



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 12th September, 2023

Pronounced on: 12th January, 2024

MAT.APP.(F.C.) 47/2023 & CM APPL. 7625/2023



..... Appellant

Through: Mr. Abhishek Kumar & Ms. Shivangi Singh, Advocates with appellant in person.

versus



..... Respondent

Through: Mr. Iashwar Singh, Advocate with respondent in person.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

CM APPL. 7623/2023 (Condonation of delay)

1. The present Application under Section 5 of the Limitation Act, 1963 read with Section 151 of the Code of Civil Procedure, 1908 has been filed on behalf of the applicant/appellant seeking condonation of 61 days' delay in filing the present appeal.

2. For the reasons and grounds stated in the present application, the delay of 61 days in filing the present appeal is hereby condoned.

3. Accordingly, the present application is disposed of.

CM APPL. 7624/2023 (Condonation of delay)



1. The present Application under Section 151 of the Code of Civil Procedure, 1908 has been filed on behalf of the applicant/appellant seeking condonation of 8 days' delay in re-filing the present appeal.
2. For the reasons and grounds stated in the present application, the delay of 8 days in re-filing the present appeal is hereby condoned.
3. Accordingly, the present application is disposed of.

MAT.APP.(F.C.) 47/2023

It is the child who suffers the most casualty in custody battle because even if either parent wins, the child loses everything due to polarization of familial relations. Merely having a child does not make one a 'parent', rather the one who protects the child from being torn in such parental conflicts is the closest to being an 'ideal-parent'. The focus should be the child's future and not the parents' past.

1. The present Appeal under Section 19 of the Family Courts Act, 1984 has been filed on behalf of the appellant/mother (*respondent in Guardianship Petition*) against the Judgment dated 22.09.2022 passed by the learned Principal Judge, Family Court, South, Saket Courts, New Delhi declaring the parents of the minor as joint guardians and granting visitation rights to the respondent/father (*petitioner in Guardianship Petition*) while the custody of the minor is granted to the appellant/mother till the age of eighteen years.
2. Admittedly, the parties got married on 11.05.2006 and one son, [REDACTED] was born from their wedlock on 02.05.2007.
3. The matrimonial disputes arose between the parties and eventually they got separated on 22.02.2009 i.e. after about three years. The custody of the child, however, remained with the appellant/mother.



4. The respondent/father filed a *Guardianship Petition under Sections 7 and 25 of the Guardians and Wards Act, 1890* for Declaration/ appointment as guardian of person of minor child, [REDACTED] and for his permanent custody, being the father and natural guardian on the premise that the appellant/mother was not taking proper care of the child and was not fit to safeguard the interest of the minor child, [REDACTED].

5. It was asserted in the *Guardianship Petition* that the appellant/mother was a lady of short temperament and psychologically imbalanced. The appellant/mother had a habit of flaring up on trivial issues, which she had admitted and apologized in writing *vide* Annexure A. It was further claimed that the appellant/mother had no emotional feelings for the minor and the child's growth would be hampered if his custody remained with the mother.

6. The respondent/father had claimed that he has the financial capacity to take care of the needs and health of the minor child and it was in the interest and welfare of the child to be removed from the harmful influence of the appellant/mother.

7. Therefore, the respondent/father made a prayer that it would be in the interest and welfare of the child if he is declared the guardian and the custody of the minor is given to him. Further, the appellant/mother may be restrained from meeting the child or to regulate and restrict her meeting in such a manner that the physical and mental health of the child is not affected.

8. The appellant/mother in her *Written Statement filed in these proceedings before the Family Court*, asserted that the respondent/father is not well behaved, cultured, is not educated and is unable to provide good education to the child. The respondent's father, who was a Government



employee, and his mother are very aged and incapable of taking care of the minor. Moreover, the respondent/father has two sisters who are prejudiced against the appellant/mother and her child and are always ready to fight with the family members. Moreover, the family members of the respondent/father behave in an indecent manner.

9. On the other hand, the appellant/mother lives in a decent and cultured atmosphere where all the needs of the child can be fulfilled. Therefore, the appellant/mother has claimed that the respondent/father was not entitled to be declared a guardian or be given the custody of the minor.

