IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 08TH DAY OF JANUARY, 2019

BEFORE

THE HON'BLE MR. JUSTICE B. VEERAPPA

WRIT PETITION No.52377/2018 (GM-FC)
C/W
WRIT PETITION No.49517/2018 (GM-FC)

IN WP No.52377/2018:

BETWEEN:

MR. PREETAM A. EKLASPUR,
AGED ABOUT 40 YEARS,
S/O. ANDANAPPA G. EKLASPUR,
RESIDING AT D 702,
SURAJ GANGA APARTMENTS,
VAJARAHALLI, KANAKAPURA ROAD,
BENGALURU 560062.

... PETITIONER

(BY SRI UDAYA HOLLA, SENIOR COUNSEL FOR
SMT. SUSHMA NAVEEN, ADVOCATE)

AND:

SMT. VANISHREE
AGED ABOUT 38 YEARS,
D/O. SRI. ANNAPPA B. PUTTI,
CHITAGI, 541/B,
PITASRI BUILDING,
3RD CROSS, BHAGYANAGAR,
BELGAUM 590006.

ALSO AT PO BOX 95051,
RPO KINGS GATE,
VANCOUVER B. C., V5T4T8,
CANADA.

... RESPONDENT

(BY SRI SREEVATSA, SENIOR COUNSEL FOR SRI CHANNABASAVAPPA S. N., ADVOCATE FOR C/R)

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THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED ORDER DATED. 7.11.2018 (ANNEXURE-A) PASSED BY THE INCHARGE COURT OF THE V ADDITIONAL FAMILY JUDGE, BENGALURU ON I.A.NO.5 IN G & W. C No.242 OF 2018, ALLOWING THE RESPONDENT'S PRAYER TO DIRECT THE JURISDICTIONAL POLICE STATION TO ASSIST THE RESPONDENT IN SECURING THE CUSTODY OF THE CHILD - PRISHA EKLASPUR.

IN WP No.49517/2018:

BETWEEN:

MR. PREETAM A. EKLASPUR,
AGED ABOUT 40 YEARS,
S/O. ANDANAPPA G. EKLASPUR,
RESIDING AT D 702,
SURAJ GANGA APARTMENTS,
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... RESPONDENT

(BY SRI SREEVATSA, SENIOR COUNSEL FOR SRI CHANNABASAVAPPA S. N., ADVOCATE FOR C/R)

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THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED ORDER DATED, 30.10.2018 PASSED BY THE INCHARGE COURT OF THE V ADDITIONAL FAMILY JUDGE, BENGALURU ON I.A.NO.2 IN G & W.C.242 OF 2018 (ANNEXURE-A) DISMISSING THE INTERIM PRAYER OF THE PETITIONER SEEKING THE CUSTODY OF THE MINOR CHILD PRISHA EKLASPUR.

THESE WRIT PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT OF ORDER THIS DAY, THE COURT MADE THE FOLLOWING:

O R D E R

The petitioner–father filed Writ Petition No.49517/2018 against the order dated 30.10.2018 made in G & WC No.242/2018 on the file of the V Addl. Prl. Judge, Family Court, Bengaluru rejecting I.A. No.2 filed by him under Section 12 of the Guardians and Wards Act, 1890 ('G & W Act' for short) and vacating the interim order dated 1.9.2018 and consequently directing him to return the child – *Prisha Eklaspur* to the custody of the respondent–mother, forthwith.

2. The petitioner–father filed Writ Petition No.52377/2018 against the order dated 7.11.2018 made in G & WC No.242/2018 allowing I.A. No.5 filed by the respondent – mother and directing the Station House Officer, Thalagattapura Police Station, Bengaluru to assist the respondent – mother in securing the custody of the

minor child – *Prisha* from the petitioner – father as per the order dated 30.10.2018.

I. BRIEF FACTS OF THE CASE

3. It is the case of the petitioner that his marriage with the respondent was solemnized on 30.4.2006 at Gadag as per the arrangement made by the elders of both the families and thereafter he took an assignment at Vancouver, Canada from his employer company in Bengaluru as the respondent was fond of staying abroad and he moved to Canada along with the respondent, leaving his parents in India. During many other occasions, the petitioner has also traveled to US and UK on long term work projects without any intentions of settling permanently there and has returned to India after the completion of the project. It is further case of the petitioner that after moving to Vancouver - Canada, the petitioner had added the respondent as a joint account

holder to his salary account, giving her access to his salary account and given the respondent the full freedom and security financially and emotionally and there were several investments that the petitioner and his sister had made in the name of the respondent. The respondent insisted to take a job using her law degree but she had to first complete a course in English and the petitioner had completely borne the expenses of her course financially and supported morally to complete the same. Out of the wedlock, the female child by name – *Prisha* was born on 20.10.2008 in Canada and since *Prisha* was born in Canada, she automatically became a Canadian citizen, however, she holds a PIO Card ('Person of Indian Origin' Card).

