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

Judgment Reserved on: 26.02.2019

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Judgment Pronounced on: 26.03.2019

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MAT.APP.(F.C.) 312/2018, CM No. 50248/2018 & CM
No.2409/2019

D S G

..... Appellant

Through: Appellant in person.

Versus

A K G

..... Respondent

Through: Mr.Yudhishter Sharma and
Mr. Nishant Sharma, Advocates with
respondent in person.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. By way of the present matrimonial appeal, the appellant seeks to challenge an order dated 16.11.2018 passed by the Learned Family Court, whereby the Learned Family Court has directed that the custody arrangement of the 11 years old daughter of the parties would continue as decided by the earlier order dated 28.07.2018 wherein the interim custody of the child is to remain with the father for four days

and with the mother for three days.

2. The relevant and necessary facts for the adjudication of the present appeal are that from the wedlock of the parties a girl child was born in the year 2007 and she is presently a little over 11 years of age. Marital discord occurred in between the parties and the respondent (father) filed a Guardianship Petition bearing No. G.P. No. 2266/2018, seeking custody of the minor child on the ground that the petitioner herein was suffering from mental illness and treated the child with cruelty and did not permit the respondent to meet the child.
3. The Learned Family Court vide order dated 13.07.2018 directed the appellant (mother) herein to remain present with the minor child on 18.07.2018. On 18.07.2018, the appellant did not appear nor was the minor child produced. An application for adjournment was filed on behalf of the appellant on the ground of illness of the child. A prayer was also made in the application for appointment of a counsellor/Child Specialist, to visit the residence of the appellant to counsel the child. Prayer for providing Protection to the female child was also made. On the said date, the respondent, brought to the notice of the learned Family Court that after the respondent had filed the guardianship petition, the appellant had filed a case against him under the POCSO Act. The Learned Family Court looking into the facts and circumstances of the case, perceived that the child was perhaps under pressure and therefore before forming any opinion, thought it fit to appoint a Counsellor to meet the child and submit a report as to the factual condition of the child. Learned Family Court accordingly

appointed a Counsellor, attached to that court and directed him to visit the child and submit a report. The matter was adjourned for 19.07.2018.

4. The Counsellor submitted his report, after interacting with the child, in the presence of two female Sub-Inspectors. In his report, he brought out that the child did not complain of any bad behavior towards her by the father and in fact expressed a desire to stay with the father only. He also reported that the child was confident and was speaking without fear. On 19.07.2018, the child was produced in the court from Nirmal Chhaya, where she was sent, keeping her best interest in mind, for one night on 18.07.2018.
5. On 19.07.2018, the child was referred to another Counsellor Ms. Himali Anand who too gave a report that the child was more comfortable with the father and denied any misbehavior towards her. Even during the interaction with the learned Family Court, the child expressed her willingness to live with her father. On the basis of the report of the Counsellors, the custody of child was handed over to father till the next date of hearing on an undertaking given by the father, that at night, the child shall be kept with female members of the family.
6. On 21.07.2018, the learned Family Court gave the custody of the child to the mother for staying with her till 24.07.2018 and also directed that the child shall be handed over to the father in the evening of 24.07.2018 at 5:00 PM, at the residence of the father.

7. On 27.07.2018, being the next date of hearing before the learned Family Court, the mother requested for appointment of an independent child Counsellor for assessing the mental state of the child and had even suggested the name of Dr.Uzma Parveen, as a Counsellor.
8. The learned Family Court vide order dated 28.07.2018 directed that the custody of the minor child will remain with the mother from Saturday (after school hours) to Monday till 7:00 PM and with the father from Monday from 7:00 PM till Saturday morning. However, in case any Saturday happened to be a school holiday of the child, the father would drop the minor child at the house of the mother at 11:00 AM. Dr.Uzma Parveen agreed to hold psychological assessment of the minor child on Tuesday and Thursday at her Malviya Nagar Centre.
9. The order dated 28.07.2018 was challenged by the appellant before this Court and the appeal was disposed of with liberty to the appellant to seek a review of order dated 28.07.2018. A review application was filed by the appellant before the learned Family Court and on 12.10.2018 the court listed the matter for 26.10.2018 to consider the said application as being one for modification of visitation rights.
10. In the meanwhile, on 14.09.2018, Dr. Uzma Parveen submitted her report which was kept in a sealed cover with the Court and only the conclusion on the final page was supplied to the parties. The report brought out that the daughter was more comfortable with her father.

