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

Reserved on: 28th July, 2023
Pronounced on: 11th October, 2023

\+ MAT.APP.(F.C.) 132/2020 & CM APPL. 27875/2020 (for direction), CM APPL. 4975/2021 (for additional documents), CM APPL. 21862/2021 (for interim custody), CM APPL. 32875/2021(for interim custody) & CM APPL. 37930/2021 (under Section 12 of the Family Courts Act, 1984 read with Section 12 of the Guardian and Wards Act read with Section 151 CPC)

SUGANDHI AGGARWAL ..... Appellant

Through: Appellant in-person

versus

COL. RAMNEESH PAL SINGH ..... Respondent

Through: Respondent in-person

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present appeal under Section 19(1) of the Family Courts Act, 1984 has been preferred by the appellant against the judgment dated 22.08.2020 passed by Sh. Rakesh Syal, Learned Judge, Family Courts, West, Tis Hazari

Courts in GP No. 45/17 (Old GP No. 75/2015) titled 'Smt. Sugandhi Aggarwal Vs. Colonel Ramneesh Pal Singh'. *Vide* the impugned judgment, the learned Family Court, granted permanent custody of the minor children to the Respondent-father, and provided visitation rights to the present appellant.

Submissions of the Appellant/Sugandhi Aggarwal

2. It is the case of the appellant that the marriage between the appellant and respondent was solemnized on 22.12.2002 at Delhi, in accordance with Hindu/Sikh rites and ceremonies. Out of the said wedlock, the parties have two minor children, one daughter namely, 'SSU' aged about 14 and a son namely, 'SSH' aged about 10 (as referred to in the impugned judgment). In December 2013, the respondent was promoted to the rank of Colonel and was supposed to be posted at Jammu and Kashmir. Therefore, it was mutually decided between the parties to shift the appellant and the children permanently to Delhi.

3. The appellant further submitted that on the night of 08.08.2015, when the respondent visited the household premises at Delhi, certain differences arose between the parties in the presence of their family members with regard to the alleged character of the present appellant. Upon the occurrence of the said incident, the appellant left the premises for a night. On the next day, when she visited the house, she found it locked and the respondent and the minor children were not available at the premises. Thereafter, the appellant filed a missing children report on 19.08.2015 as well as a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 on 17.08.2015.

4. The appellant submitted that she subsequently learnt that the respondent was staying with the children at Gulmarg, Kashmir and was soon

going to shift to Bikaner, Rajasthan. The appellant alleged that the respondent had abducted their minor children, which caused them trauma, owing to the respondent's unnatural and irrational behavior. Therefore, a guardianship petition was filed by the appellant seeking custody of the minor children of the parties before the learned Family Court, which was disposed of by the learned Family Court in terms of the impugned judgment dated 22.08.2020. The learned Family Court directed as follows:

> "16.1 In view of the aforesaid discussion, it is directed that the permanent custody of minor children SSU and SSH shall remain with the respondent. However, the petitioner shall be entitled to have interaction with the minor children daily through audio-video call for half an hour, between 7:00 PM to 8:00 PM. The respondent shall facilitate the said call. She shall also be entitled to visit the minor children and take them out with her from 10:00 AM to 5:00 PM, on every second and fourth Sunday, at the station, where the minor children are staying, subject to their school/educational commitments. She can pick up the children from their residence at 10:00 AM and drop them back at 5:00 PM. If it is not possible to have visitation on any such day, it shall be compensated on the next Sunday i.e. third or fifth/first Sunday. Further, during the summer vacations and the winter vacations in the school(s) of the minor children, the petitioner shall be entitled to have the custody of the minor children for ten days and five days respectively. Such days can be mutually decided by the parties. Accordingly, the petition filed by the Petitioner for seeking custody of the minor children SSU and SSH is dismissed, subject to contact/ visitation/custody rights of the petitioner as aforesaid."

5. The appellant submitted that the learned Family Court failed to take into consideration that the son of the former requires medical attention, owing to his ailments. The appellant urged that apart from her, there is no other female presence in the house, and therefore, her absence negatively impacts the upbringing of her daughter. Furthermore, she also submitted that the

respondent has a transferable job and therefore, cannot suitably take care of the children.

6. The appellant submitted that the learned Family Court has also not taken note of the fact that that the respondent has made deliberate attempts to alienate the children from the appellant. It was submitted that even though the children, in their interactions with the learned Family Court, had shown equal alignment towards both parents, the appellant was neither allowed to meet or even speak with her children.

7. It was further submitted that the learned Family Court has only taken note of the cross-examination of the present appellant and has erroneously declared her an untruthful witness because of minor discrepancies. She also submitted that the learned Family Court failed to appreciate the cross-examination of the respondent, wherein major discrepancies had came to light.

8. The appellant submitted that the learned family court has also failed to consider that the alleged WhatsApp chats between her and 'CGA' could have been tampered or altered with. She also submits that the reliance placed by the learned Family Court on the aforesaid WhatsApp chats was misplaced as the phone and laptop of the parties were never submitted for proper inspection, nor the printouts of the alleged chats were handed over for perusal.

9. It was submitted that the learned Family Court failed to consider that prior to the alleged incident on 08.08.2015, the respondent was already seeking legal advice in relation to obtaining a divorce which sufficiently indicates that the events which occurred on the night of 08.08.2015 were staged accordingly to satisfy the ulterior motive of the respondent. She also submitted that the learned Family Court has failed to consider that the present

respondent was on cordial terms with the officer, whom he alleges to be in an adulterous relationship with the appellant. The said fact renders allegations of adultery levelled by the respondent sufficiently doubtful.

10. The appellant submitted that the custody of children was denied to her on the ground of the allegations made by the respondent in relation to her character and the childrens' opinion, which could have been influenced by the respondent while they were in his custody.

11. The appellant argued that being in custody of the respondent is not in the best interest of the children as they are in need of motherly love and care, which continues to create an adverse impact on their physical and mental growth. The appellant also submitted that the respondent is an unfit guardian as his job requires him to travel constantly, which further contributes to negligence of the children during their adolescent stage, especially in view of the fact that their son is susceptible to febrile seizures and needs constant medical attention.

12. The appellant placed reliance on a judgment of the Hon'ble Supreme Court in, **Gaurav Nagpal v. Sumedha Nagpal** reported as **(2009) 1 SCC 42**, and in particular, the following paragraphs thereof:

> "15. It was further submitted that the child's welfare cannot be weighed in terms of money, facilities, area of a house or the financial might of either the father or the mother. It was pointed out that respondent had no option but to reside with her parents and is a teacher in Salwan Public School. Merely because she was residing with the parents cannot disqualify her from looking after her child. She may not be as financially sound as the appellant, but that alone cannot disentitle her from the custody of the child. She has stated that she was drawing a salary of Rs.13,000/-p.m. (which is likely to be substantially increased) and was receiving Rs.25,000/- as maintenance pursuant to the order passed by the Delhi High Court and she can look after the financial needs for educating the child. She resides in Gulabi Bagh which is well located and surrounded and there is a park nearby. The colony has 8-10 parks and it is a

better location where the child can be well developed. Therefore, it cannot be said that the respondent resides in an area which is unsuitable to the minor child.

16. It is also pointed out that the appellant has no fixed residence. He shifted from Delhi to Bahadurgarh and then Gurgaon and back to Delhi in a house in Sainik farm where the appellant claims to reside. Same is owned by his brother. It has been a deliberate attempt to poison the mind of the child. Negative facts have been fed into the child's mind against the respondent. It was further submitted that if sufficient time is given the child would overcome any tutored prejudice. Though, there was a claim that the relatives would provide healthy environment to the child, none of them stepped into the witness box and affidavits filed much later cannot be a substitute for the evidence in Court. The High Court took note of Section 13 of the Act which is the foundation for the custody of the child. The welfare of the minor is of paramount consideration. The High Court looking into the materials placed observed as follows:

> "In view of the facts, noticed herein before, the question that exercises this Court's mind is should the child be permitted to stay with a father, who inculcates fear and apprehension in the mind of minor, against his mother and thwarts court orders with impunity. The answer to the above questions, in my opinion, must be in the negative. The appellant, cannot wish away his role, in the minor harboring such an irrational fear towards the mother. I am conscious of the fact that directing the custody of the child to the respondent, may result in a degree of trauma. However, the daily trauma the child appears to undergo while being tutored against his mother would be far in excess of the trauma likely to be faced while entrusting to the respondent. The minor child must be allowed to grow up with a healthy regard for both parents. A parent in this case, the appellant, who poisons the minor's mind against the other parent cannot possibly be stated to act for the welfare of the minor."