10. On the basis of the pleadings, the *issues* were framed on 01.02.2010 as under: -

“1. Whether it is in the interest and welfare of the minor child [REDACTED] if petitioner/his father is declared his guardian? OPP.

2. Relief.”

11. The *respondent/father* examined himself as *PW1* and was duly cross-examined by the appellant/mother. *The appellant/mother, however, failed to lead any evidence* despite several opportunities and her right to lead evidence was closed on 06.07.022.

12. The *learned Principal Judge, Family Court* before final adjudication of the petition, interacted with the minor who was 15 years old on 20.07.2022. The minor at that time was studying in 10th Class in [REDACTED]. He clearly stated that he wanted to continue to live with his mother.

13. The *learned Principal Judge* considered the evidence as led by the respondent/father and declared both, the appellant/mother and the respondent/father, being the parents, as joint guardians of the minor child.



Insofar as the custody was concerned, it was observed that all the needs and requirements were being well taken care of by the appellant/mother and the child, who was of age of discretion i.e., 15 years, had also exercised his preference of being with the appellant/mother. Both the parents were declared as joint guardians and custody was directed to be continued with the mother while the respondent/father was granted visitation rights in the following terms: -

“(i) The respondent will leave the child at the house of petitioner on every first Saturday of each month at 12:00 noon. The petitioner will leave the child back at respondent’s house at 05:00 pm on first Sunday of the month. Thus the child will have a night stay at petitioner’s house between first Saturday and first Sunday of each month.

(ii) If the child has any tuition classes/school classes/any other extra curricular activities, it will be duty of petitioner to make the child attend said classes.

(iii) In case the child is ill on the aforesaid first Saturday and first Sunday of the month, the petitioner shall take all medical care of the child at his own expenses.

(iv) On every third Sunday of the month, the respondent shall leave the child at petitioner’s house at 12:00 noon and petitioner shall leave the child at respondent’s house at 5:00 pm on that very day. The directions at point (ii) & (iii) shall be applicable to petitioner during this visitation also.”

14. Aggrieved by the visitation rights, the present Appeal has been preferred by the appellant/mother only to the limited extent challenging the visitation rights.

15. The basic premise on which the visitation rights have been **challenged by the appellant/ mother** is that the Court has failed to appreciate that the child is not safe in the custody of father. The learned Principal Judge has not



appreciated the incident dated 15.08.2016, wherein the respondent/father along with the child, escaped after giving the Counsellor a laced lassi which caused him stomach ache and loose motions. Mr. Kumar Pal, Counsellor was locked inside the toilet and thereafter, even chilli powder was thrown in his eyes.

16. On the complaint of Mr. Kumar Pal, Counsellor, the FIR No. 669/2016 titled State vs. Shiv Prasad @ Shiv & Ors. was registered on 15.08.2016 against the respondent/father and his family members under Sections 324/342/363/365/368/34 of the Indian Penal Code, 1860 which is still pending before the learned Metropolitan Magistrate.

17. Consequent to the complaint of the Counsellor, the Visitation Order dated 11.08.2016 was recalled by the learned Principal Judge with the directions to the concerned SHO to send the information to the airports as well as FRRO, Immigration Office to prevent the respondent/father along with the child, to leave the country. The child was traced by the Police after a week and handed over to the appellant/mother. These facts have been duly recorded in the Order dated 22.08.2016.

18. Furthermore, as noted in the judgment itself, the child, on interaction with the learned Principal Judge, had shown his disinclination to live with the respondent/father, which again has been overlooked and ignored.

19. The learned Principal Judge has failed to consider several incidents as stated by the Court Commissioner in the Report dated 10.03.2014.

20. The appellant/mother has further asserted that her evidence could not be placed on record on account of negligence of her counsel. The Counsel of appellant/mother subsequently filed the Written Submissions in the Court on 20.07.2022 without first seeking aside of the Order dated 16.07.2022



closing appellant/mother's evidence or seeking opportunity to lead her evidence.

21. Furthermore, the respondent/father has failed to pay the maintenance for the last three years and has been avoiding the same on one pretext or the other. The Execution Petition has been filed on behalf of the appellant/mother which is pending adjudication.