4. It is further case of the petitioner that the relationship between the petitioner and the respondent was never cordial and the respondent used to regularly pick up some or the other quarrel with the petitioner and abuse him and his parents. The respondent abused and chased away

the parents of the petitioner who had gone to Vancouver to help the respondent during the post-partum period. The respondent returned to India in 2009 since her dependent visa had expired and again after the same was extended, she moved back to Vancouver with the child after nine months, on obtaining fresh Dependent Visa in December 2009.

5. It is further case of the petitioner that only to prevent from multiple renewals of work permits during their multiyear job posting, at the behest of the respondent and her friends, petitioner obtained a Permanent Resident (PR) visa for himself and the respondent as his dependent in order to avoid expiry of health insurance coverage every time the work permit expires. The petitioner had been a very good husband and father and he would wake up early, cook breakfast and lunch to the respondent and their daughter as the respondent attended office work in night shifts and used to spend considerable number of hours

during the day sleeping and it was the petitioner who took care of the child while availing the option of 'work from home' from his office. However, the respondent always found fault with the petitioner and never left an opportunity to pick fights with him no matter what he did. Inspite of repeated requests by the petitioner, the respondent had made it clear that she was neither interested in living amicably nor interested in returning to India and used to fight that no money be sent to his parents who were in India and that the same money be transferred to her. It is beyond imagination and not very easy to state for the respondent that, the respondent had once broken the thumb finger nail of the petitioner and the petitioner had undergone a few sessions with the Psychologist. The Psychologists had reported the incident to the Government Child Services Agency and had advised the petitioner to leave the house with the child if such behaviour repeats again.

6. It is further case of the petitioner that after his assignment of work at Canada, he made sincere attempts to convince the respondent to come along with him to India, but it was failed. The respondent in order to stay back in Vancouver further has initiated divorce proceedings against the petitioner, and also sought for a share in the property owned by the petitioner in India and had sought for financial support and permanent custody of the child. Thereafter the petitioner requested the interaction of his in-laws to convince the respondent. But, the respondent did not oblige the request of her parents. Thereafter the petitioner made several attempts to contact the respondent and convince her to come back to India and ultimately filed M.C. No.2056/2011 for restitution of conjugal rights and same was granted in the year 2012 and the Court refused to grant custody of child in favour of the petitioner in the said case, as the child was not ordinarily residing within the jurisdiction of the Family Court and the Canadian Court

granted interim custody of the child to the respondent. Since the respondent did not comply with the restitution of conjugal rights order, the petitioner filed a petition for divorce and the same was decreed *exparte* vide Judgment dated 17.9.2014 etc., Therefore the petitioner filed G & WC No.242/2018 under Section 7 of the Family Courts Act r/w Section 17(1) of the G & W Act for grant of custody of the child – *Prisha,* aged about 10 years in his favour.

7. The respondent – mother filed objections to the G & WC Petition and denied all the averments except the marriage and the child born out of the wedlock.

8. During the pendency of the main petition, the petitioner filed an application under Section 12 of the G & W Act for interim custody of the child – *Prisha,* aged about 10 years in his favour along with the child's passport and PIO Card ('Person of India Origin' Card) till the disposal of the petition, reiterating the averments made in the G & WC

Petition. The respondent has filed memo dated 17.9.2018 adopting the objections to the main petition as objections to I.A. No.2. The Family Court considering the application and the objections by the impugned order dated 30.10.2018 rejected the application filed by the petitioner and vacated the *exparte* interim order granted on 1.9.2018 and directed the petitioner to return the child – *Prisha* to the custody of the respondent forthwith.

9. Since the petitioner has not complied the order passed by the Family Court, the respondent filed I.A. No.5 to direct the jurisdictional Police to assist the respondent in securing the custody of the child in compliance of the order dated 30.10.2018. The Family Court allowed I.A. No.5 on 7.11.2018 and directed the Station House Officer of Thalagattapura Police Station to assist the respondent in securing the custody of the minor child. Hence these writ petitions are filed by the petitioner.