11. The appellant was granted permission, on her application, to meet the child at the school gate on all school days, in the morning for 5-10 minutes, without disturbing the schedule of the child. All pending applications and the review application was directed to be listed for consideration on 20.09.2018. On 20.09.2018, the Family Court gave custody to the respondent for visiting his native village at Dharamshala (Himachal Pradesh). The said order was challenged in this court in MAT. APP. (F.C) 247/2018 and again serious allegations of molestation of the child by the father were made in the court. Notice was issued in the appeal by this court, returnable on 01.10.2018. On 01.10.2018 the respondent entered appearance. Since the order in appeal had already been acted upon, the parties agreed that no further orders were required in the appeal. However, this court requested the Family Court to consider all grounds urged by the parties before it on 05.10.2018, when the matter was next listed before the court. From 05.10.2018 the matter in the Family Court was adjourned to 12.10.2018, on which date affidavits were filed on behalf of the appellant wherein again allegations were made against the respondent. Learned counsel for the appellant stated that she would not press the review application but the same be treated as one for modification of the child custody. The case was adjourned for 26.10.2018. Record filed before this court does not indicate as to what transpired on 26.10.2018 and the only order on record thereafter is the impugned order dated 16.11.2018. Vide order dated 16.11.2018, the Family Court disposed off the Review application treating the same to be one for modification of visitation rights. It

noticed that the arrangement for the interim custody of the child worked out in the order dated 28.07.2018 was working well and there was no requirement of changing the said arrangement for the present. The parties were, however, given liberty to file application for change of visitation during the examinations or for any other specific requirement. A direction was issued to the appellant that she would not unnecessarily detain the child or make her miss school during the period the child was in her custody and shall also take proper care of the child. The case was thereafter adjourned for 11.01.2019 for recording evidence.

12. The present appeal has been filed impugning the order dated 16.11.2018 and only ground repeatedly urged by the appellant who appeared in person, is that the custody of the daughter should not be given to the respondent as he is guilty of sexual abuse towards the daughter and the child is, therefore, insecure in his custody. When the appeal came up before this court on 30.11.2018 a direction was issued to the respondent to remain present in the court and/or be represented through a counsel for 06.12.2018. On 06.12.2018 the respondent entered appearance and was also represented by a counsel. He denied the allegations made by the appellant and handed over the certified copies of the various order sheets of the Family Court including the report of the Counsellor. Time was sought to file a short affidavit in this regard and the matter was listed for 18.12.2018. On the said date, on receiving copy of the affidavit, the appellant sought time to go through the same and the matter was listed on 08.01.2019, on a date convenient to the appellant. Arguments were heard on 08.01.2019.

Both the parties made their respective submissions. Learned counsel for respondent handed over various orders passed by this court in earlier appeals.

13. After the judgment was reserved on 08.01.2019, in the latter half of the day, the appellant appeared in person and requested the court that the judgment may not be pronounced till the video clipping as recorded by her is seen by the court. Since this request was made orally and that too in the absence of the respondent, the same was not entertained. Subsequent thereto, the appellant moved an application bearing CM APPL. No.2409/2019. In the said application, she prayed for a direction from the court to grant custody of the child to her in view of the video clipping and permit her to admit the child in a boarding school in Delhi. The said application was listed before this court on 18.01.2019. Notice was issued to the non-applicant/respondent as well as through his counsel, returnable on 30.01.2019.
14. On 30.01.2019, learned counsel for the respondent entered appearance along with respondent. He submitted that he had not been served with a copy of the DVD, along with the application, which was sought to be relied upon by the appellant/applicant. The appellant supplied the copy of the DVD to learned counsel for the respondent, who then sought time to go through the same and file a reply. At the joint request of both the parties, this court had seen some parts of the DVD given by the appellant in open Court. The matter was thereafter adjourned to 14.02.2019, granting time of 10 days to the respondent.

On 14.02.2019, the matter was passed over once to enable learned counsel for the respondent to hand over reply to the appellant which was done. However, at the second call the appellant was not present and in the interest of justice, the matter was re-notified for 26.02.2019.

15. On 26.02.2019, detailed arguments were advanced by both the parties and after hearing the arguments, the judgment was reserved.
16. We have gone through the order of learned Family Court, the pleadings of the parties, report of the counsellors as well as the DVD, produced before us by the appellant.
17. Learned Family Court after considering the facts and circumstances, vide order dated 28.07.2018 directed that the child would remain with the mother from Saturday (after school hours) to Monday 07:00 PM and with the father from Monday 07:00 PM to Saturday morning. The appellant sought modification of this order on the ground that the respondent was a sexually abusive father and sought to produce a CCTV/video record to that effect. Respondent had denied these allegations and instead had stated that the appellant was suffering from mental illness and was in habit of leveling false allegations against one and all. He also submitted that the child was, in fact, fearful of the appellant and was comfortable in his company. He also submitted that video/CCTV footage could be seen, as it did not contain any incriminating material and the allegations were only a figment of imagination of the appellant. He also produced on record medical reports of the appellant in support of the submission that she was suffering from Schizophrenia, as diagnosed by AIIMS and

VIMHANS, besides having hearing problem.