22. It is, therefore, submitted that the impugned Judgment dated 22.09.2022 granting visitation rights to the respondent/father is liable to be set aside.

23. ***Learned counsel on behalf of the respondent/father*** has controverted the allegations made and submitted that the visitation rights have been rightly granted for the proper upbringing and welfare of the child. Therefore, the present Appeal is liable to be dismissed.

24. **Submissions heard of the learned counsels for the parties and the documents perused.**

25. The relevant parameters while determining the custody matters has been explained by the Apex Court in the case of *Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413, wherein it was observed that while dealing with custody cases, the court has 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 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.



26. Admittedly, one son, [REDACTED] was born from the wedlock of the parties on 02.05.2007 and he is in exclusive custody of the appellant/mother since 22.02.2009 i.e., since the age of two years at the time when the parties separated.

27. Learned Principal Judge has taken a balanced view to hold that both the parents are the natural guardian and both have the interest and welfare of the child in their mind and conduct. Neither parent suffers from any disability and thus, they have been rightly appointed/declared as the joint guardian of the minor. Neither parent is aggrieved by the declaration of both the parties as joint guardian. The only challenge is to the visitation rights which have been granted to the respondent/father.

28. Undeniably, the child has been in the exclusive custody of the appellant/mother since he was two years old. From time to time, the respondent/father has been given access and has been regularly availing the visitation rights despite which, it is on record that he has not been able to create any bond or develop any love and affection with the child and all the visitations have been forced with the intervention of the Counsellor.

29. The inability of the respondent/father to have been able to win the love and affection of the child is also evident from the incident of 15.08.2016 when while the visitation was permitted under the guidance of the Counsellor, the respondent/father forcibly took away the child. The child was recovered after one week, only with the intervention of the Police and the custody was restored to the appellant/mother. The incident of 15.08.2016 resulted in registration of FIR No. 699/2016 under Sections 324/342/363/365/368/34 of the Indian Penal Code, 1860 on the complaint made by the Counsellor, wherein serious allegations were made that he had



been given a laced lassi by the respondent/father which resulted in loose motions. Thereafter, he was locked in the toilet by the respondent/father and the child was taken away.

30. This taking away of the child from the custody of the appellant/mother during the visitation held as per the Orders of the Court, in fact reflects the affection of the desperate father who somehow wants to be with his son. However, the affection of the child cannot be won over by force. While taking of the child away in the aforesaid manner, cannot be justified in any manner, but what is significantly reflected from this incident is that the child was not willing to be with the respondent/father.

31. In the present case, it is evident that the child who is now about sixteen years, who has been separated from his father since the age of two years, has no special affection for the respondent/father which is also reflected from the observations of the learned Principal Judge that during his interaction with the minor child, he clearly expressed his disinclination to be in the custody of the respondent/father. The child even stated that he does not have any happy memories with the respondent/father and does not want to interact or meet him. Because of this long alienation, the child has no inclination even to meet the respondent/father. This intelligent preference of the child who is on the verge of adulthood, which is a significant factor in terms of *S.17(3) Of the Guardian and Wards Act, 1890* cannot be overlooked or ignored.

32. Additionally, the respondent/father had asserted that he is *financially sound* and is capable of meeting day-to-day requirements and needs of the child. However, there is no evidence of how he can ensure better care of the child than the appellant. Admittedly, the child is studying in Sardar Patel



School which is one of the most renowned schools of Delhi.

33. The respondent/father may have a better financial standing, but he has not been able to prove that appellant/mother had any financial constraint or her financial status has come in the way of proper upbringing of the child and meeting his needs and requirements.

34. In the case of Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673, the Apex Court, while discussing whether the financial capacity of the father would be a the sole factor for adjudicating the question of custody of a minor held as under:

“20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.”

35. Similar observations were made in the case of Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112 and reiterated in Smriti Madan Kansagra v. Perry Kansagra, 2020 SCC OnLine Del 1414.