II. ARGUMENTS ADVANCED BY THE LEARNED SENIOR COUSNEL APPEARING FOR THE PARTIES

10. I have heard the learned senior counsel appearing for the parties to the *lis*.

11. Sri Udaya Holla, learned senior counsel appearing for the petitioner – father contended that the impugned order passed by the trial Court rejecting the application filed by the petitioner under Section 12 of the G & W Act & directing the petitioner to return the child to the respondent – mother is erroneous and contrary to the material on record. He would further contend that the Family Court failed to notice that in terms of the provisions of Section 6 of the Hindu Minority and Guardianship Act,1956 the natural guardian of a Hindu minor in the case of a boy or an unmarried girl is the father and after him, the mother. The Family Court has also not considered the provisions of Section 12 of the G & W Act that the Court has the power to

make interlocutory order for interim protection of the person and property and the Court may make such order for temporary custody and protection of the person or property of the minor as it thinks proper. Therefore the impugned order passed by the Family Court rejecting I.A. No.2 is contrary to the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956 and Section 12 of the G & W Act and the same cannot be sustained.

12. He would further contend that the impugned order has not been passed in the best interest and over all well being of the child and if the child is handed over to the respondent – mother as per the impugned order, she will take the child away from the jurisdiction of this Court and may not continue to participate in the proceedings itself. He would further contend that before passing the impugned order, the Family Court has not at all considered the wishes of the child. He would further contend that the Family Court has proceeded to pass the impugned order mainly on the

basis of the order passed by the Hon'ble Supreme Court of British Columbia granting custody rights in favour of the respondent and wrongly drawn inference against the petitioner that the petitioner has suppressed the said order of the Supreme Court of British Columbia and further the Family court has erred in not taking into consideration that the child is born to parents who are Indian citizens and that she holds a PIO Card ('Person of the Indian Origin' Card). The Family Court erred in coming to the illogical conclusion that as the petitioner has re-married and there is no chance for the petitioner to have a child out of the 2nd wife, he had hatched a plan to succeed in his attempt to secure the interim custody of the child by filing an application before the Family Court. Therefore the impugned order passed by the Family Court on I.A. No.2 is erroneous.

13. He would further contend that even though the petitioner was absent on the relevant day, no sufficient opportunity was given to the petitioner and erroneously

allowed I.A. No.5 filed by the respondent directing the jurisdictional Police to assist the respondent in securing the custody of the child from the petitioner and the said order is not a speaking order. Therefore he sought to allow the writ petitions by quashing the impugned orders passed by the Family Court.

14. In support of his contentions, learned senior counsel appearing for the petitioner has relied upon the following judgments:

1. *Jitender Arora v. Sukriti Arora* [(2017)3 SCC 726]
2. *Vishnu v. Jaya* [(2010)6 SCC 733]
3. *Nil Ratan Kundu v. Abhijit Kundu* [(2008)9 SCC 413]
4. *Sheila B. Das v. P.R. Sugasree* [(2006)3 SCC 62]
5. *Chethana Ramatheertha v. Kumar V. Jahgirdar* [ILR 2003 KAR 1205]
6. *Sarita Sharma v. Sushil Sharma* [(2000)3 SCC 14]
7. *Jasmeet Kaur v. Navtej Singh* [(2018)4 SCC 295]
8. *Nithya Anand Raghavan v. State (NCT of Delhi)* [(2017)8 SCC 454]

9. *Mohan Kumar Rayana v. Komal Mohan Rayana* [(2010)5 SCC 657]

10. *Y. Narasimha Rao v. Y. Venkata Lakshmi* [(1991)3 SCC 451]

11. *Vivek Singh v. Romani Singh* [(2017)3 SCC 231]

12. *Ruchi Majoo v. Sanjeev Majoo* [(2011)6 SCC 479]

15. Per contra, Sreevatsa, learned senior counsel appearing for the respondent sought to justify the impugned orders passed by the Family Court rejecting the application filed by the petitioner – father for interim custody of the child and allowing the application filed by the respondent – mother for direction to the jurisdictional Police to assist her in securing the interim custody of the child from the petitioner. He further contended that it is an undisputed fact that the child was born at Canada on 20.10.2008 and she has studied seven years at Canada and the School Report Card produced by the petitioner as per

Annexure-J clearly shows that the child studied at Mount Pleasant Elementary, Vancouver. The child was with the respondent - mother for the last eight years without any complaint and the petitioner - father never initiated any proceedings for custody of the child except the present proceedings. He would further contend that the order passed by the Family court was not implemented by the petitioner and thereby the wife was forced to file application for police protection, which was rightly allowed by the Family Court. Therefore the petitioner is not entitled to the interim custody of the minor child. He would further contend that the petitioner - father has tutored the child to go against her own wishes and further the petitioner has already married with some other lady and therefore taking into consideration the paramount interest of the minor child and in the peculiar facts and circumstances of the present case, the Family Court is justified in passing the impugned orders. Therefore he sought to dismiss the writ petitions.

