

2026:BHC-AS:35609



wp 3975 of 2023.doc

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3975 OF 2023**

1. Yogesh Gangaram Sanap,
Age 35 years, Occu – Service
2. Rupali Yogesh Sanap,
Age 32 years, Occu -Housewife,
Both residing at Room No.11-J,
Chandrakant Bhoir Chawl, Mangal
Ragho Nagar, Near Saibaba Temple,
Teesgaon Road, Teesgaon,
Kalyan (East). ... Petitioners

versus

Anil Mahadev Raghav,
Age Adult, Occu – Service,
Residing at Room No.5-Q,
Chandrakant Bhoir Chawl, Mangal
Ragho Nagar, Near Saibaba Temple,
Teesgaon Road, Teesgaon,
Kalyan (East). ... Respondent

Mr. Prashant B. Kayande, for Petitioners.
Mr. Samir B. Pawar, for Respondent.

CORAM: N.J.JAMADAR, J.

**RESERVED ON : 27 MARCH 2026
PRONOUNCED ON : 31 AUGUST 2026**

JUDGMENT :

1. Rule. Rule made returnable forthwith, and, with the consent of the learned Counsel for the parties, heard finally.
2. This Petition under Articles 226 and 227 of the Constitution of India

SSP

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assails the legality, propriety and correctness of an order dated 28 November 2022, passed by the learned District Judge, Kalyan, on an application for grant of interim custody of the girl child 'Y', during the pendency of the application for permanent custody of the child, whereby the said interim application (Exh.5) came to be rejected.

3. The background facts leading to this petition can be stated, as under :

3.1 The Petitioners are the biological parents of the child 'Y'. Respondent No.1 was the neighbour of the Petitioners. The Petitioner No.1 and the Respondent developed a friendly relationship as both were working in a company M/s. Haymarket SAC Publishing (India) Pvt. Ltd. The daughter 'Y' was born to the Petitioner No.2 on 1 December 2014. 'Y' was the third daughter of the Petitioners. The Respondent and his wife were issue-less.

3.2 The Petitioners assert that, when 'Y' was three months old, Respondent and his wife implored the Petitioners to give the custody of 'Y' to the wife of the Respondent for a temporary period as it would have positive impact on the state of mind of the wife of the Respondent and she might conceive. In good faith, the Petitioners acceded to the request of the Respondent and allowed the Respondent and his wife to have the temporary custody of their daughter 'Y'. However, when the Petitioners discussed the issue of admission of 'Y' in a pre-school, the Respondent informed the Petitioners that he had

already admitted 'Y' in a Little Angle Nursery, a play-group by enrolling her under the name of "Ovi Anil Raghav". The Petitioners, thus, realized that, taking undue advantage of the generosity of the Petitioners in giving temporary custody of 'Y', the Respondent had enrolled 'Y' in the playgroup as 'Ovi Anil Raghav', and, thereby deceived the Petitioners. Thus, the Petitioners addressed letters to the schools in which 'Y' was admitted unbeknownst to the Petitioners in the false name of 'Ovi Anil Raghav'.

3.3 Thereafter, there was change in the attitude of the Respondent and his wife. They declined to send 'Y' to the house of the Petitioners, though they were her biological parents and natural guardians. The Respondent and his wife also restrained the Petitioners and their family members from meeting 'Y' by keeping 'Y' away from them, on one or the other pretext. The Respondent, thus, forcibly and illegally retained the custody of 'Y' without any semblance of authority.

3.4 Eventually, the Petitioners addressed legal notice to the Respondent on 29 June 2019 to deliver the custody of 'Y' back to the Petitioners. A false and frivolous reply was given by the Respondent on 12 July 2019 that, 'Y' was given in adoption to the Respondent. The Petitioners, thus, filed an application under Section 25 of the Guardians and Wards Act, 1890 (GW Act, 1890) seeking permanent custody of 'Y' asserting, inter alia, that the welfare

of the child would not be secured if the child remains in the custody of the Respondent, who has illegally detained the child.

3.5 The Respondent resisted the application by filing an affidavit in reply.

3.6 During the pendency of the said application, the Petitioners preferred an application under Section 12 of the Act, 1890, for interim custody of 'Y'. In the said application, it was, inter alia, averred that the Petitioners had secured admission of 'Y' in Pacific Global Pre-School for the year 2019-20. As the Respondent was not delivering custody of the child to the Petitioners, the child's education and development was prejudicially affected.