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18. In support of the appeal, learned counsel for the appellant re-iterated the stand taken before the High Court. It was additionally submitted that the child's reluctance to go with the mother should have been duly considered by the High Court. Apparently, that has not been done."

13. The appellant further placed reliance on the following judgments:

i. Chetna Ramatheertha v. Kumar V. Jahgirdar, 2003 (3) KarLJ 530.

ii. Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840.

iii. Dhanwati Joshi v. Madhu Unde, (1998) SCC 112.

iv. Deepti Kapur v. Kunal Julka, 2020:DHC:2188.

v. Jayashree v. Vivekananda, MAT Appeal No. 410/2012.

vi. Mrs. Umamaheshwari v. V. Sekar, AIR 1992 Mad 272.

vii. Mamta Alias Anju v. Ashok Jagannath Bharuka, (2005) 12 SCC 452.

viii. Thrity Hoshie Dolikuku v. Hoshiam Shavaksha Dolikuku B, 1982 AIR 1276.

Submissions of the Respondent/Col. Ramneesh Pal Singh

14. *Per contra*, the respondent submitted that the present appellant is incapable of looking after the welfare and social development of the children. He submitted that the appellant engaged in an adulterous relationship with his colleague, under the same roof, where her children were present. Therefore, it was submitted that the said actions of the appellant prove that she had no regard for the psychological impact her actions would have on the children.

15. The respondent further submitted that the factum of the extra marital relationship of the appellant has been clearly brought out in the impugned judgment and has been dealt with by the learned Family Court. All the evidence adduced in the proceedings before the learned Family Court was reliable and produced in adherence to all rules and regulations stipulated under law. He also submitted that the written statement submitted on behalf of 'CGA', in HMA No. 257/2017 titled 'Col. Ramneesh Pal Singh v. Sugandhi Aggarwal', clearly brings out the forensic analysis of the evidence submitted during the trial which clarifies that there is no indication of alteration or tampering. Therefore, the appellant's averment that the learned Family Court has relied on forged and fabricated evidence does not hold any ground.

16. The respondent also submitted that he had never objected or interfered with the appellant's desire to meet the children since 2015 and at no instance has made attempts to instill poison in the minds of the children against the appellant. However, the children themselves, and on their own accord, refused to visit their mother on numerous occasions and expressed their desire to stay with the respondent.

17. The respondent argued that the appellant has an unstable nature and prioritized her relationship with 'CGA' over and above her children's well-being. He further submitted that on 08.08.2015, the appellant left the house on her own accord and has been falsely claiming that there was a threat to her life. The respondent further submitted that the impugned judgment has correctly given a reasoned observation with regard to the appellant's character by taking into consideration all the relevant facts and evidence. Moreover, the appellant's cross-examination has brought out the fact that she lied under oath and had given a false statement, which eventually lead to her being declared as an unreliable and untruthful witness.

18. The respondent further submitted that the he has ardently nurtured and provided a healthy lifestyle to both his children as a single father. He has undertaken all measures to support his daughter who has attained puberty and duly provides for medical attention as required by her. It was also submitted that the appellant's son suffered from febrile seizures only because of the neglectful attitude of the appellant, who despite the respondent persuading her to rush the child into emergency, caused considerable delay which led to the said child ultimately suffering a seizure and being hospitalized for two weeks.

19. In support of the aforesaid submissions, the respondent relied on the following precedents:

i. Lahari Sakhakumari v. Sobhan Kodalli, (2019) 7 SCC 311.
ii. Mamta v. Jagannath Bharuka, (2005) 12 SCC 452.
iii. Vikram Vir Vohra v. Shalini Bhatia, (2010) 4 SCC 409.
iv. Nil Ratan Kundu v. Abhiji Kundu, (2008) 9 SCC 413.
v. J. Selvan v. N. Punidha, (2007) 4 CTC 566.
vi. Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840.
vii. Deepak Bajaj v. State of Maharashtra, (2008) 16 SCC 48.
viii. Mausami Moitra Ganguli v. Jayant Ganguli, (2009) 7 SCC 673.
ix. Chetna Ramatheertha v. Kumar V. Jahgirdar, 2003 (3) Kar LJ 530.
x. Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 840.
xi. Dhanwanti Joshi v. Madhu Unde, (1998) SCC 112.
xii. Vivek Singh v. Romani Singh, (2017) 3 SCC 231.
xiii. Mausami Moitra Ganguli v. Jayanti Ganguli, (2009) 7 SCC 673.

Analysis and Findings

20. Determination of the custody of minor children cannot be construed through a conventional *modus operandi*, rather is dependent upon the facts and circumstances of each case. Having said that, although the custody/guardianship rights cannot be decided solely by interpreting legal provisions, however the principles governing the custody of minor children are well settled. The paramount consideration, while deciding the custody of a minor should be the 'welfare' and 'well being' of the minor child.

21. *Vide* the impugned judgment dated 22.08.2020, the learned Family Court decided the custody of the minor children in favour of the present respondent and against the appellant. The learned Family Court concluded that the secretive and amorous extra-marital relationship of the present appellant with an officer in the Army, which eventually led to the cause of

separation between the parties, cannot be conducive to the interest and welfare of minor children. In the impugned judgement, the learned Family Court, after examining the evidence with regard to the allegations with respect to the extra marital relationship of the appellant, has categorically arrived at a conclusion that the Call Detail Records and the WhatsApp chats exchanged between the present appellant and the Army officer established that the appellant was involved in an adulterous relationship. Furthermore, while keeping in view the settled principles with regard to the moral and ethical values while determining the concept of welfare of minor children, the learned Family Court has stated that the present appellant, on several instances, made contradicting statements under her deposition, which evinces that her testimony cannot be relied upon and therefore, she is an untruthful witness. The learned Family Court has also held that the present appellant, admittedly has stated to not have any independent income and has exhibited suicidal tendencies. Under the said context, it is the observation of the learned Family Court that the present respondent, by virtue of his profession, shall be able to provide for a financially stable life to the minor children. It has been further concluded that averments as made by the present appellant against the respondent, are not corroborated by any material on record, which in turn further strengthens the argument that there exists no shred of evidence to indicate that the present respondent has not been or cannot be a good father/parent.

22. *Vide* the impugned judgment, the learned Family Court has also categorically taken into consideration the preference of the minor children, who have, in turn indicated their inclination and preference to live with their father, i.e., the respondent. In view of the said affirmation, the learned Family

Court has deemed it appropriate to not unsettle the minor children from their present environment but at the same time, has opined that they shall also not loose complete contact with their mother. In view of the same, the Learned Family Court has passed the impugned judgment while providing permanent custody of the minor children to the present respondent, while conferring visitation rights to the present appellant.

23. The observations of the learned Family Court are as under:

> "15.4 As per the respondent, the petitioner was in a secretive and amorous extra-marital relationship with CGA and was in contact with him physically as well as through telephone and whatsapp. The same is denied by the petitioner. The petitioner, while deposing as PW1, in her cross-examination, stated that she came to know CGA in the year 2002 as he and the respondent were friends. She used to speak to wife of CGA. She does not remember, if she ever called CGA. She had not interacted with CGA over whatsapp. She does not remember, whether, she, respondent, CGA and his wife had a chat group on whatsapp. She further stated that her mobile number was 9891445445. In the year 2015, she was having the same mobile number. She further stated that she was not having contact of CGA saved in her mobile phone. She does not remember, whether 85277010440 is the mobile number of CGA. She further stated that she had seen photocopy of Call Detail Record, Mark PW1/D1 (Colly.) [also Ex. RW1/2 (Colly.)] Her phone number is mentioned on the left side of the Call Detail Record, She could not say, whether the details contained therein pertains to call made to or from her number. It can be seen that the petitioner has not denied that the aforesaid Call Detail Record are not of her mobile number. With regard to Call Detail Record, RW2 Subedar M.N. Singh, posted at HQs Delhi Area, Delhi Cantt. has produced the proceedings of Court of Inquiry in respect of CGA. He has produced Call Detail Record of mobile No.9891445445, from 01.04.2015 to 30.11.2015, the tower location of said mobile phone, the application form for the said mobile number and certificate u/s 65 B of the Indian Evidence Act, 1872, Mark-RW2/X3 (Colly.). He has also produced photocopy of Call Detail Record of mobile No.8527701044, along with certificate u/s 65 of the Indian Evidence Act, 1872, Ex.RW2/2 (Colly). Further, he has produced photocopy of Call Detail Record of mobile No.8527701044, from 01.04.2015 to 15.07.2015 along with certificate u/s 65 of the Indian