16. In support of his contentions, learned senior counsel for the respondent has relied upon the following judgments:

1. *Sumedha Nagpal v. State of Delhi* [(2000)9 SCC 745]
2. *Gaurav Nagpal v. Sumedha Nagpal* [(2009)1 SCC 42]
3. *Hoshiam Shavaksha Dolikuka v. Thrity Hoshie Dolikuka* [(1982)2 SCC 577]
4. *David Jude v. Hannah Grace Jude* [(2003)10 SCC 760]
5. *Nithya Anand Raghavan v. State (NCT of Delhi)* [(2017)8 SCC 454]
6. *Kanika Goel v. State (NCT of Delhi)* [(2018)9 SCC 578]
7. *Elizabeth Dinshaw v. Arvand M. Dinshaw* [(1987)1 SCC 42]
8. *Vivek Singh v. Romani Singh* [(2017)3 SCC 231]
9. *State of Rajasthan v. Ganeshi Lal* [(2008)2 SCC 533]

17. Learned senior counsel for the parties also filed memos along with certain documents which relate to

parental alienation syndrome, some articles by the learned authors and opinions of the doctors as well as chatting through *e.mail* among father, mother and the child.

III. POINTS FOR CONSDIERATION

18. In view of the aforesaid rival contentions urged by the learned senior counsel appearing for the parties, the points that arise for consideration in the present writ petitions are:

i) *Whether the Family Court is justified in passing the impugned order dated 30.10.2018 rejecting I.A. No.2 filed by the petitioner - father under Section 12 of the G & W Act for interim custody of the minor child – Prisha, aged about 10 years, in the facts and circumstances of the present case ?*

ii) *Whether the Family Court is justified in passing the impugned order dated 7.11.2018*

allowing I.A. No.5 filed by the respondent – mother directing the jurisdictional Police to assist her in securing the custody of the minor child from the petitioner, in the facts and circumstances of the case ?

IV. CONSIDERATION

19. I have given my anxious consideration to the arguments advanced by the learned senior counsel appearing for the parties and perused the entire materials available on record carefully.

20. It is an undisputed fact that the marriage between the petitioner and the respondent was solemnized on 30.4.2006 at Gadag as per the Hindu customs. It is also not in dispute that subsequently they moved to Vancouver, Canada and out of their wedlock, the child – Prisha was born on 20.10.2008. There were allegations and counter allegations between the petitioner and the respondent as

husband and wife. It is also not in dispute that the minor child – *Prisha* was born in Canada and studied for seven years staying with the mother at Canada. The pleadings of both the parties clearly depict that after the decree of divorce obtained by the petitioner - father, he has already married with some other lady. It is also not in dispute that the present petitioner filed the main petition under Section 7 of the Family Courts Act r/w Sections 17(1) and (2) of the G & W Act praying for grant of custody of the child – *Prisha*, aged about 10 years in his favour. The present writ petitions are filed by the petitioner against the order passed by the Family Court on I.A. No.2 rejecting the interim custody of the minor child in his favour as well as allowing I.A. No.5 filed by the respondent – mother directing the jurisdictional Police to assist the respondent in securing the custody of the minor child.

21. It is well settled that while giving custody of the minor female child, the wishes and welfare of the child is of

paramount importance and the Court should give due consideration to the same in view of the provisions of Section 17 of the G & W Act. Admittedly in the present case, the female child is aged about 10 years and she is mentally matured to know the differences between the father and mother and who is capable of taking care of her in a better way. The Court before giving custody of minor child to either father or mother must give regard to the minor's welfare as the first and paramount consideration and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father.

22. In deciding a difficult and complex question as to the custody of a minor child, a Court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting

legal provisions. It is a human 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 to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings and the Court should also take the wishes of the minor child into consideration.

23. Admittedly in the present case, the female minor child is aged about 10 years and for whose custody, both mother and father are fighting with egoistic litigation without taking into consideration the paramount interest of the child and her future.

24. At this stage, it is relevant to refer to the reasoning given by the Family Court at paragraphs 12 and 17 of the impugned order dated 30.10.2018, which reads as under:

> *"12. It is relevant to note that vide chamber conciliation dated 31.8.2018, the child has expressed her intention before this Court to stay with her father i.e, the petitioner, in India. But, after perusing the pleadings of the parties and materials on record, I am of the view that much importance need not be given to the wishes of the minor child at this stage. It appears that the child is innocent and because of immaturity of mind, it might have expressed her preference or interest to stay with her father in India. But, I am of the view that to consider the prayer of the petitioner in the main petition, the evidence of the parties is very much necessary. Mere child's preference itself is not sufficient to pass orders in the present case. Therefore, at this stage I hold that the child is directed to be returned to the respondent to enable her to go back and pursue her studies in Canada.*

17. I have considered the said citations in the background of the rival contentions of the parties. Having regard to the pleadings and reliefs claimed by the parties and in the best interest of the child, I am of the view that the interim order passed by this Court on 1.9.2018 is liable to be vacated. Admittedly, the child Prisha Eklaspur is a girl child. Since the petitioner has already married with some other lady, the respondent – mother is the best guardian for the said child. Since the order passed by British Columbia Court in respect of the custody of the child is still in force, I hold that the petitioner is not entitled for the interim custody of the child as prayed for in I.A. No.II."

