2024:DHC:782-DB

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

% ***Reserved on:12th September, 2023***
Pronounced on:30th January, 2024

\+ **MAT.APP.(F.C.) 23/2020 & CM APPLs. 2647/2020, 21370/2022, 26366/2022**

..... Appellant

Through: Ms. Rashmi Malhotra & Mr. Shalinder Saini, Advocates with appellant in person.

Versus

.....Respondent

Through: Mr. S.D. Singh & Ms. Shweta Sinha, Advocates with respondent and children in person.

\+ **MAT.APP.(F.C.) 63/2020 & CM APPLs. 7805/2020, 7806/2022**

..... Appellant

Through: Mr. S.D. Singh & Ms. Shweta Sinha, Advocates with respondent and children in person.

versus

.....Respondent

Through: Ms. Rashmi Malhotra & Mr. Shalinder Saini, Advocates with appellant 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.

"Adulterous Spouse" is not equivalent to "Incompetent Parent". Points for consideration in Divorce proceedings and custody matters may be co-related but are always mutually exclusive. Any adulterous relationship or extramarital affair of either spouse, cannot be the sole determining factor to deny custody of a child, unless it is proved that the adulterous relationship in itself is pernicious/detrimental/injurious to the welfare of the child.

1. The present Appeals under Section 19 of the Family Courts Act, 1984 read with Section 47 of the Guardians and Wards Act, 1890 *(hereinafter referred to as* "Act, 1890"*)* has been filed on behalf of the both the parties respectively, against the Judgment and Final Order dated 23.12.2019 passed in GP No. 22/2019 filed by the mother/respondent under ***Section 25 of the Act, 1890***, whereby both the parties have been granted joint custody of the minor children with the shared parenting as provided therein.

2. *Briefly stated*, the parties got married on 28.11.2004 according to Hindu rites and customs. From their wedlock, two daughters i.e., 'S' was born on 17.04.2011 and 'A' was born on 19.05.2013. The matrimonial life of the parties was tumultuous and strained and the parties ultimately got separated on 27.02.2018 i.e. for last about six years.

3. The respondent/mother had claimed in the ***Petition*** that the behaviour of the appellant/father was erratic and irresponsible. He had run away to some ashrams and unknown places and had abandoned the respondent/mother and the two aforementioned daughters for a period of 2.5 years from 24.08.2014 till March, 2017. During this period, she was forced to stay at her parental house along with kids, and she took care of the children as well as her in-laws all by herself. Subsequently, though the

husband returned and the respondent/mother shifted to Noida along with him in an attempt to save their married life, but their relations did not improve.

4. It was further asserted that their children were kidnapped by the sister of the appellant/father and removed from the custody of the respondent/mother, on 16.02.2018 and the appellant/mother was ousted from the matrimonial home on 27.02.2018. Since 16.02.2018 she was not even allowed to talk to children on phone as they have been in the custody of the appellant/father and she did not know the whereabouts of the children. Aggrieved, the mother filed the custody petition seeking permanent custody of both the daughters.

5. *Per contra*, the appellant/father asserted in the ***Written Statement*** that the Guardianship Petition is a counter blast to the Divorce Petition filed him on 13.02.2018 against the respondent/mother on the grounds of cruelty and adultery and to the criminal complaint filed by him on 28.03.2018 against petitioner and her paramour Amit Garg, for the offence u/s 497/498/34 IPC, in Gautam Budh Nagar Court, Noida.

6. He further alleged that the conduct of the respondent/mother was irresponsible as she did not take care of the minor daughters. She invested most of her time and energy in her illicit relationship with her paramour Amit Garg, thereby neglecting the minor children. Hence, the respondent/mother has no motherly care and concern for the minor daughters.

7. The appellant/father further explained that he had caught the respondent/mother and her paramour, Amit Garg in Hotel Apple Pie,

Sector-30, Noida, on 16.02.2018 which had precipitated the entire incident of separation of the parties and the children.

8. It is not in dispute that a divorce petition was filed by the appellant/father on 13.02.2018, while the parties were still residing together. Soon, thereafter, the Guardianship Petition No. 22/2019 was instituted by the respondent/mother on 21.08.2018.

9. The **issues** on the pleadings were made on 25.02.2019 which read as under: -

> *"i. Whether the petitioner, being mother, .is entitled to the custody of the minor girls named S and A aged seven and half years and five and half years on the grounds pleaded in the petitioner? OPP*
>
> *ii. Whether it shall be in the welfare and interest of the minor girls to entrust their custody to the petitioner? OPP*
>
> *iii. Whether the petition is not maintainable? OPR*
>
> *iv. Relief."*

10. The respondent/mother examined herself as PW1 and her brother Tarun Aggarwal as PW2, her mother Manju Aggarwal as PW3 and her father P.K. Aggarwal as PW4.