Evidence Act, 1872, Mark-RW2/X-2 (Colly.). As per the application form, which is part of Mark RW2/X-3 (Colly.), the mobile phone number 9891445445 is in the name of mother of the petitioner. However, it is not disputed that the same was being used by the petitioner. It is also clear from the record, as is discussed in the succeeding paragraphs, that mobile number 8527701044 was being used by CGA. It has been submitted by Ld. Counsel for the respondent that the Call Detail Records, Mark-RW2/X-3 (Colly.), Ex.RW2/2 (Colly.) and Mark-RW2/X-2 (Colly.) had been originally provided by the service providers, who have no interest in the case. Similarly, RW2 is also an independent person, who has no interest in the case whatsoever. The above fact is not disputed. There is force in the contention of the Ld. Counsel for the respondent. There appears to be no reason to disbelieve the above Call Detail Records. The said Call Detail Records reveal that number of calls were made from mobile phone number 9891445445 to mobile phone number 8527701044 and vice versa, especially in the month of July, 2015. In this regard, the Call Detail Records of both the said mobile numbers, Mark-RW2/X-3(Colly.) and Mark-RW2/X-2(Colly.) correspond to each other. The petitioner has falsely stated that she does not remember having ever called CGA.

15.5 Further, petitioner/PW1, during her cross examination, was shown the printouts of the screen shots of whatsapp messages/chats, Mark-PW1/D2 (Colly.). She stated that none of the messages have been received or sent by her. She stated that she does not know, whether, the screenshots, Mark-PW1/D2 (Colly.) (Also Ex.RW1/1-Colly.) pertain to her mobile phone or not. She further stated that the contacts details given on the left side of the screenshots in Mark-PW1/D2 (Colly.) [also Ex.RW1/1(Colly.)] are known to her. Some of them were available in the contact list of her mobile phone at that time. Some of them are still available in her contact list. She admitted that she had been using whatsapp during July and August 2015. She further stated that she does not remember whether during the Court of Inquiry, she made any statement, wherein, she accepted that the whatsapp messages cannot be fabricated. She admitted that in para 409, on the second last page of her statement in the Court of Inquiry, Ex. PW1/DA, the Court of Inquiry has observed that she had, after reading the paragraphs, accepted that original contents of message only in this message as written as English language in words/sentence did not delete/alter/substitute. She voluntarily stated that immediately after the above observation was forced upon her and they refused to take the printouts produced by her on record, she had approached the senior officers. In his affidavit, RW1/A, the respondent

has stated about synchronizing phone of the petitioner with his laptop in June 2015 and checking the whatsapp messages on 05.07.2015. He has also produced the printouts of the screenshots of whatsapp messages of the petitioner, RW1/1 (Colly.) [also Mark PW1/D2(Colly.)] along with affidavit/certificate u/s 65 B of the Indian Evidence Act, 1872, Ex.RW1/1A. During his cross-examination, a suggestion was given to RW1 that he had synchronized her whatsapp account with his laptop without her knowledge and consent, which he admitted. It is well settled that suggestions made to the witness by the counsel of the opposite side and the reply to such suggestions would form part of the evidence and can be relied upon by the Court along with other evidence on record to determine the fact in issue. Such admissions are covered within the expression "matters before it" used in the definition of the term "proved" in section 2 of Indian Evidence Act, 1872. In this regard reference can be made to **Tarun Bora alias Alok Hazarika Vs. State of Assam, 2002 Cri.L.J., 4076 and Rakesh Kumar alias Babli Vs. State of Haryana, AIR 1987 SC 690**. Thus, the petitioner has admitted that the respondent had synchronized her whatsapp account with his laptop. To the suggestion that every time whatsapp message is to be seen in the laptop, it has to be synchronized with the mobile phone either by scanning QR code or by using password, he stated that he did not need it at that time after he had synchronized it for the first time. To the suggestion that there was forensic report regarding his laptop to the effect that there was no such message, he deposed that he does not know about the forensic report, however, the messages were there in the laptop. He stated that he cannot produced the laptop, as it was already deposited with General Court Martial.. He denied the suggestion that before submitting his laptop at the stage of summary of evidence, he had removed the data as per his convenience. It was also suggested to him that he had taken screenshots of only selected chats from the whatsapp web of the whatsapp account of the petitioner, which he admitted, although, he voluntarily stated that he had taken all the screenshots of whatsapp chat with CGA By giving the above suggestion, the petitioner also admitted that the respondent had taken screen shots of the whatsapp messages of the whatsapp account of the petitioner, albeit selected ones. RW1 also stated that he had saved the screenshots in MS Word document. No question was put to RW1 that the certificate under section 65B of the Indian Evidence Act, 1872, Ex.RW1/1A was false. To the suggestion that if a document is created in MS Word, it can be altered or changed, he stated that a text document can be edited but he was not aware, whether, a screenshot can be edited. He further stated that he had taken

printouts of screenshots for the first time when he came to Delhi in the morning of 08.08.2015.

15.6 It can be seen that in the printouts of whatsapp messages, Ex. RW1/1(Colly.) [also Mark PW1/D2(Colly.)], at internal pages 32 to 61, besides chats between the petitioner and 'A .... Delhi', which refers to CGA, on the right side there is also contact info of the contact. It shows mobile number of 'A ..... Delhi' as 8527701044 and the photograph of 'A .... Delhi', apparently with his family. From the facts and circumstances which have come on record, there appears to be no doubt that the telephone number 8527701044 was being used by CGA and the chats contained in Ex.RW1/1 (Colly.) (also Mark PW1/D2) were exchanged by petitioner with CGA. The chats contained in Ex.RW1/1(Colly.) [also Mark PW1/D2(Colly.)] correspond to the Calls Detail Record, Mark-RW2/X3 (Colly.) of mobile number 9891445445 of the petitioner and Call Detail Record, Mark RW2/X2 (Colly.) of mobile number 8527701044 of CGA. lt is pertinent to observe that in the whatsapp chat, Ex.RW1/1(Colly.) [also Mark PW1/D2(Colly.)], at page 61. at 12:05 AM on 07.08.2015, the petitioner had sent a whatsapp message, "*speak to me*" to CGA. As per page 39 of the Call Detail Record, Mark RW2/X3 (Colly.), of mobile No.9891445445, CGA has made a call to the petitioner on 07.08.2015 at 0.07.03 AM for 748 seconds. The same is also reflected from the Call Detail Record, Mark RW2/X2 (Colly.) of mobile number 852770l044 of CGA. This substantiates the authenticity of the aforesaid documents as well as the fact that the petitioner and CGA were exchanging whatsapp chats as contained in Ex.RW1/1(Colly.) (also Mark-PW1/D2). The contents of the documents viz. CDR of mobile number 8527701044 of CGA, Mark-RW2/X2 (Colly.), the CDRs of the mobile 9891445445 of the petitioner, Ex. RWl/2 (Colly.) [also Mark-PW1/Dl(Colly.)] and Mark-RW2/X3 and the whatsapp chats, Ex. RWl/l(Colly.) [also Mark PW1/D2(Colly.)] between the petitioner and CGA corroborate each other. Thus, it can be safely inferred that the aforesaid document are authentic and genuine.