25. On careful perusal of the impugned order, it clearly depicts that the reasoning given by the Family Court at paragraphs 12 and 17 of the impugned order is inconsistent. When the Family Court got the wishes of the child as per the Chamber Conciliation Order dated 31.8.2018 and when the child expressed her intention before the learned Family Court Judge to stay with her father in India, the Family Court ought to have given due

consideration for the same in view of the dictums of this Court and the Supreme Court time and again that the wishes of the child is of paramount importance. But the Family court erred in holding that much importance need not be given to the wishes of the minor child.

26. When the matter came up before this Court on 23.11.2018, after hearing the learned senior counsel appearing for the parties for some time, this Court felt it appropriate to ascertain the views and wishes of the minor child – *Prisha*, aged about 10 years, studying in 4th Standard. Accordingly, the minor child was invited to the Chamber at 4.40 p.m. and when the Court interacted with the minor female child, it is found that she was quite intelligent, active and able to understand the questions put forth by the Court and when the Court put the question to the child about interim custody, she immediately reacted that she prefers to stay with her father, whom she felt more comfortable and she wants to continue her studies in India

and she don't want to go back to Canada with her mother. When the Court told the child that her father has already married with some other lady, she quickly answered that 2nd mum is very good and close to her and she is taking care of her better than the mother and she categorically reiterated while weeping that she don't want to go back to Canada and wants to stay with her father in India.

27. The material on record clearly depicts that for more than seven years, the child was with the mother studying at Canada. The School report card produced as per Annexure-J depicts that she was studying at Fraser Institute, Vancouver. The said facts are not in dispute. The dispute arose only when the parents of the child came to India. Though the learned senior counsel appearing for the respondent contended that the mind of the child has been polluted by the father and the child is innocent and because of immaturity of her mind, she might have expressed her preference or interest to stay with her father

in India and same has to be ignored, cannot be accepted, as it is a matter to be adjudicated after full fledged trial.

28. The learned senior counsel appearing for the petitioner made allegations against the respondent - mother about the way in which the child studied in a school where there are no basic facilities available and the child was not properly looked after by her mother and the school where the child studied at Canada is not good rating school etc., On the other hand, the learned senior counsel appearing for the respondent made allegations against the petitioner - father that he has not taken care of the child for more than 09 years and only he filed the petition for custody before the Family Court after his 2nd marriage and when he came to know that he will not get any child from the 2nd marriage and further father is not a proper custodian since he is having 2nd wife etc., These allegations and counter allegations made by the learned senior counsel

appearing for the parties are all matters to be adjudicated only after full fledged trial.

29. Though the learned senior counsel appearing for the parties argued with vehemence on three hearing dates and produced various documents with regard to parental alienation syndrome and the articles with regard to child's mind and opinions of the doctor, they are all the matters to be adjudicated after a full fledged trial between the parties and cannot be considered at this stage.

30. The learned senior counsel appearing for the respondent relied upon judgments in *Sumedha Nagpal, Gaurav Nagpal, Hoshiam Shavaksha Dolikuka, David Jude, Nithya Anand Raghavan, Kanika Goel, Elizabeth Dinshaw, Vivek Singh and other cases stated supra* with regard to welfare of the minor child and submits that custody cases not to be decided merely based upon the rights of the parties under law and the trauma that the child likely to

experience in the event of change of such custody, pending proceedings before a Court of competent jurisdiction etc., will have to be borne in mind. The judgments relied upon the learned counsel for the respondent pertain to the proceedings arising under Section 25 r/w Section 6 of the G & W Act and the child below five years and is not in a position to know anything about the parents; the proceedings initiated under Article 226 of the Constitution of India for Habeas Corpus and custody of minor after divorce in USA etc. Admittedly in the present case, the minor child is aged about more than 10 years and she has expressed her wishes to stay with the petitioner - father before the Family Court vide chamber conciliation order dated 31.8.2018. Even before this Court on 23.11.2018 when the child was invited to the chamber, it is found that she is quite intelligent and active and able to understand the questions put forth by the Court and categorically and consistently stated that she prefers to stay with the father

in India and she don't want to go back to Canada with the mother. In view of the above, the judgments relied upon by the learned senior counsel for the respondent have no application to the peculiar facts and circumstances of the present case.

