the present appellant in this regard, their phone call records, proximity of the Delhi – Kalkaji address of both persons. The materials relied on by the appellant further were letters adduced by him– in opposition to the application for custody, said to have been written by his daughters and by the *Abacus* teacher – (the latter informing the father that the children were getting disturbed perhaps because of the parents' personal life squabbles). The children's letters relied upon by the father were not found reliable by the Trial Court which reasoned that the children who were living with their father, would not write letters of such nature to him. The Family Court found the mother's contention more plausible and credible and the circumstances more conducive with the mother for the custody of the children. The Trial Court had reasoned that the letters were written after filing of the custody petition and

indeed if the children were in the habit of writing such letters to their father – with whom they are living – then they must have written letters earlier and subsequent to the ones adduced by the father. However, for unexplained reasons, no other letters had been brought on record. Therefore, no reliance was placed on the said letters.

5. While granting custody to the mother the Trial Court was mindful of the law with respect to the grant of interim permanent custody of the minor children in particular of female minors. It referred to *Gaurav Nagpal v. Sumedha Nagpal* (2009) 1 SCC 42 and *Nil Ratan. v. Abhijit Kundu* Civil Appeal No.496/2008, which requires that issue of a custody of the minor being a complex question should be solved with a delicate human touch. That where a court deals with such a case, neither statutes nor strict rules of evidence or of procedure ought to be given privacy and that the paramount consideration in such cases should be the wellbeing and welfare of the minor. That in such cases of selecting a guardian, the Court would be bound to give due weight to a child's ordinary comfort, health, education, emotional development and favourable surroundings. If the minor is old enough to state his/her independent preference, the Court must consider such

preference as well though the final decision would rest with Court as what would be conducive to the welfare of the minor.

6. During the course of the hearing before the Trial Court the children had been brought to the Court since the counsel for the petitioner had sought to examine them in chamber but on that date the applicant gave up this request. However, since the children had come all the way from Lucknow, the Trial Court thought it fit to examine them.

The observations in this regard are relevant:

“However, since both the children were brought in the Court therefore, this Court decided to interact with the children in the chamber and he also stated that he conveyed this fact to the counsel for the respondent also. It seems that since this fact was conveyed to the counsel for the respondent that petitioner will not press for her prayer to examine the daughters in chambers therefore, respondent brought the daughters in the court but they were brought without being tutored. Seeking the plight and fear on the face of both the children we all three decided that will not say any such thing to any of the party and if the respondent will inquire from the children then they will stated that they were asked about their school friends at Lucknow.”

“14. Last but not the least it may be mentioned that on 11.7.2013 after counsel for the petitioner moved application for early hearing, I talked to both the children in the chamber which took place between the undersigned and children hardly for 5 minutes. I talked to children and asked them as to how was their

*stay with their mother during the summer vacation. They stated that it was wonderful. They further told that they have come from Lucknow and in Lucknow their grandmother is not there as she has suffered fracture of her leg and she is in Delhi. Subsequently I asked a very small question to both children that “**Ab kiske pass rehna hai, papa ke pass or mummi ke pass?**” Elder of the two kids kept silent but the younger one replied that “**mujhe to mammi ke pass rehna hai**”. When this question was put to the elder one she also stated that “**Mujhe bhi mammi ke pass rehna hai per ye bat boli to bahut daant padegi.**”*

7. The court granted custody of the minor children to the mother after concluding that it would be in the interest and the welfare of both the children that she have their custody. Reliance was placed upon a case titled *Ayesha Bhati v. Vijay R. Bhatia* AIR 1988 Delhi 149 which had held that wishes expressed by minor are an important consideration.
8. The appellant’s counsel, Senior Advocate Mr. Sudhir Nandrajog, argued that the father was threatened by the respondent/mother that she would have him put behind the bars; that she shied away from meeting the children in Lucknow between 11th and 15th November, 2012; that the non-handing over the custody of the minor daughters was on account of their ill-health and not for any other reason; that the allusion to an extra marital relationship of the father was a further

attempt to prejudice the Court and that indeed the Court did take this into account as a factor for granting custody to the mother, whereas in fact there was no truth in the said allegation; that the children themselves shared with the High Court and later through their letters to their father that they did not wish to either meet or stay with their mother who is otherwise preoccupied with her professional career and personal care only. It was argued that the letters of the children which are on record and their interaction with this Court – earlier on 24.5.2013 and during the course of this appeal have revealed that they do not wish to stay with their mother but with the appellant/father; that the father is providing them all the care, love and affection which ought to be given to them and he is best suited in the circumstances for their nurturing as the children will always be in a protected environment. In this context it was submitted that the accommodation provided to senior officers of the Army is most suitable for their healthy and proper upbringing; and that the Trial Court should not have interviewed the children in July 2013 when they had already expressed their desire to stay with the father to the High Court. Counsel urged that changing their school or transfer or handling over

their custody to the mother at this stage would seriously upset them psychologically and socially and such upheaval would affect their personal growth; handing them over to the mother at this juncture would severely upset their academic session too which has reached the stage of their academic examinations and finally, that the impugned order was not in the welfare of the children which being the paramount interest was ignored by the trial court.