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15.9 The above contents of the screen shots of whatsapp chats, Ex.RWl/l(Colly.) [also Mark PWl/D-2(Colly.)] show the nature of intense amorous relationship between the petitioner and CGA. It can be seen that in the said whatsapp chats, the petitioner and CGA have been referring to each other as "sweetheart" and "baby". They have expressed to each other to feel and hold each other. They are discussing how to keep their affair secret and to meet discreetly. The above chats also show that they have been discussing sexual fantasies and positions that they

want to engage with each other. The above chat also reveals about their earlier sexual encounter on a sofa. The petitioner is also calling CGA to her place by telling him that her children are fast asleep. From the material which has come on record, it is clear that the petitioner was having a secretive and amorous extra-marital relation with CGA. She has falsely stated that she had not exchanged any whatsapp chat with CGA or that she does not remember having ever called CGA. The conduct of the respondent after learning about the aforesaid relation of the petitioner and CGA and the betrayal of his trust by them, by checking her whatsapp chats and confronting them in presence of the three concerned families, in a straight forward manner, was quite natural. There is no reason to disbelieve him.

15.10 RWl, in his affidavit, EX.RW1/A, has deposed that when he visited the petitioner at New Delhi during his vacations, he realized that she was behaving indifferently towards him. He also came across a message on the phone of the petitioner in November, 2014, which read, "*I am waiting for 4th of December, imagine a wife waiting for husband to leave*", addressed to their common friend Ms. 'BR'. Upon confronting the petitioner with the aforesaid message, she dared him of the dire consequences and threatened him not to touch her phone. He further stated that when he visited the petitioner at New Delhi in April, 2015, he noticed that she had developed a sudden interest in CGA. She left no stone unturned to meet CGA and planned for get together and dinner etc. He further stated that when the petitioner visited him in J&K in May, 2015, he had synced the phone of the petitioner with his laptop due to which, he could view the messages sent/received by the petitioner from her phone through whatsapp. He was at a forward post after the petitioner left in July 2015 and was able to check messages only on 5th July, 2015. He was devastated upon reading the contents of the messages between her and CGA. He kept on saving screenshots of the messages between the petitioner and CGA between 05.07.2015 to 08.08.2015. He had also deposed about the contents of the intimate and sexually explicit chats between them. He has further stated that on 08.08.2015, he came to New Delhi. He had invited CGA and his family, his parents and parents of the petitioner for dinner. During the said meeting, he confronted the petitioner and CGA regarding their affair. Both CGA and the petitioner accepted their affair. During this confrontation, the petitioner's and CGA's acceptance was recorded by him in a video from his phone. The petitioner kept on insisting that he should discuss the issue first with her and not in front of her parents. He made it amply clear that he wanted

separation from the petitioner and that he would keep the custody of the children. She did not object to the same.

15.11 During his cross-examination, a suggestion was given to RW1 that he had synchronized her whatsapp account with his laptop without consent and knowledge of the petitioner, which he admitted. He has also stated that after seeing the whatsapp messages, he did not think to speak to the petitioner about this on telephone. He wanted to confront her in person. He further stated that to the best of his memory, he had informed the petitioner in the morning of 08.08.2015 that he would be coming to Delhi. As per him, he had asked the petitioner to speak to GI for inviting them for dinner. Regarding the get together of 08.08.2015, he has testified that he had not recorded the entire meeting of 08.08.2015. He started recording, when he started speaking. It was also suggested to him that he had made recording in his mobile phone, which he admitted. Thus, the petitioner has also admitted that the respondent has made recording in his mobile phone during the get together on 08.08.2015. RW1 further stated that he had not informed anybody that he was recording the meeting in his mobile phone. Now he is not using the said mobile phone from which he had recorded the meeting. He could not produce the mobile phone as it was lying at the place, where he was putting up. He denied the suggestion that on 08.08.2015, the petitioner had not admitted her relation with CGA. He admitted that as per the recording and transcript thereof, Mark PW1/ D4, during the get together, he had stated "*but she is not admitting it*". He denied the suggestion that when the petitioner stated, "*chalo accept ho gaya*", she had not admitted the relation between her and CGA. To the suggestion that through out the meeting, after he had confronted the petitioner and CGA, the petitioner was trying to pacify the situation and asked him to speak to her after her parents leave, he stated that she kept on saying that he should have spoken to her first and also asked her parents to leave. He denied that during the get together his father had threatened the petitioner to kill her. He admitted that during the get together, he had questioned the petitioner as to why she is sleeping with CGA and she had responded that she had not been sleeping with him. He denied the suggestion that the video, Mark PW1/ D3 is an edited video. He also admitted that in the get together on 08.08.2015, he had told the petitioner that he will not allow the petitioner to stay in the said house even for a single day. He volunteered to state that it was because, he was told by his friend from whom he had sought legal advice that it would be his acceptance of her adultery. To the suggestion that in the get together, he had admitted that

he had never been a good husband and a son-in-law, he stated that such was the petitioner's father contention.

15.12 So far as the get together of 08.08.2015 is concerned, as per petitioner/PWl, on 08.08.2015, the respondent suddenly visited the shared household in pre-planned manner, where he called the parents of the petitioner, his parents and at the end of dinner he had not only leveled wild and baseless allegations against her character but threatened to kill her in front of her parents. When she and her parents protested to his indecent and cruel behaviour, the respondent and his parents started shouting and her parents asked her to leave the house. During her cross-examination, she denied the suggestion that during the meeting on 08.08.2015, CGA had accepted that there was an affair between him and her. She also denied that in the evening of 08.08.2015, she had also accepted that she was having affair with CGA. She further stated that she is aware of video recording of 08.08.2015. It may be mentioned that the said video recording, Mark PW1/ D3 was played in the court during the cross-examination of PW1 in the presence of both the parties and Ld. Counsels for the parties. After having seen the entire video recording, she stated that she is not sure that whether, the video recording pertains to incident dated 08.08.2015 in the house at Hari Nagar, New Delhi in its entirety. On being asked by the court, she stated that once she is seen in the video recording and some times her voice is there in the video recording. She also stated that she could recognise her brother's voice, respondent's voice, his father voice and two women's voice, one of which sound like her mother and other is of GI. She denied that at 8 minutes and 21 seconds of video recording, Mark PW1/D3, she had accepted her affair with CGA. She voluntarily stated that before that time, the respondent had tried to lure her into saying, "*I accept*". He kept on saying that they have been friends for a long time and that the said portion was missing in the video recording. She also denied that the respondent had asked her to own up her affair with CGA or that she had accepted the same. It can be seen that the respondent has also filed a certificate u/s 65 B of the Indian Evidence act, Ex. RW1/23B regarding the Compact Disc of the video recording of 08.08.2015 made by him from his mobile phone. The petitioner has admitted that the respondent had made the video recording in the get together on 08.05.2015 from his mobile phone. Certain suggestions were also given to the respondent regarding the statements made by the petitioner and the respondent, which are also there in the video recording. The only dispute with regard to the video recording raised on behalf of the petitioner is that the said video recording has been edited. However, it has not been specified as to

what was there in the edited portion, except the voluntary statement of petitioner during her cross-examination, wherein she stated that the respondent had tried to her lure into saying, "*I accept*" and that he kept on saying that they have been friends for a long time. It is considered that if the respondent had been saying that they had been friends for a long time, about which there was no dispute, the natural response to it, in the common course of human conduct, would not be, "*I accept*".

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15.14 From the video recording, it is clear when the respondent raised toast to the petitioner and her new found love CGA and confronted them about their secretive and amorous extra-marital affair, there was no denial of the said allegation either by the petitioner or CGA. There was reaction from her brother and her father. After some time, the reaction of the petitioner was, "*don't do this yaar*". In the common course of human conduct, if a wife and her alleged paramour, in presence of their families are falsely accused of adultery, the immediate reaction of the wife and her alleged paramour would be of categorical denial of the allegation. It is not there in the present case.

Rather, the petitioner kept on trying to evade, avoid and pacify the situation in a subdued manner. She, inter-alia, stated "*acha chalo* ", "*chalo ho gaya ok*" and when the respondent asked her, "*to own up*", she stated "*kar deti hoon yaar ab kya chahte ho* ". She further stated that her parents be allowed to leave. She also stated that the respondent should have spoken to her. Only when the respondent questioned her, "*Then why you have been sleeping with him?*", she stated, "*I have not been sleeping with him, CRPS*". When he stated, "*Please don't make me bring out the proofs and the evidence that I have*", there was no response from her side, though her father abused the respondent. The petitioner again stated that the respondent should have spoken to her first. If the petitioner was not involved in any such relation with CGA, there would have been categorical denial immediately on levelling of such allegation, rather than saying that the respondent should have spoken to her first. It is also observed that after passage of some time, CGA simply stated. "*See pehli baat to ye hai ki human emotions are complex ..... we have been friends for long, it does'nt end. Yaar ek us se kuch nahi badal ta hai relationship mai, intna bada nahi hai all that*". It is not disputed that CGA has not said as above. There was no denial of the allegation by him. Throughout the recording, CGA has not denied the allegation regarding his secretive and amorous extramarital relation with the petitioner. Rather, he tried to justify by saying that human relations are complex, nothing changes with one (incident or ?) and that it was not a big issue.