36. Hence, it can be concluded as well settled that the financial status of



either party is not the sole determining factor when considering the issue of custody, though it may be relevant. Thus, a natural corollary to the above is that even if the mother is less capable financially, she becomes no less competent to ensure the welfare of the child and the father would still be under an obligation to ensure the financial well being of the child.

37. Significantly, it has been submitted on behalf of the Appellant that for the last three years, the respondent/father has failed to pay even a single penny despite Orders of the Court, for which an Execution Petition has been filed which is pending trial. The father/respondent has thus, exhibited a reluctance to discharge his financial obligations towards the child and the mother is managing all the affairs of the child. There is no evidence whatsoever that the financial needs of the child have suffered in any manner while being in the custody of the mother.

38. The respondent/father had also asserted that the appellant/mother is *aggressive and short tempered and her anger used to flare up on the most trivial issues*, a fact which has been admitted by her. She is therefore, not fit to have the custody of the Child. Whatever may have been the temperament of the appellant/mother towards the respondent/father, but there is not a single incident to show that the appellant/mother has been temperamentally/emotionally unfit to bring up the child.

39. While considering all the circumstances in detail, the Learned Principal Judge has observed as under:-

“15. On the other hand, there appears to be no discord between mother and the child, who is happy in the custody of her mother. Apart from the aforesaid evidence, nothing has been brought on record by the petitioner to prove that return of custody of the child to the petitioner would be in



best interest of the child. As per Section 17(3) of The Guardians and Wards Act, if minor is old enough to form an intelligent preference, court may consider that preference. As already discussed above, in interaction with the court, the child who is more than 15 years of age as of now, he clearly indicates his preference to live with his mother/respondent.

16. Further, there is no evidence on record to show that the return of custody of child to petitioner is in his paramount interest. On the contrary, I am of the opinion that it is in interest of the child that his custody remains with his mother/respondent till he attains the age of majority. Therefore, issue no.1 is decided against the petitioner.”

40. We observe that the Ld. Principal Judge has rightly concluded from the circumstances that the custody of the child shall remain with the appellant/ mother when she has been in exclusive custody of the child, since he was two years old and is now more than sixteen years. However, considering that the respondent is his father, some interaction with the child is imperative for his interest and welfare, as has also been held by the Ld. Family Judge.

41. The question however, is what extent of visitation rights would ensure the child's well being. The learned Principal Judge has granted overnight stay from 12:00 noon of every first Saturday to 5:00 pm of every first Sunday, of every month. Further, on every third Sunday of the month, the custody of the child has been granted from 12:00 noon to 05:00 P.M.

42. In the case of Yashita Sahu v. State of Rajasthan, (2020) 3 SCC 67, the Hon'ble Apex Court observed that the child, especially of tender age, requires love, affection, company and protection of both the parents, he is not an inanimate object which can be tossed from one parent to the other.



The Court must weigh each and every circumstance very carefully before deciding the manner in which the custody should be shared between the parents. This is to ensure that the child does not lose social, physical and psychological contact with either of the parents. However, in extreme circumstances even the visitation rights may be denied.

43. Therefore, considering all the surrounding circumstances and keeping in mind the physical and mental well-being of the child, the profound alienation of the child for the last about 14 years and the reservation expressed by him in meeting the father, we hold that it would not be in the best interest and welfare of the child if he is perforce compelled to stay overnight with the respondent/father, even though it is on one weekend in the month.

44. **We therefore, modify the overnight custody and the visitations rights granted, as follows:**

- (i) The appellant/mother is directed to bring the child to the Children's Room of Family Court Saket on every first and third Saturday, of every month, from 02:00 to 05:00 P.M. for meeting the respondent/father. In case, any Saturday is a holiday, the child would be produced on the following Saturday or may be compensated on any other date as per mutual convenience.
- (ii) The respondent/father shall be permitted to talk to the child on mobile phone at least once a week, subject to the convenience of the child.
- (iii) This Order shall remain effective till the child attains the age of majority.



45. Accordingly, we hereby dispose of the present Appeal with the aforementioned modifications. The pending application, if any, is also disposed of.

**(NEENA BANSAL KRISHNA)
JUDGE**

**(SURESH KUMAR KAIT)
JUDGE**

JANUARY 12, 2024
JN/ S.Sharma