11. The appellant/father examined seven witnesses in all. Shri Rajesh Dulkan, Guest Service Executive with Roots Corporation Ltd. at Ginger Hotel as RW1, Shri Aditya Mehta, Manager, Treebo as RW2, Smt. Jaya Laxmi Mehta, neighbour of the parties as RW3, Shri Ajay Kumar, Nodal Officer, Bharti Airtel Ltd. as RW4, himself as RW5, Shri Bhartendu Sharma, owner of Hotel Apple Pie as RW6 and Shri A.K. Tiwari, Deputy Manager (HR), National Fertilizers Ltd. as RW6A. The appellant/father

tendered his evidence as RW5 by way of affidavits, Ex. RW5/A and Affidavit dated 21.10.2019, Ex. RW5/B.

12. The **Learned Principal Judge, Family Court** on detailed appreciation of the evidence led by the parties, concluded that the children were not kidnapped on 16.02.2018. Rather, the respondent/mother was caught with her paramour in Hotel Apple Pie Noida. It was thus, held that there was an extra-marital affair between the respondent/ mother and Amit Garg. The appellant/father had therefore, shifted the minor children from the matrimonial home on 18-19.02.2018 without informing the respondent/mother. It was however, concluded that the appellant/father had abandoned and completely neglected his daughters for 2.5 years.

13. The **conclusions** arrived at by the learned Principal Judge, Family Court were summarised in *Paragraph-57* of his Judgment which reads as under: -

> *"57. If the entire evidence which has come on record, discussed above and taken as proved is evaluated, the following negative traits, as far as custody of both the children are concerned, against each of the parties stands established: -*
>
> *i. Petitioner remain indulged in extra marital affair even when she was expected to devote all her time and energy for bringing up and welfare of the children. Two incidents dated 02.03.2018 and 16.02.2013 show the considerable period of this relationship of petitioner with her paramour. It is matrimonial wrong and in view of the settled law discussed above cannot be taken as a sole ground to deny custody of the children to her. In addition to that both the children during interaction with the Court have stated that they remain more comfortable in the company, of their mother.*
>
> *ii. Respondent had erratic and irresponsible behaviour from August. 2014 to March, 2017. During this period he had left petitioner and both the daughters making no efforts to meet*

them and ignoring them. This period was very crucial for the children and this was the formative phase of their life. But now during interaction with this Court children have not complained anything to show if behaviour of respondent is not as per the expected requirements."

14. It was thus, held that ***the custody of the children should be handed over to the respondent/mother.*** However, since both the children were comfortable in company of both the parties, a ***shared-parenting arrangement*** was laid down as under: -

"62. Accordingly, the shared parent is ordered in the following manner: -

a. Since both the children are comfortable in the company of both parents, it is in the welfare of the children that they should have company and guidance of both the parents during their formative, years. Accordingly, for two weeks of the month staring from January, 2020 custody of the children will remain with the petitioner and for the other two weeks custody will remain with the respondent.

b. Petitioner will shift to Noida, taking house nearby to the vicinity of school of the children.

c. The petitioner may take some time to get rented accommodation in Noida, due to this reason for the first two weeks custody will remain with respondent and for the remaining two weeks custody will shift to petitioner. This arrangement will continue in the following months.

d. Both the parties will have free access to talk with the children on phone. With the permission and consent of the parent having custody, the other parent can meet the children at their convenience at mutual place agreed between them.

e. on special occasions like birthdays, both the parties can either celebrate the occasion together or subject to the convenience of either party can share custody on that day.

Same manner can be followed on the other occasions like Deepawali and other festivals.

f. Petitioner had stated in her affidavit that she can get both the children admitted in DPS, Faridabad in the next academic session. Noida aiso has good schools and this order should not be taken as putting restrictions on the parents in not shifting the school of the children if they desire.

g. Though issue regarding maintenance of both the children is not raised but since shared parenting has been ordered, both parties will bear the expenses of the children in equal proportion."

15. Both the parents were aggrieved by the impugned Judgment dated 23.12.2019 and have filed their respective Appeals.

16. During the pendency of the present Appeals, this Court *vide* Order dated 23.01.2020 ***had directed that the custody of both the children shall remain with the respondent/mother till further orders.*** *Vide* subsequent *Order dated 27.02.2020,* ***the interim arrangement was modified and it was directed that the custody of the children would remain with the appellant/father till further orders.*** However, the *Supreme Court vide Order dated 17.03.2020 in SLP (Civil) No. 6019/2020* stayed the order of custody and it was directed that *status quo* be maintained with regard to the custody of the minor daughters. ***Consequently, the custody of the children has remained with the respondent/mother, though visitation rights have been granted from time to time to the appellant/father***.