3.7 Adverting to the facts narrated in the main application, the Petitioners asserted that, in the peculiar facts and circumstances of the case, in order to secure the welfare of the child 'Y', it was just and proper that, pending hearing and final disposal of the main application, the interim custody of the child was delivered to the Petitioners.

3.8 The Respondent resisted the said application as well, on the premise that on 23 January 2015, the Petitioners had given the child 'Y' in adoption to the Respondent and his wife in a ceremony. Subsequently, a naming ceremony was held on 5 April 2015, at the then residence of the Respondent at Parel, where the child 'Y' was named 'Ovi', in the presence of the Petitioners and others. The Petitioners had agreed to execute a formal deed

of adoption and render necessary co-operation in the said process. Later on, the Petitioners resiled from their promise. For almost five years, the Petitioners did not raise any objection regarding the Respondent and his wife acting as adoptive parents of 'Y'. In fact, the Respondent and his wife have been taking utmost care of 'Y' and treating her as their own daughter and the welfare of the child would be better secured if the child remains in the custody of the Respondent. On the contrary, if the custody and the residence of the child is disturbed, the child will suffer great emotional trauma and would be completely displaced as she has been in the custody of the Respondent since she was only one month and 22 days old.

4. The learned District Judge heard the parties and also interviewed the child 'Y'. Thereafter the learned District Judge, by the impugned order, was persuaded to reject the application observing, *inter alia*, that the welfare of the child was the paramount consideration and, in the facts of the case, the welfare of the child would not be promoted by disturbing the custody of the child during the pendency of the main application for custody. The learned District Judge took note of the fact that the child 'Y' has been residing with the Respondent since infancy, and during the course of the interview, the child even declined to recognize the Petitioners. Transfer of custody during the pendency of the application, in the light of the preference indicated by the child 'Y', in the opinion of the learned District Judge, would cause harm to the

welfare and comfort of the child.

5. Being aggrieved, the Petitioners have preferred this petition. An affidavit-in-reply has been filed on behalf of the Respondent. The Petitioners have filed a further affidavit to bring on record the subsequent developments, which, according to the Petitioners, bear upon the child's custody. In the wake of the pleadings and the material on record, including the documents filed on behalf of the parties to substantiate their respective contentions, I have heard Dr. Prashant Kayande, the learned Counsel for the Petitioners, and Mr. Samir Pawar, the learned Counsel for the Respondent, extensively. This Court has also interviewed the child.

6. Dr. Kayande submitted that, the custody of the Respondent is plainly illegal and wrongful. The Respondent is not a relative of the child 'Y', much less a guardian. The Respondent has no semblance of authority to retain the custody of the child 'Y'. The status of the Respondent as a complete stranger qua the child 'Y', makes a significant difference as the principles which govern the grant of custody where the parents or one of the parents and the maternal relatives of the child are at loggerheads do not apply.

7. Secondly, Dr. Kayande would urge, the circumstances in which the temporary custody of the child was entrusted to the Respondent and his wife cannot be lost sight of. It was an act of generosity on the part of the

Petitioners to give temporary custody of the child to the Respondent and his wife as they were childless. The Respondent has, on the other hand, abused the trust and confidence reposed by the Petitioners in the Respondent, in good faith.

8. Dr. Karande further submitted that, the theory of the Petitioners that the child 'Y' was given in adoption has no legs to stand. Neither the Respondents have pleaded the particulars of the adoption ceremony with reference to date, time, and place, nor there is any other evidence to show the giving and taking of the child. The claim of the Respondent is thus in teeth of the provisions of Hindu Minority and Guardianship Act, 1956. And, therefore, even at an interim stage, the case sought to be put-forth by the Respondent deserves to be firmly rejected.

9. Dr. Kayande laid emphasis on the fact that the Petitioners, who are the natural guardians, cannot be deprived of the custody of the child, especially when the Respondent is an utter stranger. The High Court, in exercise of its writ jurisdiction under Articles 226 and 227 of the Constitution of India, is empowered to issue a writ to transfer the custody of child *dehors* the proceedings under the Guardians and Wards Act. To buttress this submission, Dr. Kayande placed a very strong reliance on the decision of the Supreme Court in the case of ***Tejaswini Gaud and others vs. Shekhar Jagdish***

***Prasad Tewari and others*¹** and a judgment of this Court in the case of ***Rakesh Tulsidas Rathod vs. Jayraj Vishram Vapikar and others*²**

10. Dr. Kayande further submitted that the conduct of the Respondent, as borne out by the record, also disentitles the Respondent to retain the custody of the child. The Respondent has resorted to fabrication of the record and made false declarations to show that the Respondent and his wife are the parents/guardians of the child 'Y'. Surreptitiously, the Respondent enrolled the child in a preschool under a false name of "Ovi Anil Raghav". The Respondent, thereafter, even forged the record to obtain an AADHAR enrollment of the child by making false declarations. In the record of the school in which the child 'Y' is currently admitted under her real name also, the name of the wife of the Respondent is fraudulently shown as the child's mother. These fraudulent acts on the part of the Respondent completely disentitle the Respondent from retaining the custody of the child.