He further stated that this is not to be discussed in front of parents. From the overall conversation which took place on 08.08.2015, it appears that the respondent in a straight forward and open manner confronted the petitioner and CGA in presence of her parents and brother and CGA's wife about their secretive and amorous relationship. Though, the petitioner's brother and father reacted to the same, initially there was silence on the part of the petitioner and CGA and later they tried to evade the issue. CGA also tried to justify and trivialize the issue. It is considered that such silence and conduct amounts to admission on the part of the petitioner and CGA of their secretive extra-marital relationship. Her statement that she had not been sleeping with CGA also does not appear credible in view of the Call Detail Record and the whatsapp chats exchanged between her and CGA. The conduct and behaviour of the petitioner and CGA were not like those who are innocent of the allegations of such a serious nature levelled against them. The respondent has also submitted that CGA is facing trial by a General Court Martial, on charges under section 45 of the Army Act, 1950, for indulging in inappropriate relationship with the petitioner, sending sexually explicit video message to the petitioner and improperly indulging in sexually explicit chatting with the petitioner on whatsapp. He has also filed Convening Order dated 29.09.2015, Ex. RWl/3, Charge sheet against CGA, Mark RW1/X1 and a copy of judgment in "CGA" v/s Union of India and Others, 2019 SCC OnLine AFT 10979, Ex. PWl/5 in this regard. Ld. Counsel for the petitioner has submitted that the trial by General Court Martial has been stayed by the Hon'ble Supreme Court. The above facts are not disputed. From the facts and circumstances of the case, it has been sufficiently established that the petitioner was involved in a secretive and amorous extra-marital relationship with CGA. It also appears that the petitioner had also called CGA to her house, in the absence of CRPS, when the minor children were sleeping, apparently for amorous activities. Such conduct on the part of the petitioner can be harmful to the psychological well being of the children. It shows the petitioner's lack of concern for the welfare of the minor children.

15.15 The petitioner has deposed that she had done graduation in Sociology (Honours) from Lady Sri Ram College, Delhi University in 1994-97, post graduate diploma in Tourism Management from IMS, Ghaziabad, U.P. in 1997-99, B.Ed. from Army Institute of Education, Delhi in 2003-2004 and Masters in Human Resources and Public Relations from Madras University in 2010-11. She had also worked in SOTC from April 2000 to December 2001, in Thomas Cook in 2004, in Bloom Public School, Vasant Kunj, New Delhi in 2005-2006, in Army

Public School, Jammu from October, 2006 to March, 2007, in Holy Innocent Public School, Vikaspuri, New Delhi in July, 2015 and also worked as a trainee in Link Logistic Pvt. Ltd., New Delhi from January, 2016 to March, 2019. However, during her cross-examination, she has admitted that presently, she is not having any income. She had stated that she had applied for job in various schools like St. Frobel, Paschim Vihar, New Delhi for a middle school teacher for S. St. or English. She learnt about the said vacancy in March, 2020, from her sister-in-law, who is working there. She further stated that she has not received any communication from the said school. She had also spoken to various schools but has not applied due to lock down, due to Corona pandemic. Admittedly the petitioner has also filed petition u/s 125 Cr.P.C. seeking maintenance from the respondent. Thus, it is clear that at this stage, the petitioner is not having any independent income. It appears that she may not be able to maintain the minor children with the same lifestyle and facilities as they are having now. On the other hand, the respondent being an Army officer is having a fairly handsome and stable income along with various perquisites and facilities to provide the same lifestyle to which the minor children are now accustomed. In this regard, reference can be made to **Master Zubeen v. Principal Judge, Family Court, 1993 SCC OnLine All 147**, wherein it was held,

> " ..... *Therefore, on consideration of the fact that an application for maintenance under S. 125, Cr. P.C. was moved by the mother of the minor child, it is clear that she is not able to maintain herself. If the mother is not able to maintain herself then how can she maintain the minor child. The welfare of the minor is not safe in the hands of such a mother who cannot maintain herself.* "

15.16 It is also relevant to note that during cross-examination of RW1, a question was asked to him that whether the petitioner had tried to commit suicide twice in 2005-2006, to which he stated that he does not remember. He was also asked whether in 2006 during their stay in Mohali in his parent's house, the petitioner had consumed rat poison, to which also he stated that he does not remember. Thus, as per the petitioner herself, she has earlier twice attempted suicide. Her parents are admittedly residing in Bhiwadi, although it is submitted that her mother divides her time equally between Bhiwadi and Delhi. The aforesaid fact and other circumstances brought on record gives force to the contention of the Ld. Counsel for the respondent that the petitioner may not have the requisite stability and maturity, as compared to the respondent, to independently raise the minor children. Though earlier also she had stayed alone with the children, but there was moral, financial,

infrastructural and emotional support by the respondent, who was in touch and would visit during his leave. Other relatives staying in the house where the petitioner is residing i.e. her uncle, cousin etc. can not take the place of parents or grandparents for the upbringing of the minor children especially when a better option to live with the father and paternal grandparents is available.

15.17 It is also contented on behalf of petitioner that the respondent is frequently transferred/posted to different stations including field locations and, thus, the minor children's education will be adversely affected. On the other hand, Ld. Counsel for the respondent has argued that the respondent had already commanded the unit and, thus, he is unlikely to be now posted in a field station. He further contended that even if the respondent, being an army officer, is transferred, it will not affect the children's education since the army officer's children get admission in new station in army schools etc., even during the mid session, without any problem. It is also submitted that the army officer's children move from one cantonment to another, where there is strong support system of the same fraternity and facilities which are not there on the civil side. The Army, as an organisation, provides similar environment and facilities in all the stations where the army officers and their families live. The children also learn to adapt to different circumstances which is good for their growth. There is force in the contention of the Ld. Counsel for the respondent. Even if the respondent is transferred, as usually happens in most of the government services, since the respondent is serving in army, there does not appear to be any problem in admission of the minor children in the schools in the new station. The support system and the facilities available in the army can very well take care of the same. It has been also submitted by the petitioner that in the Army, her daughter is surrounded by menfolk and, thus, she is not safe. This general statement is baseless and, thus, of no value.

15.18 Another very important aspect in deciding custody matters is the preference of the minor children. The undersigned had interacted with both the minor children namely SSU, aged about 12 years, and SSH, aged about 8 1/2 years, on 11.08.2020 in chamber. Both the children are quiet clear in their thinking and appear to be old enough to make an intelligent preference. The interaction was recorded in a memorandum of the substance of interaction. Both the minor children are aware of the facts and circumstances in which they are placed. They are able to understand and comprehend the matter and think of their own interest and welfare. Both the minor children have stated that presently

they are living with their father, paternal grandfather and paternal grandmother. They want to live permanently with their father as their father loves them more and takes care of them. They further stated that they are friendly with their father. They share everything with their father, grandfather and grandmother. They do not share everything with their mother. They further stated that except two to three days in a week their mother talk to them daily on telephone. They also stated that they like cantonment area and want to stay in cantonment area only. They also stated that they have not faced any problem in their schooling etc. while shifting, on transfer of their father, from one station to another. They also stated that they do not want to stay with their mother. However, their mother can meet them on weekends and during vacations. They can also stay overnight with their mother during vacations, but only for two to three days. As per Section 17 of the Act, if a minor child is old enough to form an intelligent preference, the court may consider that preference. It is well settled that in such case, the court has to consider the said preference.

15.19 It is also pertinent to note that as per the respondent, the minor children are doing well in their education and co-curriculum activities while staying with him. He has produced copy of certificate/report card of Master SSH, RWl/13 (colly.). The same is not disputed. He has also produced printouts of 30 photographs of him, his children, his sister's children and parents, RWl/23 (colly.). There appears to be no doubt that the minor children are now well settled with the respondent. They are progressing well while living with the respondent. There is nothing on record to indicate that the interests and welfare of the minor children were in any manner affected during their stay with the respondent during the last about five years.