17. ***The appellant/husband has strenuously argued*** that the adulterous relationship of the respondent/wife disentitled her to the custody of the Children. In support of his assertions, he placed reliance on *Nil Ratan Kundu v. Abhijit Kundu,* (2008) 9 SCC 413; *Gaurav Nagpal v. Sumedha Nagpal,*

(2009) 1 SCC 42; *Kamlesh Kumari v. Laxmi Kant*, 1997 SCC OnLine Raj 913; *Rowhith Thammanna Gowda v. State of Karnataka* 2022 SCC OnLine SC 937; *Deepti Kapur v. Kunal Julka* AIR 2020 Del 156; and *Yashita Sahu v. State of Rajasthan*, (2020) 3 SCC 67.

18. ***The respondent/ mother on the other hand, argued*** that she had looked after the children when the appellant father had abandoned them for 2.5 years. Also, she is fully capable and has in fact been taking good care of all the needs and requirements of the children and the custody of the children has been rightly granted to her. To buttress their arguments, the respondent/wife has relied upon *Prabhati Mitra v. D.K. Mitra* (1984) 25 DLT 186; *Rama Shankar v. Smt. Rama Beti alias Sharda*, 1979 SCC OnLine Raj 286; *Mary Vanitha v. Babu Royan* 1991 SC OnLine Mad 843; *J. Finny Jefferson v. S. Ponsiro Bella* CRP (PD)(MD) No. 383 of 2009 ; *Chavda Twinkle v. State of Gujrat* 2020 SCC OnLine Guj 1167; *Khawar Butt v. Asif Nazir Mir* 2013 (139) DRJ 157; *Vishal Kaushik v. Family Court and Anr.* 2016 (1) RLW 693 (Raj.); Reyala M. Bhuvaneswari v. Nagaphanender Rayal 2007 SCC OnLine AP 892; *Anurima @ Abha Mehta v. Sunil* 2016 (1) MPLJ; *Vinit Kumar v. CBI* 2019 SCC OnLine Bom 3155; *K.L.D. Nagasree v. Government of India*, 2007 (1) APLJ 1 (HC); *PUCL v. Union of India* (2005) 5 SCC 363; *K.S. Puttaswamy (Privacy-9J.) v. Union of India*, (2017) 10 SCC 1; *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840; *Romani Singh v. Lt. Col. Vivek Singh*, 2013 SCC OnLine Del 1264; *Lt. Col. Manish Sehgal v. Mrs. Meenu Sehgal*, 2013 SCC OnLine Del 5117; *Asha Varghese v. Leelama Pailo and Ors.* 2004 SCC OnLine Mad 520; *Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413; *Kriti Kumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi* (1992) 3 SCC

573; *Anvar P.V. v. P.K. Basheer* , (2014) 10 SCC 473; and *Radhika Vickram Tikkoo v. Vickram Ravi Tikkoo*, 1955 (35) DRJ.

19. **Submissions heard from the counsels for the parties and the evidence as well as the documents perused.**

20. Admittedly, the parties got married on 28.11.2004 and eventually, they got separated after about 14 years of matrimonial life, on 27.02.2018.

21. The appellant/father had essentially agitated that because of the conduct of the respondent/mother (*wife of the appellant*) who was having extra-marital relations, he came under depression and left the matrimonial home on 24.08.2014 and returned after about 2.5 years in March, 2017.

22. The appellant/father has explained in his testimony that for the period from 25.08.2014 to 31.03.2015, he resided at his home at Sector-20, Noida; from March, 2016 till 06.03.2017, he resided in Ashram at Dwarka, New Delhi and at his native village in Meerut and also at his sister's place at Noida.

23. The appellant/father's explanation for separating from the family for about 2.5 years was that he came under depression to such an extent that he even tendered his resignation from his job, though he withdrew the same after about three months on the counselling by the family members.

24. As has been observed by the learned Principal Judge, Family Court that there are no supporting documents to explain the nature of depression, but we observe that the fact remains that he got disillusioned by whatever circumstances, which compelled him to be away from his family for about 2.5 years. Such disillusionment of the appellant/father is not sufficient to conclude that he was permanently rendered incapable of being a good parent.

25. Likewise, though it has been proved from the overwhelming evidence on record that the respondent/mother had an extra-marital affair, this in itself cannot be the ground to disentitle the respondent/ mother from the custody of the children unless there is something more to prove that her interests elsewhere has led to impinging on the welfare of the children. The question remains that whether such involvement of the respondent/mother had rendered her unfit for the custody of the children?