11. Dr. Kayande further submitted that the expression "welfare" is not confined to material and financial welfare. It is a broad and encompassing concept. Welfare also includes the moral and ethical welfare of the child. The situation in life of the Respondent, the surroundings in which the Respondent lives, and the acts and conduct of the Respondent are extremely detrimental

¹ (2019) 7 SCC 42.

² Criminal WP/579/2021 dated 1/2/2022.

to the moral and ethical welfare of the child. To buttress this submission, Dr. Kayande placed reliance on a judgment of the Madras High Court in the case of ***N. Nirmala vs. Nelson Jayakumar***³.

12. Dr. Kayande submitted that the learned District Judge was unduly swayed by the preference indicated by the child 'Y'. Amplifying the submission, Dr. Kayande would urge while appreciating the preference indicated by the child, the aspects of the child being in the custody of the Respondent since a very young age and the Respondent being in a position to poison the mind of the child qua the Petitioners, were required to be kept in view. The preference indicated by a child of a tender and impressionable age cannot be construed as an intelligent preference. Therefore, Dr Kayande would urge, the learned District Judge grossly erred in giving undue weight to the preference purportedly expressed by the child. In the same vein, Dr. Kayande appealed to this Court as well that much significance need not be given to the impression that this Court might have gathered upon interaction with the child 'Y'.

13. In order to lend support to the submission that a child of tender age is not equipped to make intelligent preference, Dr. Kayande placed reliance on the judgments of the Madras High Court in the cases of **Venkatarama**

³ (1999) 1 DMC 737.

Ayyangar Vs Thulasi⁴ and S Rama Iyer Vs K. V. Nataraja Iyer.⁵

14. Lastly it was submitted that, though the Petition assails an interim order passed by the learned District Judge in an Application under Section 12 of the Guardians and Wards Act, yet, in the peculiar facts of the case, this Court in exercise of its extraordinary jurisdiction would be justified in passing an order for transfer of the custody of the child 'Y'.

15. Per contra, Mr. Pawar, the learned Counsel for the Respondent stoutly supported the impugned order. First and foremost, Mr. Pawar would urge the grant of prayer in the Interim Application would amount to allowing the Application for custody as the prayers in main Application and the Interim Application are identical. It would thus amount to granting a final relief at an interim stage without examining the relative merits of contentions of the parties.

16. Secondly, Mr. Pawar would urge, the material on record unmistakably indicates that the child 'Y' was given in adoption while she was barely one and half month of age. Though the Petitioners have made an endeavour to progressively improve upon their case, yet, notice issued by the Petitioners on 29 June 2019 clearly reveals that not only the child 'Y' was given in custody of the Respondent during her infancy but even the Petitioners had shared the

4 (AIR 1950 Madras 320.

5 AIR 1948 Madras 294.

documents with the Respondent for securing the admission of child in the school. The contention of the Petitioners that the child 'Y' was given in the custody of the Respondent for a temporary period is belied by the material on record and the time that was allowed to pass by. It was only after four and half years, the Petitioners started raising grievances regarding the custody of the child 'Y'.

17. Under no circumstances, Mr. Pawar would urge, can it be said that the custody of the child with the Respondent and his wife is wrongful or illegal. On the contrary, the material on record indicates that the Petitioners had voluntarily given the child 'Y' in adoption and resiled from their promises to execute the documents. Mr Pawar laid stress on the fact that it was the Petitioners who put hindrances in the educational prospects of the child 'Y' by addressing letters to the schools in which the Respondent had secured the admission of the child in the year 2019.

18. Mr. Pawar further submitted that while considering an application under Section 12 of the Guardians and Wards Act, the question of the impact of abrupt change in the custody on the mind of the child was required to be considered and the learned District Judge has rightly observed that the change in the custody during the pendency of the main Application would cause immense harm and discomfort to the child.

