

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

+ **CM(M) 373/2009 & CM(M) 821/2009**

% **Date of decision: 12th January, 2010**

PRABHAT KUMAR **Petitioner**

Through: Mr. S.S.Gandhi, Sr. Advocate with
Mr. Vikas Kumar, Advocate

Versus

MS. HIMALINI **Respondent**

Through: Ms. Anu Narula, Advocate

AND

HIMALINI KASHYAP **Petitioner**

Through: Ms. Anu Narula, Advocate

Versus

PRABHAT KUMAR **Respondent**

Through: Mr. S.S.Gandhi, Sr. Advocate with
Mr. Vikas Kumar, Advocate

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. Both the warring parents being dissatisfied with the order dated 6th April, 2009 of the Guardianship Judge qua interim custody / visitation rights of the minor girl child have preferred these petitions challenging the same. The Guardianship Judge has vide the impugned order permitted the father alone (and not any relative

of his) to meet the child Gauri born on 6th December, 1997, between 1:00 p.m. to 5:00 p.m. at Patiala House Courts Complex before learned Duty Magistrate on every Sunday and at Delhi Gymkhana Club or any other mutually agreed venue on the birthday or any other important Hindu festivals and prohibited the mother from taking the child out of Delhi without the permission of the court. The father has approached this Court seeking interim custody of the minor and the mother has approached this court seeking to stop the father from meeting / visiting the minor as permitted by the Guardianship Judge.

2. This court vide ex parte order dated 29th April, 2009 in CM(M) No.373/2009, on the plea of the senior counsel for the father that meeting the child in the presence of the Duty Magistrate would be torturous and not in the interest of the child, allowed the father to meet the child once a day for one hour at any time. Subsequently, with the consent of the parents, on 22nd May, 2009 it was ordered that the father would meet the child at the mother's residence thrice a week between 7:30 p.m. and 8:30 p.m.; the mother was also permitted to take the child to Himachal Pradesh for a period of 10 days in June, 2009; the father was permitted to speak to the child during that time on telephone; the condition imposed by the Guardianship Judge restraining the mother from taking the child out of Delhi was also removed subject to the mother giving a reasonable prior notice to the father of her intent to travel with the child. The child was subsequently examined by this court. Keeping in view the exchange with the child, the arrangement earlier made was modified; the father was permitted to meet the child every Sunday from 12:00 noon to 5:00 p.m. and for this purpose to pick up the child from the residence of the mother and drop her back in the evening. A Court Commissioner was also appointed to supervise the said visits. It was further ordered that the father would be entitled to take the child for lunch, shopping, movies etc. and even to his own house to meet the paternal grandparents; arrangement was also made for interim visitation on the occasion of Dusshera; it

was clarified that the Local Commissioner was being appointed only in view of the contradictory stand of the parents qua the reaction of the child towards the father; the father was also permitted to occasionally have telephonic conversations with the child.

3. The Local Commissioner appointed by this court has given the report of the interaction of the child with the father on three Sundays. A perusal thereof shows that though on each of the occasions there was initial reluctance of the child to leave the mother's house and to go with the father but as the day progressed the child was found to be more at ease. The child is also reported to be having a rapport with the father. However, the child from time to time was withdrawn. All these observations are understandable in the context. The child is caught in the war between the two parents. It appears that neither of the parents have shown maturity enough to leave the child out of their mutual differences. The Guardianship Judge has also after an interaction with the child observed that each of the parents is using the child as a pawn against the other. This court can only express regret at such attitude of the parents. The parents even if having mutual differences and incompatibility owe a duty to permit least impact thereof on the child. The child ought to be permitted to grow with the mutual affection as is normal of both parents; the parents ought not to instigate the child against each other and/or to spite the other, ought not to attempt to show the other down in the presence of or through a reference before the child. These are not empty words or utopian thoughts incapable of achievement. Cases are known where children of such warring spouses have come out nearly completely unscathed by the duel between the parents and enjoy an excellent relationship with both parents. The children have an inherent capability to adapt to the situation. Unfortunately, such capability is sought to be suppressed by the parents. The parents instead of letting the children decide for themselves or to have a free flow interaction with both parents are often found to be luring the child away from the other forgetting that

for proper development of a child, the love, affection, companionship, guidance of both parents is essential. They forget that their roles as spouses and as parents are entirely different. They allow the same to merge and which can only be to the detriment of the child. I have expressed my thoughts and anguish in the hope that the parents at least in the present case would in the future attempt to keep their acrimony as far away as possible from the child.