26. The evidence on record reflects that the respondent/mother frequently spent her time by taking leave from the office or otherwise with the third person, Amit Garg in whom she had special interest. While the over-emphasis of the entire evidence has been to prove the extra-marital affair, but there is not an iota of evidence to show that whatever may have been the personal affairs of the respondent/mother, she in any way, failed to take care of the needs of the children. The respondent/mother may not have been a faithful or a good wife to the appellant/husband, but that in itself is not sufficient to conclude that she is unfit to have the custody of the minor children, especially when no evidence has been brought on record to prove that she in any manner, neglected to take care of the children or that her conduct has resulted in bad influence of any kind, on the children.

27. It is not denied that the respondent/mother is a Post-graduate in Mass Communication and M.Sc. and has passion for teaching. Both the appellant/father and the respondent/mother are senior officers in the Government and they are therefore, similarly placed and are equally capable financially to take care of the children.

28. Both, being employed in services, naturally look for support of their parents for taking care of the requirements of the children. Admittedly, the

respondent/mother had been residing with her parents while the appellant/father also has his parents to support him in taking care of the children. Here too, they both are similarly placed in their capacities to look after the welfare of the children. There is not an iota of evidence that the education of the children has been hampered or has suffered in any manner, while the children were in the exclusive custody of the respondent/mother for a period of 2.5 years or subsequently when the children were with the appellant/father. It thereby, leads to the irresistible inference of the educational requirements of the children also being taken care of equally by both the parents.

29. Pertinently, we may refer to the case of *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42 wherein the Supreme Court observed that "*Merely because there is no defect in his personal care and his attachment for his children—which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him.* ***Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society*** *and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them."*

30. Therefore, though the father may be equally capable of taking care of the minor daughters, but that in itself cannot be the ground to disturb the custody of the children who are now in the custody of the respondent/mother since January-February,2020.

31. In this backdrop, we also cannot overlook that the children are the minor girls who are now aged about 12 and 10 years respectively. Being daughters who are in their formative years, their special needs during their puberty and adolescence, can be better understood and taken care of by the respondent/mother. Moreover, the children, during their interaction with the learned Principal Judge, Family Court, had expressed their intelligent preference to be with the respondent/mother. Though they had conceded that they were also comfortable with their appellant/father but they wanted to stay with their mother.

32. **Therefore, considering that it is the interest and welfare of the children, which is the paramount consideration in such matters, the grant of permanent custody to the respondent/mother cannot be faulted. We do not find any reason to interfere in the grant of permanent custody to the respondent/mother.**

33. We observe from the above discussion that the appellant/father has also been equally involved in the welfare of the children. The relationship between the appellant/father and the respondent/mother as husband and wife may not have been of trust, faith and cordiality, but their relationship *inter se* cannot be held to be the determining factor for working out the custody plan of the children.

34. 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.

35. Considering that the appellant/father has always been there to take care of the children and there is no evidence to show that the appellant/father has, in any manner faulted in his care for the children, accordingly, we observe that the learned Principal Judge, Family Court has rightly concluded that both the parents must be involved and thus, devised a shared-parenting plan.

36. **However, in our considered opinion, the shared-parenting plan needs to be modified by taking into consideration their educational needs and also an element of stability in their day-to-day life. Hence, we revise the shared-parenting plan in the following manner: -**

(i) That the regular/permanent custody of the children shall remain with the respondent/mother, but the appellant/father shall have his right of day custody from 09:00 A.M. till 08:00 P.M. on every second Sunday of the month. In case of unavailability of the children on this particular day, the same shall be accommodated on any other day, as per the convenience and availability of the minor children.

(ii) That whenever there are school holidays of four days and more including summer break, winter break, Dussera and Diwali and any other vacations, the same shall be shared equally by both the parents.

The first half shall be with the appellant/father and the second half with the respondent/mother, subject to mutual adjustments.

(iii) That on special occasions, like birthday or any intervening festival/occasion, the appellant/father shall have a right to meet the children for minimum three hours during the day, which may be worked out mutually by the parties.

(iv) That the appellant/father shall be regularly informed about the educational progress of the children and the report cards shall be shared with him. Also, he may attend the Parent-Teacher Meetings (PTM).

(v) That all the decisions in regard to the education and future of the children shall be taken jointly by both the parties.

(vi) That the appellant/father shall be entitled to talk to the children through mobile phone or through video conferencing at least once in three days, in the evening at about 06:30 P.M., though it may be modified according to the mutual convenience of the parties and the children.

37. In addition to above shared-parenting plan, we further direct both the parties that the focus of both the parents should be on the welfare of the children and to provide them conducive atmosphere for their all-round growth and development and both the parents shall refrain themselves from talking ill about each other or make any attempt to tutor the children against the other parent.

38. We, in the end, observe that both the parties being responsible citizens having the paramount interest of the children, shall adhere to the aforesaid

shared-parenting plan and shall work together for the well-being of the children.

39. Accordingly, both the Appeals, along with pending applications, are disposed of in the above terms.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

JANUARY 30, 2024
S.Sharma/JN