15.20 In view of the aforesaid discussion and from the matters before this court, it is clear that the petitioner has been in a secretive and amorous extra-marital relation with CGA. The same was the cause of separation of the petitioner and the respondent. Such conduct can not be conducive to the interest and welfare of the minor children. As earlier observed, the petitioner has also not been a truthful witness. It is well settled that moral and ethical aspects are equally, if not more, important than other factors for the welfare of the minor children. Further, presently, the petitioner is not having any independent income /financial stability. Admittedly, the petitioner has also earlier twice attempted suicide. On the other hand, it appears that the respondent would be able to provide a financially stable life to the minor children. There is nothing on record to indicate that he has not been or can not be a good

father/parent. Further, and very importantly, the minor children have categorically shown their preference to live with the respondent/father and in a cantonment area. The minor children are well settled with the respondent. At this juncture, it would not be in their interest to unsettle them from their present environment. The issue of custody of children has to be decided on the basis of the present circumstances.

15.21 In view of the aforesaid discussion, it is considered that it would be in the interest and welfare of minor children namely SSU and SSH that they continue to stay with their father i.e. the respondent. The petitioner has not been able to prove her case. Accordingly, issue no. (i) is decided in favour of the respondent and against the petitioner. However, the minor children should also not loose total contact with their mother and thus, the petitioner should also have contact/visitation/custody rights.

Relief

16.1 In view of the aforesaid discussion, it is directed that the permanent custody of minor children SSU and SSH shall remain with the respondent. However, the petitioner shall be entitled to have interaction with the minor children daily through audio-video call for half an hour, between 7:00 PM to 8:00 PM. The respondent shall facilitate the said call. She shall also be entitled to visit the minor children and take them out with her from 10:00 AM to 5:00PM, on every second and fourth Sunday, at the station, where the minor children are staying, subject to their school/educational commitments. She can pick up the children from their residence at 10:00 AM and drop them back at 5:00PM. If it is not possible to have visitation on any such day, it shall be compensated on the next Sunday i.e. third or fifth/first Sunday. Further, during the summer vacations and the winter vacations in the school(s) of the minor children, the petitioner shall be entitled to have the custody of the minor children for ten days and five days respectively. Such days can be mutually decided by the parties. Accordingly, the petition filed by the petitioner for seeking custody of the minor children SSU and SSH is dismissed, subject to contact/visitation/custody rights of the petitioner as aforesaid.

17.1 No order as to cost."

24. This Court has gone through the material on record, including the evidence produced on behalf of the respondent before the learned Family Court by way of screenshots of WhatsApp chats (Ex. RW1/1(Colly.)[also

Mark PW1/D2(Colly.)] exchanged between the appellant and 'CGA'. It is correct that the said screenshots were taken by the respondent by hacking into the phone of the appellant, but in view of the provisions of Section 14 of the Family Courts Act, 1984, the same are admissible as evidence. A perusal of the said chats shows that the same were not random messages which had been picked up, but were part of a series of conversations between the appellant and the 'CGA'. These chats have also been corroborated by way of Call Detail Records produced by the respondent before the learned Family Court. Section 14 of the Family Courts Act is produced as under:-

> "**14. Application of Indian Evidence Act, 1872**.—A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872)."

The findings of the learned Family Court with respect to the video of the incident dated 08.08.2015 shot by the respondent also cannot be faulted with. As per the record, the said video recording (Mark PW-1/D3) was played during the cross-examination of the appellant, i.e., PW-1 and the observations of the learned Family Court in that regard are as under:

> "It may be mentioned that the said video recording, Mark PW1/ D3 was played in the court during the cross-examination of PW1 in the presence of both the parties and Ld. Counsels for the parties. After having seen the entire video recording, she stated that she is not sure that whether, the video recording pertains to incident dated 08.08.2015 in the house at Hari Nagar, New Delhi in its entirety. On being asked by the court, she stated that once she is seen in the video recording and some times her voice is there in the video recording. She also stated that she could recognise her brother's voice, respondent's voice, his father voice and two women's voice, one of which sound like her mother and other is of GI. She denied that at 8 minutes and 21 seconds of video recording, Mark PW1/D3, she had accepted her affair with

> CGA. She voluntarily stated that before that time, the respondent had tried to lure her into saying, "*I accept*"."
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> The only dispute with regard to the video recording raised on behalf of the petitioner is that the said video recording has been edited. However, it has not been specified as to what was there in the edited portion, except the voluntary statement of petitioner during her cross-examination, wherein she stated that the respondent had tried to her lure into saying, "*I accept*" and that he kept on saying that they have been friends for a long time."

25. From the aforesaid, it is apparent that the learned Family Court has based its decision on the aforesaid material on record to hold that the appellant should not get the custody of the children. We are of the opinion that the aforesaid approach by the learned Family Court is not correct. The aforesaid material maybe relevant for matrimonial proceedings between the appellant and the respondent, however, the same cannot be sole criteria for deciding the issue of custody. Another incident which has been relied upon by the learned Family Court is as under:

> "...It also appears that the petitioner had also called CGA to her house, in the absence of CRPS, when the minor children were sleeping, apparently for amorous activities. Such conduct on the part of the petitioner can be harmful to the psychological well being of the children. It shows the petitioner's lack of concern for the welfare of the minor children."

It is pertinent to note that the aforesaid has been picked up by the Family Court from a series of chats placed on record by the present respondent, however, there is nothing on record to establish that such incident did actually take place. The learned Family Court also observed that the appellant was not a truthful witness and therefore, the issue of custody was decided against the appellant. The learned Family Court also observed that the appellant had tried to commit suicide on two occasions.

It is pertinent to note that this was put to the respondent in his cross-examination and he denied having knowledge of the same.

26. It is pertinent to note that apart from the aforesaid, the learned Family Court has not given any finding as to how the conduct of the appellant has in any manner impacted the children themselves. The aforesaid reasoning of learned Family Court cannot in anyway dilute the love of appellant for her children. It is relevant to note that the respondent herein initiated CM(M) 1606/2019 titled 'Col Ramneesh Pal Singh v. Sugandhi Aggarwal' challenging the order dated 16.10.2017 passed by the learned Additional Principal Judge, Family Court, Tis Hazari Courts, Delhi in GP No. 75/2015, *inter alia* directing him to hand over the custody of the children to the appellant herein, after the final examination of the children of the session 2017-18 were over. Disposing of the said petition *vide* judgment dated 29.04.2020, a learned Single Judge of this Court noted as under:

> "19. It is notably sad that in the present case, though the parties truly love the children and have the welfare of the children as prime consideration, they have rather left the issue of determination of the welfare of the children to the Court as they could not themselves reach a consensus over the same.
> 20. In the present case, the girl child is around 11 ½ years old while the boy is aged about 8 years. They both are school-going and after having interacted with them, I find them to be confident and well groomed. I further find that they do not prefer one of the parent over the other. It is also evident from the record that till August, 2015, they were in the custody of the respondent at Delhi, while the petitioner was posted at Gulmarg. It is also evident that the respondent had filed the petition seeking their custody almost immediately on them being taken away by the petitioner. Merely because there was delay in adjudication of the application for Interim custody of the respondent by the Court, it cannot be said that the petitioner acquired a better right over the respondent due to such delay.

> 21. It is further evident from the record that on removing the children from the custody of the respondent, the petitioner took them away to Gulmarg, which was a Field Station and certainly was not conducive for the welfare of the children, Thereafter, the children were shifted to Bikaner, Rajasthan, thereafter to Mohali, Punjab and finally to Mathura, Uttar Pradesh. In this manner, the children have not had a stable environment. While this may not be the fault of the petitioner as being an Army Man this is the requirement and the nature of the job, it is an important consideration to be kept in view while determining the welfare of the children. It is also relevant to note that the petitioner submits that his next posting is due sometime in October, 2020 and he has been assured that the same will be again at a peace station. However, the fact that the posting is imminent and barring the word of the petitioner that he has been assured of a posting at a peace station, there is no assurance from the Authorities proved on record to that effect, in my opinion, would again be relevant consideration tilting the balance of the custody of the children towards the mother."