31. In view of the provisions of Section 6(a) of the Hindu Minority and Guardianship Act, 1956, the natural guardian of a Hindu minor, in the case of a boy or an unmarried girl is the father, and after him, the mother. The provisions of Section 19 of the G & W Act deals with when a guardian not to be appointed by the Court and as per the said section, nothing in the Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person of a minor who is married female and whose husband is not in the opinion of Court, unfit to be guardian of her person, or of a minor whose father is living and is not

in the opinion of the Court, unfit to be guardian of the person of the minor, or of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor. Admittedly in the present case, the female child is aged more than ten years and is capable of understanding the things about her welfare and she has categorically stated before the Family Court as well as this Court that she prefers to stay with her father with whom she is more comfortable than mother.

32. It is also not in dispute that earlier the petitioner – father filed an application before the Family Court for interim custody of the minor child – *Prisha* in his favour and to direct the respondent to hand over child's passport and PIO Card ('Person of Indian Origin' Card) to him, till disposal of the petition. The Family Court considering the application and the objections by an order dated 1.9.2018 granted interim custody of the minor child to the petitioner till the next date of hearing and consequently the

respondent – wife was directed to hand over the passport and PIO Card of the child to the petitioner immediately. By the said order, the Family Court also directed the petitioner to take all necessary steps for comfortable stay, education, health and such other things for paramount interest of the child during the custody of the child with him in India. Admittedly, the said order was the subject matter of W.P. No.40758/2018 filed by the wife. This Court after hearing both the parties by an order dated 11.10.2018 observed that the interim arrangement and the direction issued to the effect that minor child shall remain with the father, pending disposai of the application filed by the father under Section 12 of the G & W Act, is only an order in the interest of the minor child and not in any way recognizing the right of the father to have interim custody of the minor child, as that aspect of the matter is pending adjudication before the Family Court and directed the Family Court to dispose of the application expeditiously on or before

25.10.2018. The fact that the minor child is with the father for more than four months, is also not in dispute.

33. The provisions of Sections 7,9,12, 13, 17 and 25 of the G & W Act and Section 6 of the Hindu Minority and Guardianship Act, 1956, makes it manifestly clear that the paramount consideration is the welfare of the minor child and not statutory rights of the parents. The problem has to be solved rather with a human touch. In selecting a guardian, the Court exercises *parens patriae* jurisdiction. It must give due weightage to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings, as well as physical comfort and moral values. Court must ascertain child's wishes and a child is not a property or commodity. Such issues should be handled with love, affection, sentiments and applying human touch to the problem.

V. DICTUMS OF THE APEX COURT AND THIS COURT

34. While considering the provisions of the G & W Act, the Hon'ble Supreme Court in the case of ***Jitender Arora v. Sukriti Arora*** reported in (2017)3 SCC 726 held at paragraphs 15 and 17 as under:

> **15.** We also had interaction with Vaishali in the chambers earlier. On the date of hearing also, Vaishali was present in the Court and in front of her parents, she unequivocally expressed that she was happy with her father and wanted to continue in his company and did not want to go with her mother, much less to UK. From the interaction, it is clearly discernible that she is a mature girl who is in a position to weigh the pros and cons of two alternatives and to decide as to which course of action is more suited to her. She has developed her personality and formed her opinion after considering all the attendant circumstances. Her intellectual *characteristics* are adequately developed. She is able to solve problems, think about her future and

understands the long-term effects of the decision which she has taken. We also find that she has been brought up in a conducive atmosphere. It, thus, becomes apparent that in the instant case, we are dealing with the custody of a child who is 15 years of age and has achieved sufficient level of maturity. *Further*, in spite of giving ample chances to the respondent by giving temporary custody of Vaishali to her, the respondent has not been able to win over the confidence of Vaishali. We, therefore, feel that her welfare lies in the continued company of her father which appears to be in her best interest.

17. On the facts of the present case, we are convinced that custody of the child needs to be with the father. She is already 15 years of age and within 3 years, she would be major and all this custody battle between her parents would come to an end. She would have complete freedom to decide the course of action she would like to adopt in her life. We, thus, allow this appeal and set aside the judgment of the High Court. No costs.

35. The Hon'ble Supreme Court while dealing with the custody of minor child aged about nine years in the case of

Nil Ratan Kundu v. Abhijit Kundu reported in (2008)9 SCC 413 held at paragraphs 52 and 72 as under:

> ***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 the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human 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.