9. Mr. Akhil Sibal, learned counsel for the mother, contended that the statement of the children relied upon by the Trial Court was the one after they had spent some holidays with the mother and that the statement was the one nearest in time to the custody order, therefore it ought to have been and was correctly taken into consideration. He contended that besides there was no impediment or bar upon the Court to interact with the children to ascertain their preference.
10. Having heard the learned counsel and considered the facts of the case, this Court is of the opinion that the Family Court has considered all aspects of the case and addressed itself primarily as to the interest and welfare of the children before concluding and ordering that their custody should be given to their mother. This Court is also conscious

that the girls aged about 7 to 9 years would need due care and attention of their mother more than anybody else. At this tender phase in their life, it is a mother who would be more aware and alive to their emotional and physical needs and the father being a senior officer in the Army -- being on call of duty – may not be able to attend to these delicate requirements.

11. The learned counsel for the appellant relied upon three decisions *R.V.Srinath Prasad v. Nandamuri Jayakrishna & Ors.* AIR 2001 SC 1056, *Athar Hussain v. Syed Siraj Ahmed & Ors.* AIR 2010 SC 1417 and *Sheila B.Das v. P.R. Sugasree* AIR 2006 SC 1343. In the first case, the Supreme Court held that: “*custody of minor children is sensitive. It is also a matter involving of sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between attachment and sentiments of the parties towards the minor children and welfare of the minors, which had paramount interest.*” The subsequent other two cases also are on the same lines but focusing primarily on the welfare of the children irrespective of the allegations that the parties may have made against each other.

12. During the course of the hearing the learned counsel for the respondent mother had offered – upon instructions from her, who is present in the court – that keeping in view that the children are in the middle of their academic session and would have their final exams commencing shortly – and she being a teacher at Amity International School and hence alive to this fact would be ready and willing to shift to Lucknow simply to be with and take care and custody of her daughters so as not to disturb their academic session provided however that she would be free to move the children to Delhi to have them admitted in Army Public School or Amity International School or such other prestigious schools as may be suitable or convenient and appropriate for their further studies after their final examinations are over. Although in terms of the impugned order which grants immediate interim custody to the mother and for her to shift the children to Delhi even during mid-session academic session, the willingness of the mother to move to Lucknow clearly shows her *bona fides* and her concern for the welfare of the children. This Courts notices that the mother has expressed her willingness to relocate from Delhi to Lucknow albeit temporarily even though she has a regular

job as a school teacher in Amity International School, Noida merely for the overall benefit and psychological health of her daughters and in their academic interest too.

13. This Court has perused the letters purportedly written by the children and finds that the language used and content of both near identical especially in the beginning and the end i.e. : “Dear Papa, I want to stay with you.” Indeed the expressions used and the flow of thought are such as would not be ordinarily attributable to a 9 year old child and certainly not to a 7 year old. Likewise the identical allusion by both of them to their mother as “that lady” appears strained and contrived, if not downright unnatural. They both have the appearance of being dictated by somebody else and for that reason, facially, cannot be relied upon. Indeed, it bodes an unhealthy surrounding and atmosphere for the children if they are indeed dictated to write such unfortunate letters about their own mother to their father with whom they reside.
14. Counsel for the appellant had during the hearing urged that the Family Court Judge was biased and showed it during the hearing especially in the manner of conducting the interview with the child. No

contemporaneous affidavit or application alleging bias appears to have been moved to enable the Judge to deal with such allegations. Furthermore, the grounds urged are general in nature. Appellate Courts cannot be expected to render findings of bias on the basis of such tenuous pleadings and materials. Again, the argument that this Court should disregard the observations and impressions of the Trial Court since on two separate occasions, the Judges of this Court recorded contrary observations is unpersuasive. Their orders were not final; but made tentatively and cannot override the obligation of their Court to consider the correctness or soundness of the impugned order, and the overall welfare and well being of the two children.

15. For the above reasons, we are of the opinion that the impugned judgment and order does not suffer from any infirmity and does not call for any interference. However, keeping the larger interest and care of the minor child and especially the fact that the removing them from the school namely City Montessori School, Lucknow at this stage could be upsetting to them, the Court hereby directs as follows:
 - (i) The respondent-wife, in line with the statement made on her behalf, shall move to Lucknow in a week's time and the custody of

the children shall be handed over to her on or before 30th December 2013.

(ii) The children shall remain in the custody of the mother-respondent thereafter during the pendency of the proceedings in the Family Court. The appellant and the respondent-wife shall ensure that the transfer certificates of two children are obtained to ensure their smooth admission into the Army Public School in Delhi or Noida or some other school of the like nature in the forthcoming academic session 2014-2015. The respondent-wife shall not deny reasonable visitation rights to the father which shall be worked out mutually in a spirit of co-operation.

(iii) The Trial Court shall proceed to record the evidence and submissions of the parties and after adjudicating upon the merits of the petition for custody render final judgment at its earliest convenience preferably by 31st May, 2014. The Trial Court shall proceed with the matter unaffected by the observations made in this order as to the merits.

(iv) The present direction shall bind the parties and be subject to final orders in the custody petition.

16. To give effect to the above directions, counsel for the parties shall be present before the Guardianship Court on 6th January, 2014. This Court hereby clarifies that it has not expressed its approval with respect to the Trial Court's observations as regards the appellant's alleged matrimonial relationship. Those are ultimately matters for trial, and nothing stated or observed here shall be construed as an expression of the merit of either party's claim which has to be decided finally, after considering rival contentions and the materials placed on the record of the Trial Court.
17. The appeal is dismissed, subject to the above modifications. No costs. Order Dasti to both parties.

**NAJMI WAZIRI
(JUDGE)**

**S. RAVINDRA BHAT
(JUDGE)**

**DECEMBER 18, 2013
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