The learned Single Judge, after making the aforesaid observations, proceeded to pass the following order:

> "30. In view of the above, while upholding the order passed by the learned Family Court, it is directed that the petitioner shall handover the custody of the children to the respondent immediately on the opening of schools for admission/transfer once the lockdown that has been declared because of COVID-19 pandemic is lifted. It would be for the respondent to inform the petitioner when she will like to take the custody of the children and her decision in this regard shall be final as she can keep the custody of the children only for a limited period as is provided hereinafter. The petitioner shall also handover to the respondent all such certificates as may be required by the respondent for the purpose of securing admission of the children to a new school in Delhi. If the respondent for any reason is unable to secure the admission of the children in a new school, the respondent shall handover the custody of the children back to the petitioner within a period of two weeks of obtaining their custody, for them to attend their present schools without any further loss of studies. The respondent shall also remain bound by the statement that the petitioner shall be allowed unrestricted visitation rights, including overnight custody of the children, during their vacations and during the holidays of the petitioner. The parties shall be

> free to move an appropriate application before the learned Family Court for further directions with respect to the visitation rights and the custody of the children, including for variation of the present arrangement in case for any reason, the same requires any alteration or modification.
> 30. The petition is disposed of in the above terms, with no order as to costs."

It is pertinent to mention that the aforesaid judgment dated 29.04.2020 was challenged by the present respondent before the Hon'ble Supreme Court in SLP (Civil) No. 6861-6865/2020. *Vide* order dated 08.06.2020, the said SLP was dismissed and it was observed that the Trial Court shall decide the custody petition on its own merits, uninfluenced by any observations made by the High Court, within a period of 1 month.

27. So far as the relief sought with respect to the custody of the child is concerned, the same has to be considered on the touchstone of welfare of children.

28. At this point, it is deemed appropriate to refer to various judicial pronouncements in relation to custody of children:

28.1. The Hon'ble Supreme Court, in **Gaytri Bajaj v. Jiten Bhalla** reported as **(2012) 12 SCC 471,** held as under:

> "14. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are certain relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor"

28.2. The Hon'ble Supreme Court, in **Rosy Jacob v. Jacob A Chakramakkal** reported as **(1973) 1 SCC 840,** held as under:

> "15. In our opinion, Section 25 of the Guardians and Wards Act contemplates not only actual physical custody but also cons- tructive custody of the guardian which term includes all categories of guardians.

The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian ,to properly look after the ward's health, maintenance and ,education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian the necessary assistance from the Court in effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare…In our opinion, the dominant consideration in making orders under s.25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of (their children, the approach has to be somewhat different from that adopted by the Letters Patent Bench of the High Court in this case. There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under s.25 merely because there is no defect in his personal character and he has attachment for his children which every normal parent has."

28.3 The Hon'ble Supreme Court, in **Gaurav Nagpal v. Sumedha Nagpal** reported as **(2009) 1 SCC 42,** held as under:

> "48. .. 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."

28.4. In **Mausami Moitra Ganguli v. Jayant Ganguli** reported as **(2008) 7 SCC 673,** it was held as under:

> "20. ..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."

28.5. In **Ruchi Majoo v. Sanjeev Majoo** reported as **(2011) 6 SCC 479**, it was held as under:

> "68. The order of the Delhi Court granting interim custody of the minor to the appellant did not make any provision for visitation rights of the respondent father of the child. In the ordinary course the court ought to have done so not only because even an interim order of custody in favour of the parent should not insulate the minor from the parental touch and influence of the other parent which is so very important for the healthy growth of the minor and the development of his personality"

28.6. The Hon'ble Supreme Court, in **Mamta v. Ashok Jagannath Bharuka** reported as **(2005) 12 SCC 452,** held as under:

> "4. We are of the view that before deciding the issue as to whether the custody should be given to the mother or the father or partially to one and partially to the other, the High Court must, (a) take into account the wishes of the child concerned, and (b) assess the psychological impact, if any, on the change in custody after obtaining the opinion of a child psychiatrist or a child welfare worker. All this must be done in addition to ascertaining the comparative material welfare that the child/children may enjoy with either parent."

28.7. The Hon'ble Supreme Court, in **Nil Ratan Kundu v. Abhijit Kundu** reported as **(2008) 9 SCC 413** held:

> "52. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, 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 we may say, 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."

28.8. The Hon'ble Supreme Court. in **Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari** reported as **(2019) 7 SCC 42,** held as under:

> "34...The welfare of the child shall include various factors like ethical upbringing, economic well being of the guardian, child's ordinary comfort, contentment, health, education etc."

29. From perusal of the aforesaid judgments, it is clear that while considering the custody of a child, the Court exercises its '*parens patriae*' jurisdiction and the custody is to be determined primarily on the consideration of the welfare of the child. The children of the parties, in the present proceedings, have interacted with the Court on two different occasions, i.e., on 23.08.2021 and 17.08.2022. It is pertinent to note that during the

interaction with the children, this Bench was not inclined to change the interim arrangement as was previously directed *vide* order dated 23.08.2021. At this point, it is clarified that the children had expressed their desire to stay with the respondent. The children were comfortable and had adjusted to the respondent's service atmosphere. At the same time they also wished to meet the appellant but did not desire to live with her. *Vide* order dated 23.08.2021, a predecessor bench in the present proceedings, had passed the following directions:

> "We have interacted, firstly, with the children and, thereafter with the parties in Chamber. In the light of the said interaction, we direct that till further orders, the appellant would be entitled to meet the two minor children on the second and fourth weekend of every month. The appellant shall travel to Bhopal on her own expenses on the second Friday of every month in the evening. She shall make either her own arrangement, or she may request the respondent to arrange for her accommodation in the guest house in the Cantonment Area. The children will be handed over by the respondent to the appellant on the evening of the Second Friday once she has arrived, and the children shall remain with the appellant till Sunday evening when the respondent shall pick up the children well before the appellant leaves for Delhi.
>
> On the fourth weekend of the month, the respondent shall bring the children to Delhi. Since, the children are intelligent and reasonably grown up, he may send them by the flight on the fourth Friday evening, while placing them in the care of the of the Airline staff. In that situation, it shall be the responsibility of the appellant to pick up the children from the Airport and take them home. The children shall be returned by flight available on Sunday evening. The expenses for the to and fro of the Journey of the children on this occasion shall be borne by the respondent. When the children are with the appellant, she shall ensure that they attend to their online classes, if any, over the weekend. List the matter on 17.12.2021 for further directions."

30. In **Vivek Singh v. Romani Singh** reported as **(2017) 3 SCC 231**, the Hon'ble Supreme Court, while dealing with almost similar circumstances as in the present case, held as under:

> **"18.** The aforesaid observations, contained in para 31 of the order of the High Court extracted above, apply with greater force today, when Saesha is 8 years' old child. She is at a crucial phase when there is a major shift in thinking ability which may help her to understand cause and effect better and think about the future. She would need regular and frequent contact with each parent as well as shielding from parental hostility. Involvement of both parents in her life and regular school attendance are absolutely essential at this age for her personality development. She would soon be able to establish her individual interests and preferences, shaped by her own individual personality as well as experience. Towards this end, it also becomes necessary for parents to exhibit model good behaviour and set healthy and positive examples as much and as often as possible. It is the age when her emotional development may be evolving at a deeper level than ever before. In order to ensure that she achieves stability and maturity in her thinking and is able to deal with complex emotions, it is necessary that she is in the company of her mother as well, for some time. **This Court cannot turn a blind eye to the fact that there have been strong feelings of bitterness, betrayal, anger and distress between the appellant and the respondent, where each party feels that they are "right" in many of their views on issues which led to separation. The intensity of negative feeling of the appellant towards the respondent would have obvious effect on the psyche of Saesha, who has remained in the company of her father, to the exclusion of her mother.** The possibility of appellant's effort to get the child to give up her own positive perceptions of the other parent i.e. the mother and change her to agree with the appellant's viewpoint cannot be ruled out thereby diminishing the affection of Saesha towards her mother. Obviously, the appellant, during all this period, would not have said anything about the positive traits of the respondent. **Even the matrimonial discord between the two parties would have been understood by Saesha, as perceived by the appellant. Psychologists term it as "The Parental Alienation Syndrome" [The Parental Alienation Syndrome was originally described by Dr Richard Gardner in "Recent Developments in Child Custody Litigation", *The Academy Forum*, Vol. 29, No. 2: The American Academy of Psychoanalysis, 1985.] . It has at least two psychological destructive effects:**
>
> **(*i*) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to**

choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

(*ii*) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality.