In the present case, both parents are well educated and belong to a responsible strata of society. Their focus should be to maintain a peaceful environment for the child in both homes, so as to allow full cognitive development of the child and to have a positive impact on the mental health of the child. That is the need of the hour.

4. The factors relevant for determining the interim arrangement are as follows:-

The girl child is now about 12 years of age. She has a sibling, a brother, elder to her by 10 years. The said brother was last reported as studying in the 5th / final year in a National Law University outside Delhi. The parents resided together till 2007. The child is studying in Sardar Patel Vidyalya at Lodhi Road, Delhi. The child since 2007 is residing with the mother. Both the parents are high government officials; the father is from the Indian Administrative Service and the mother from the Indian Revenue Services; they were residing together at Pandara Road; the mother is now residing in the government accommodation allotted to her at Pragati Vihar Hostel, Lodhi Road, New Delhi and the father with his own parents at Noida.

5. Besides the guardianship proceedings, there have been domestic violence proceedings also between the parents. During the pendency thereof for about 10 months there was an order of the Metropolitan Magistrate permitting the father to meet the child everyday. In fact, it was in view of that order that the ex parte order aforesaid permitting the father to meet the child everyday was made.

6. The Guardianship Judge has refused to give interim custody of the child to the father as sought by him. I am not inclined to interfere with that part of the order for the reason that the minor is a girl child who is on the threshold of teenage. At this stage, in her life she requires to be with the mother more than with the father; from the report of the Local Commissioner appointed by this Court the child is not found to have any rapport with the paternal grandmother; it has not come on record that there is any other such relative in the household of the father who can provide the guidance which the child will need at this stage in her life. The senior counsel for the father though contending on the basis of the order in the domestic violence case and other facts that the mother is of a volatile temper and emotional and the father is better suited to look after the child has not seriously pressed for complete interim custody. He has however definitely pressed for free visitation and interaction with the child.

7. Similarly, the contention of the counsel for the mother to deprive the child of all interaction with the father has also not been accepted by the Guardianship Judge and does not find favour with me either. The arguments of the child not wanting to meet the father and the father instigating the child against the mother and of taunting the child remain vague and are not found to have been borne out from the report of the Local Commissioner appointed by this Court. Even otherwise, the certain initial reluctance of the child in meeting the father as reported by the Local Commissioner is found to be understandable. The possibility of the mother being instrumental in the same cannot be ruled out. However, on each of the three visits in the presence of the Court Commissioner, it is reported that the child by the passage of time became more and more relaxed and was found to be having a normal relationship as expected of any child of her age with the father. The report of the Local Commissioner of the child in one of the visits not interacting at all with the father also does not show any reluctance of the child to meet the father. Children of that age depending upon their mood even

in normal households refuse to laugh or act in a particular fashion merely at the dictates of the parents.

8. That leaves the question of the visitation rights. This court deprecates the practice of allowing such visitation / meetings in the presence of Duty Magistrates. The same should be avoided as far as possible. There is no reason whatsoever in the order impugned for a direction for such meetings in the presence of the Duty Magistrate. Similarly, there is no basis whatsoever for not allowing the father to take the child anywhere else and or to disallow the meetings of the child with any members of the family of the father. Thus, that part of the order is set aside.

9. From the report of the Local Commissioner, it transpires that the child shares an excellent relationship with her elder brother. She was reported to be the happiest as expected in the company of her brother. The said aspect has been totally lost sight of by the trial court. Though the brother is studying outside Delhi but it appears that in holidays etc. he has been visiting the house of the father. Moreover, he is nearing the end of his course and as it is not yet known where he would be after completing his law course.

10. In the aforesaid circumstances, I make the following interim arrangements:-

- (i) The father shall be entitled to pick up the child from the house of the mother on every Sunday at any time between 8:00 a.m. in the morning and 8:00 p.m. in the night, for about six hours calculated door to door. The time shall be decided by the father in consultation with the child, as per the convenience of the child and for which purpose the extracurricular activities, examination schedule, engagement of the child with the mother etc. shall be considered. If for any reason meetings on Sundays are not convenient, the said meeting for the same or lesser duration may take place on the preceding Saturday evening. If there is a long weekend, the father shall be entitled to so take away the child besides on Sundays also on

another day at a mutually convenient time for about three hours. It is made clear to the parents that if they cause impediments in the working of the said order, the court would be left with no option but to appoint a Court Commissioner at the equal costs to be borne by each of the parents to supervise each of the said visits. The fee of the Local Commissioner shall be fixed taking into consideration the high official stature of the parents and also the acumen required of the Commissioner.