72. *We have called Antariksh in our chamber. To us, he appeared to be quite intelligent. When we asked him whether he wanted to go to his father and to stay with him, he unequivocally refused to go with him or to stay with him. He also stated that he was very happy with his maternal grandparents and would like to continue to stay with them. We are, therefore, of the considered view that it would not be proper on the facts and in the circumstances to give custody of Antariksh to his father, the respondent herein."*

36. While considering the provisions of Sections 7 and 17 of the G & W Act, the Hon'ble Supreme Court in the case of ***Mausami Moitra Ganguli v. Jayant Ganguli*** reported in *(2008) 7 SCC 673 held at paragraphs 12 and 26 as under:*

12. *Before hearing the case, we interviewed Satyajeet in chambers and found that he was quite intelligent and was able to understand the facts and circumstances in which he was placed. He could comprehend matters and visualise his own well-being. He seemed to have no complaint against his father. He explicitly stated before us that he was not inclined to go with his mother and would like to stay with his father and continue his studies at Allahabad where he has quite a few friends.*

26. *Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained. We feel that the visitation rights given to the appellant by the High Court, as noted above, also do not require any modification. We, therefore, affirm the order and the aforeextracted directions given by the High Court. It will, however, be open to the parties to move this Court for modification of this*

order or for seeking any direction regarding the custody and well-being of the child, if there is any change in the circumstances.

37. The Division Bench of this Court in the case of ***Chethana Ramatheertha vs. Kumar V. Jahgirdar*** reported in ILR 2003 KAR 1205 while considering the provisions of Sections 25 and 26 of the Hindu Marriage Act, held at Paragraph 27 as under:

27. *In disputes relating to the custody of the minor children, the consideration can only be the welfare of the child and the rights of the parents has to yield or give way, is a proposition now very well established and recognised by Courts. The historical concept that the father of a minor child is in a better or superior position to take care of the child has as of now given way to the modern thinking that it is not necessarily so; that either parent is equally capable of taking care of the child; that the question of custody should always be decided by taking into consideration the facts and circumstances that prevail in each case; the ability of the parents to provide necessary facilities - environmental,*

companionship, love and affection, are all factors which Courts have to bear in mind in deciding the question. The question is not viewed any more from the angle of "which parent has a better right", but from the approach as to "the company of which of the two parents is better suited for the integrated development of the personality of the child" and "as to whether the child receives the necessary inputs if it is in the company of a particular parent, for a healthy growth and development of the personality of the child". In fact, as one could perceive, the child always needs the company of both parents for such growth and development. The Child desires and yearns for the company of both parents. Unfortunately in a situation where it has become inevitable that the parents part company and they live separately, the child can have the company of only one parent at a time and not simultaneously. This is a situation brought about by the parents and inevitably the child is the victim and whatever arrangement may be made either by the parties themselves or on their failure, by the Courts, as ultimate guardian of a minor child will always fall short of a satisfactory arrangement from the child's point of view and the child does suffer. Therefore, the question is to be approached from the angle of

mitigating the suffering, the hardship and the psychological trauma that the child may undergo due to separation of the parents. The harsh reality is that the parents can no more live together and particularly in a situation of the present nature where the parents have not only divorced and one of the parents has married thereafter. What promotes the interest of the child, what are the possibilities to promote the welfare of the child, how best the child's suffering, hardship and trauma is mitigated, are the considerations before the Court.

38. The Hon'ble Supreme Court while considering the Family and Personal Laws, Guardians and Wards and custody of minor child in the case of **Jasmeet Kaur vs. Navtej Singh** reported in (2018)4 SCC 295 held at paragraph-4 as under:

4. *In view of the above, principle of comity of courts or principle of forum convenience alone cannot determine the threshold bar of jurisdiction. Paramount consideration is the best interest of the child. The same cannot be the subject-matter of final determination in proceedings under Order 7 Rule 11 CPC.*

39. While considering the custody of child under Article 226 of the Constitution of India in Habeas Corpus petition in the case of ***Nithya Anand Raghavan vs. State (NCT of Delhi) and another*** reported in (2017)8 SCC 454, the Three-Judge Bench of the Hon'ble Supreme Court held at paragraphs 24 and 26 as under:

> ***24.*** *Ms Rajkotia submits that parens patriae jurisdiction of the court within whose jurisdiction the child is located as also the welfare of the child in question must be given greater weightage as opposed to a mechanical interpretation of the principle of comity of courts. By giving effect to the comity of courts, the High Court has eroded its own parens patriae jurisdiction and also ignored the welfare of the child who is located within its jurisdiction. In fact, the evolving standard, at least as far as the USA and the UK Courts are concerned, is to give greater importance to the welfare of the child as opposed to giving primacy to the principle of comity of courts. She has relied upon a judgment of the United States Supreme Court in Lozano v. Montoya Alvarez [Lozano v. Montoya Alvarez, 2014 SCC OnLine US SC 62 : 134 S Ct 1224*

: 572 US _ (2014)] wherein the Court, inter alia, stated that while the Hague Convention was intended to discourage child abduction, it was not supposed to do so at the cost of the child's interest in choosing to remain in the jurisdiction of the country or in settling the matter.