19. The aforesaid discussion leads us to feel that continuous company of the mother with Saesha, for some time, is absolutely essential. It may also be underlying that the notion that a child's primary need is for the care and love of its mother, where she has been its primary care giving parent, is supported by a vast body of psychological literature. Empirical studies show that mother-infant "bonding" begins at the child's birth and that infants as young as two months old frequently show signs of distress when the mother is replaced by a substitute caregiver. An infant typically responds preferentially to the sound of its mother's voice by four weeks, actively demands her presence and protests her absence by eight months, and within the first year has formed a profound and enduring attachment to her. Psychological theory hypothesises that the mother is the centre of an infant's small world, his psychological homebase, and that she "must continue to be so for some years to come". Developmental psychologists believe that the quality and strength of this original bond largely determines the child's later capacity to fulfil her individual potential and to form attachments to other individuals and to the human community.

20. No doubt, this presumption in favour of maternal custody as sound child welfare policy, is rebuttable and in a given case, it can be shown that father is better suited to have the custody of the child. Such an assessment, however, can be only after level playing field is granted to both the parents. That has not happened in the instant case so far.

21. It is also to be emphasised that her mother is a teacher in a prestigious Kendriya Vidyalaya School. Saesha is herself a school-going child at primary level. If Saesha is admitted in the same school where her mother is teaching, not only Saesha would be under full care and protection of the mother, she would also be in a position to get better education and better guidance of a mother who herself is a teacher.

22. We, thus, find that the factors in favour of respondent are weightier than those in favour of the appellant which have been noted above. It is a fit case where respondent deserves a chance to have the custody of child Saesha for the time being i.e. at least for one year, and not merely visitation rights.

> **23.** New academic session would start in April 2017. At this time, the process of fresh admissions in schools is underway. We are confident that the respondent shall be able to have Saesha admitted in her school where she is teaching inasmuch as wards of the teachers are accorded such preferences. Therefore, the respondent is allowed to process the case of admission of Saesha in Kendriya Vidyalaya, INA Colony, New Delhi and for this purpose the appellant shall fully cooperate. In case she is able to secure the admission, custody of Saesha shall be handed over to the respondent by the appellant one week before the next academic session starts. The custody shall remain with the respondent for full academic year. The matter shall be listed in the month of March 2018 for further directions when this Court would assess as to how the arrangement devised above has worked out. We, however, give liberty to both the parties to move application for variation of the aforesaid arrangement, in case consequences of the aforesaid arrangements turn out to be such which necessitate alteration or modification in the aforesaid arrangement."
>
> (emphasis supplied)

31. We are conscious of the fact that the custody of the children has been with the respondent since 08.08.2015 and so the possibility that the children were influenced to say on the aforesaid lines, as stated in the preceding paragraphs, cannot be ruled out. But the fact remains that despite the long separation from the mother, the children still want to meet her. It is also a natural tendency with children to cling on to their present surroundings, provided they are pleasant and conducive to their liking. The respondent, no doubt, is a doting father, who has provided for the children to the best of his abilities. The appellant has also been diligently contesting for the custody of her children, yearning to enjoy her motherhood.

32. The children, 'SSU' and 'SSH' are 14 years and 10 years old, respectively (as per order dated 17.08.2022). After having interacted with them, we felt that although they wanted to stay with their father, but at the same time they were not averse to meeting their mother. According to the additional affidavit dated 02.09.2022 filed by the present appellant, she works

as a teacher at the Delhi Public School, Gurugram Haryana. Therefore, she would be in a position to provide education to the children at the said school. As a teacher herself, she is capable of helping them in their education. It is also pertinent to note that the children are at an age where the presence of a mother as an active care-giver is crucial to the overall development and other personal needs of the children. The daughter 'SSU' is at an age where she would need the care, attention and guidance from her mother. Continuous presence of her mother by her side will be of immense value to her development. Similarly, the younger son 'SSH' has been deprived of a mother's love and care from an early age. He needs to have his mother's care and guidance for his overall development.

33. In the final analysis of the records of the case, the learned Family Court had passed the impugned order dated 22.08.2020 primarily relying upon the material on record placed by the respondent with respect to the alleged affair between the appellant and 'CGA'. As pointed out hereinabove, that cannot be the sole ground for completely denying custody of the children to the appellant. Be that as it may, the fact that the children have been living with the respondent since 2015 cannot be lost sight of. Completely uprooting them from the custody of the respondent and granting permanent custody to the appellant immediately will not be in their best interest.

34. In view of the aforesaid discussion, the impugned order dated 22.08.2020 is set aside. We, accordingly, partly allow the appeal and direct that the appellant and the respondent will share custody of the minor children 'SSU' and 'SSH' in the following manner:

i. Till the start of the next academic session the appellant would be entitled to have overnight custody of the minor children on the second

and fourth weekend of every month. For the said purpose, the appellant shall travel to the respondent's station of posting, on her own expenses on the second Friday of every month. She shall either make her own arrangements for accommodation or request the respondent to arrange for her accommodation at a guest house in the Cantonment Area. The respondent will hand over the custody of the children to the appellant on the evening of Friday, after she has arrived. The children shall remain with the appellant till Sunday evening and thereafter, the respondent shall pick them up before the appellant leaves for Delhi. On the fourth Friday of every month, the respondent shall either bring the children to Delhi or send them by flight, while placing them in the care of the airline staff. In such a situation, the appellant will pick the children up from the airport. The children shall be returned by flight available on Sunday evening. The expenses for the to and fro journey of the children on such fourth weekend of each month shall be borne by the respondent.

ii. Prior to the beginning of the next academic session, the appellant shall ensure that admission of the minor children is secured at the school where she is currently teaching, i.e., Delhi Public School, Gurugram Haryana. The respondent shall fully cooperate in the admission process. Thereafter, the respondent shall hand over the custody of the minor children to the appellant. The children will stay with the appellant at her residence in Delhi. In such a situation, the respondent would be entitled to have overnight custody of the minor children on the second and fourth weekend of every month. For the said purpose, the respondent shall travel to Delhi, on his own expenses on every second

Friday. He shall make his own arrangements for accommodation. The appellant will hand over the custody of the children to the respondent on the evening of Friday, after he has arrived. The children shall remain with the respondent till Sunday evening and thereafter, the appellant shall pick them up before the respondent leaves. On the fourth Friday of every month, the appellant shall either bring the children to the respondent's station of posting or send them by flight, while placing them in the care of the airline staff. In such a situation, the respondent will pick the children up from the airport. The children shall be returned by flight available on Sunday evening. The expenses for the to and fro journey of the children on such fourth weekend of each month shall be borne by the appellant.

iii. In case the respondent is posted to a station in the NCT of Delhi, the appellant and the respondent will have custody of the minor children for two weeks each including the weekends, every month. The children shall stay with the appellant for the first two weeks of every month and with the respondent for the next two weeks of every month. At the end of the second week of every month, i.e., on Sunday evening, the appellant shall drop the children at the respondent's accommodation. At the end of every fourth week, i.e., on Sunday evening, the respondent shall drop the children back at the appellant's residence.

iv. During summer vacations and winter vacations, the appellant and the respondent shall have custody of the minor children for an equal number of days. Such days can be mutually agreed upon by the parties. It is clarified that in case the children are required to travel as a result of the said arrangement during vacations, the expenses for their travel

shall be borne by the parent who they are visiting. Therefore, if the children are travelling from the respondent's station of posting to Delhi, the expenses shall be borne by the appellant. If the children are travelling from Delhi to the respondent's station of posting, the expenses shall be borne by the respondent.

35. The parties are at liberty to move an application seeking variation/modification of the aforesaid arrangement in case of any change in circumstances or in case of any special circumstances, if so required.

36. The present appeal is disposed of with the above directions.

37. Pending applications, if any, also stand disposed of.

38. Judgment be uploaded of the website of this Court, *forthwith.*

AMIT SHARMA
JUDGE

SIDDHARTH MRIDUL
JUDGE

OCTOBER 11, 2023/*sn*