- (ii) It is found imperative that the child has maximum interaction with her brother. Whenever, the brother of the child is on vacation and in the house of the father, the father again taking care of the school schedule of the child would also be entitled to keep the child at his own house overnight so as to enable the child to spend maximum time with her brother. Similarly, whenever, the brother is here for long vacations, if the school schedule of the child permits, the child shall during such time remain in the house of the father where the brother is staying. If the father is taking the son for a holiday, he would be entitled to take the child also along, of course with the prior intimation to the mother.
- (iii) On occasion of festivals, family functions etc., the father shall be entitled to take the child with him; however for such time as allows the parents to spend equal waking hours on the occasion of festivals with the child.
- (iv) The father during the aforesaid visitation shall be entitled to take the child either to his residence or for movies, shopping or any other place as is found by the father to be in the best interest of the child.

11. I do not agree with the contention of the counsel for the father that the conduct of the mother being cantankerous, the child should not be allowed to

remain with the mother. I also do not accept the contention of the counsel for the mother that the meetings as ordered by the court with the father are causing stress to the child or affecting the studies of the child. The meetings as aforesaid allowed of the child with the father also do not come in the way of the extra-curricular activities of the child as is contended by the counsel for the mother.

12. I may notice that the counsel for the mother has relied upon *Nil Ratan Kundu Vs. Abhijit Kundu* (2008) 9 SCC 413, *Samuel Stephen Richard Vs. Stella Richard* AIR 1955 Madras 451, *Smt. Ainunnisa Vs. Mukhtar Ahmad* AIR 1975 Allahabad 67, *Babu Ram Vs. Keshwa Chand Joshi*, AIR 1974 Punjab & Haryana 174, *Gian Chand Vs. Smt. Sudha* AIR 2000 Punjab & Haryana 208, *Dr. Sanjeev Malhotra Vs. Union Territory*, Chandigarh 1997 (4) RCR (Civil) to contend that when the child is found to be old enough to form an intelligent preference such preferences must be considered. However, I do not find the same to be apposite to the facts of the case. Neither the order of the Guardianship Judge nor of this court, after meeting the minor and seeing the report of the Local Commissioner appointed by this court, show that the child absolutely refused to meet the father. Moreover, it cannot be lost sight of that the child has been separated, but for interim visits, from the father for the last about two years. The child has to be given a chance by allowing meetings with the father to reinforce her relationship with the father.

13. Before parting with this case, I would like to comment on the role to be played by the Bar in such matters. Regretfully, it has been found that the Bar is taking the guardianship cases in the same way as any other fiercely contested adversarial litigation; though it ought not to be so. The members of the Bar can in such litigations play a very positive role. Rather than advising their respective clients to take up accusatory and aggressive positions and building cases out of the figments of their imagination and their experience, they ought to apply a soothing balm to the aching hearts with which the parents reach them. It is the lawyers who

without being the alter ego of their respective clients should encourage them to avoid taking pleas of one upmanship over the other and advise the warring parents that such adversarial litigation over custody is not in the interest of the child. Rather than the courts making orders for interim visitation / custody, the rules / parameters whereof are by now well settled as also apparent from the judgments cited by the counsel for the respondent, the members of the Bar should advise their clients accordingly. Instead of advising their clients that the child should not meet the other parent at all, they should advise them to allow the child to meet and interact with both the parents freely and also explain that such an approach bears the imprimatur of the Courts. If the members of the Bar play such a constructive role there will be no need to call the children to the courts which is of course to their prejudice or for them to witness the verbal duel between the counsels of their parents in the courts. There would similarly be no need to force such meetings in the presence of the Duty Magistrate or through the medium of the police as is often being found to be resorted to.

14. If any further clarifications/modifications of this order are required, the application thereof shall lie before the Guardianship Judge who shall deal with the same in the light of the parameters and the reasoning laid down in this order.

15. Both the petitions are disposed of. The parties are left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

January 12, 2010

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