26. *Ms Rajkotia further submits that in two cases viz. Shilpa Aggarwal v. Aviral Mittal [Shilpa Aggarwal v. Aviral Mittal, (2010) 1 SCC 591 : (2010) 1 SCC (Civ) 192] and most recently in Surya Vadanan [Surya Vadanan v. State of T.N., (2015) 5 SCC 450 : (2015) 3 SCC (Civ) 94] , this Court has deviated from the established principle of putting the welfare of the child above all other considerations. In both these cases, the Court ordered that the child and mother return to the jurisdiction of the foreign court, despite the fact that the two had left the foreign jurisdiction before the court had passed any order. She has taken exception to the reasoning given in these two judgments on the ground that the decisions overlook the parens patriae jurisdiction of the Court as also misinterpreted the concept of "intimate contact" with the child. The "intimate contact" principle only applies in an instance where the child has been taken to a country with an alien*

language, social customs, etc. It cannot be applicable where the child returns to a country where he/she has been born and brought up in, like in the present case. Further, the judgment in Surya Vadanan [Surya Vadanan v. State of T.N., (2015) 5 SCC 450 : (2015) 3 SCC (Civ) 94] has the chilling effect of giving dominance to the principle of comity of courts over the welfare of the child. The judgment, in effect, rejects the perspective of the child and may encourage multiplicity of proceedings. This, ultimately, leads to a mechanical application of the principle of comity of courts. This is in direct conflict with the binding decision in V. Ravi Chandran (2) [Ravi Chandran (2) v. Union of India, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44] where a three-Judge Bench categorically held that under no circumstances can the principle of welfare of the child be eroded and that a child can seek refuge under the parens patriae jurisdiction of the Court.

VI. CONCLUSION

40. For the reasons stated above, the 1st point raised in the present writ petitions is answered in the negative holding that the Family Court is not justified in passing the

impugned order dated 30.10.2018 rejecting I.A. No.2 filed by the petitioner – father under Section 12 of the Guardians and Wards Act, 1890 for interim custody of minor child – *Prisha,* aged about 10 years. Consequently, Point No.2 is also answered in the negative holding that the Family Court is not justified in passing the impugned order dated 7.11.2018 allowing I.A. No.5 filed by the respondent – mother directing the jurisdictional Police to assist the respondent in securing custody of minor child – *Prisha* from the petitioner. In view of the above and taking into consideration the paramount interest of the minor child-*Prisha,* who is aged more than 10 years, and the consistent wishes expressed by her before the Family Court as well as before this Court, the impugned orders passed by the Family Court cannot be sustained and are liable to quashed.

41. In view of the above, these writ petitions are **allowed**. The impugned orders passed by the Family Court dated 30.10.2018 on I.A. No.2 filed by the petitioner –

father under Section 12 of the G & W Act and the order dated 7.11.2018 on I.A. No.5 filed by the respondent - mother are hereby quashed. I.A. No.2 filed by the petitioner – father in G & WC No.242/2018 is allowed. I.A. No.5 filed by the respondent – mother in G & WC No.242/2018 is rejected.

42. This Court hopes and trusts that both the petitioner – father and respondent – mother being highly educated, cultured with all modern outlook and well off, would maintain cordial relations and conduct themselves decently, courteously and extend full cooperation for the well being of minor female child – *Prisha,* which is the object of the provisions of the Guardians and Wards Act, 1890 and the dictums of the Hon'ble Supreme Court and this Court, stated supra.

43. Taking into consideration the paramount interest of the child, the Family court is directed to dispose of the main

matter itself within a period of four months from the date of receipt of certified copy of this Order, subject to cooperation from both the parties to the *lis*.

44. It is needless to observe that the respondent being the mother of the minor child – *Prisha* is entitled to file application for visitation rights during the pendency of the proceedings before the Family Court and the petitioner being the father should not oppose for grant of visitation rights. If such an application is filed, the Family Court shall dispose of the same at the earliest in accordance with law.

Ordered accordingly.

Sd/-
JUDGE

*gss/-