18. The Family Court heard the matter and went through various reports filed by the Counsellors. The reports of three Counsellors including one appointed at the request of the appellant consistently brought out that there was no truth in the allegations that the father sexually abused the child or that the child was uncomfortable in his company. Rather the reports indicated that the child was comfortable in the company of the father and wanted to live with him. The Family Court also interacted with the child and observed the child closely during the hearing and found that the child was happy and comfortable and did not perceive any threat of any kind to the child from the father. Taking into consideration the reports of the Counsellors, his own assessment, after interaction with the child, the Family Court vide the impugned order did not think it appropriate to modify the earlier arrangement of child being in the custody of the father for four days and that of the mother for three days in a week. This was done keeping in mind that shared parenting is the most ideal situation, if parties are unable to live together.
19. We have gone through the order of the Family Court dated 16.11.2018 as well as the other order sheets of the Family Court annexed with the reply of the respondent. We have also gone through the reports of the counsellors. Both the parties have more or less reiterated the arguments made by them before the Family Court. We endorse the view of the Family Court that both parents have equal rights on the child. The Family Court has passed a detailed order on 16.11.2018

and has given reasoning for not modifying the order of 28.07.2018 which we reproduce below.

“1. Child has verbally, through her gesture as well as drawing etc. expressed her desire to live only with her father. She denied any substance in respondents allegations of sexual abuse by her father.

2. Respondent’s allegation relates to the year 2013 and thereafter on the basis of CCTV footage for which she has already preferred complaints and applications before various authorities and court of ld. MM, Delhi, but till date there is neither any FIR nor any prima facie findings about the veracity of respondents allegations. The CCTV footage shows presence of petitioner, respondent as well as minor child in a big room (drawing room) and the petitioner seems to scratch an area near his private parts in a reflex action but there is neither any continued action, follow up or any reaction by either respondent or the minor child at the said moment. Even otherwise, the matter in question is seized by a competent court, however, for the purpose of this application, the child in all her counseling sessions with three independent Counsellors, has ruled out any possibility of sexual abuse by the petitioner. She also reiterated the same contention before the court and stated that respondent was repeatedly forcing her to make false allegations against her father/petitioner.

3. The welfare of the child is paramount. The child seemed to be very happy in presence of her father, while for the purpose of stay with the respondent had to be counseled and only thereafter the child seemed to agree to stay with her mother for 03 days in a week.”

20. The Family Court has found that the child was happy in the company of the father and has repeatedly denied any misconduct towards her by the father. The Family Court has also noticed that the CCTV footage

did not indicate that the father was guilty of the alleged misbehavior. We also had an occasion to watch the DVD. Since a competent court of jurisdiction is seized of the POCSO case, we do not want to make observations on the contents of the DVD lest it would prejudice either of the parties. Suffice it would to say that, *prima facie*, there is nothing in the DVD which supports the allegation made by the appellant. More over the Family Court was satisfied that the father was not an unfit father or disqualified by any of his action to be handed over the custody of the child for 4 days in a week. In fact, by the arrangement worked out by the Family Court, child would have the love and affection of both parents. The Apex Court as well as this court has repeatedly held that where the parties are not able to resolve their differences and stay together, then shared parenting is best formula to bring up a child.

21. Having considered the totality of facts and circumstances of the case and more particularly the report of the Counsellors, we are of the opinion that there is no infirmity in the impugned order passed by the Family Court. The appellant has not been able to point out anything before this court to doubt or suspect the reports of the Counsellors, who are independent people as also experts in their own field. Needless to say that both the parties have the liberty to seek modification or variation of the impugned order as and when situation arises.
22. We may also notice here that the appellant had even on earlier occasions filed appeals and several applications on the same ground.

In W.P.(C) No.12495/2018, challenge was laid to the same order dated 28.07.2018 and in fact, while dismissing the same, we had observed that as appellant was appearing in person, we had restrained ourselves from imposing costs.

23. We find no infirmity in the impugned order of the Family Court. There is no merit in the appeal and the same is, accordingly, dismissed with no order as to costs.

JYOTI SINGH, J.

G.S. SISTANI, J.

March 26, 2019
savita/ssc

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