19. To buttress the aforesaid submissions, Mr. Pawar placed strong reliance on the judgment of the Supreme Court in the case of **Athar Hussain Vs Syed Siraj Ahmed & Ors**⁶ and the Division Bench judgment of the Calcutta High Court in the case of **Tarun Ranjan Majumdar & Anr Vs Siddhartha Datt**⁷ and a judgment of a learned Singh Judge of the Delhi High Court in the case of **Ruchika Bindra Vs Harvinder Singh Bindra**.⁸

20. Mr. Pawar countered the submissions of Dr Kayande that the wishes of the child do not deserve significance while deciding the aspect of interim custody, by canvassing a submission that, when the child is in a position to make an intelligent preference, the Court must have due regard to the wishes of the child. In the case at hand, Mr. Pawar would urge, the child was interviewed by the learned District Judge when she was about eight years of age. The child 'Y' has indicated her preference in clear and unequivocal terms. The child even did not recognize the parents. Now the child is more than 11 years of age. The child has all along been in the custody of the Respondent since a month of her birth. In this backdrop, the learned District Judge was fully justified in taking into account the wishes of the child.

21. Mr. Pawar would urge nothing could be brought on record to demonstrate that the Respondent and his wife are otherwise unsuitable.

6 (2010) 2 SCC 54.

7 AIR 1991 Calcutta 76.

8 2010 SCC OnLine Del 917.

Thus, the submissions on behalf of the Petitioners premised on the fact that they are the biological parents of the child 'Y' do not merit acceptance while considering the aspect of the custody of the child 'Y'. In order to lend support to this submission, Mr. Pawar placed reliance on the judgment of the Supreme Court in the case of **Somprabha Rana & Ors Vs State of Madhya Pradesh and Ors**,⁹ wherein the principles were culled out by the Supreme Court.

22. I have given anxious consideration to the aforesaid rival submissions canvassed across the bar.

23. To start with few uncontroverted facts. Firstly, the fact that the Petitioners are the biological parents of the child 'Y' is not in issue. The child was born to the Petitioners on 1st December 2014. Secondly, nor the fact that the child 'Y' was the third daughter of the Petitioners in contest. Thirdly, the Petitioners and the Respondent had a thick bond. Both were residing in the same neighbourhood. Both were employed with the same company. Fourthly, it is not the case that the Respondent is the relative of the Petitioners. Fifthly, the factum of custody of child 'Y' with the Respondent and his wife since the infancy of the child is not much in dispute. Sixthly, the disputes between the parties appear to have started in the year 2019, purportedly over the admission of child 'Y' in pre-school.

⁹ (2024) 9 SCC 382.

24. The parties are at issues over the circumstances in which the Respondent came in the custody of the child 'Y'. The exact date of such transfer of custody, the nature of the custody; whether exclusive, permanent or temporary, and the character of such custody in the context of the contention of the Respondent that the child 'Y' was given in adoption.

25. It would contextually relevant to note at this stage itself that in the notice dated 29 June 2019, the Petitioners have claimed that since February 2015, the child 'Y' was given in the temporary custody of the Respondent. In contrast, the Respondent contends that, the child was given in adoption on 23rd January 2015. Thus, it *prima facie* emerges that, the child has been in the custody of the Respondent since she was barely two months of age.

26. In the light of the aforesaid broad and rather uncontroverted facts, the submissions canvassed on behalf of the parties deserve to be appreciated. Evidently, as the Respondent did not accede to the demand of the Petitioners to deliver the custody of the child, the Petitioners preferred an Application under Section 25 of the GW Act, 1890, for the custody of the child before the District Court, in the year 2019.

General Principles :

27. At this juncture, the text of the provisions contained in Section 25(1) of the GW Act, 1890, deserves to be noted. It read as under:—

“25. Title of guardian to custody of a ward.— (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, it it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order, may cause the ward to be arrested and to be delivered into the custody of the guardian.”

28. From the phraseology of the aforesaid Section, it becomes explicitly clear that the Court is empowered to make an order for return of a ward who leaves or is removed from the custody of the guardian of his person, only when it forms an opinion that it will be for the welfare of the ward to return to the custody of his guardian. Thus the exercise of the jurisdiction under Section 25 is conditioned by the formation of the opinion that, it is the welfare of the child which warrants the return of the child to the guardian. Thus, the emphasis is more on the welfare of the child rather than the legal right of the guardian to have the custody of the child restored. The necessary corollary is that, the fact that the person in whose custody the child is has no legal right to retain the custody of the child, though not completely irrelevant, is not of decisive significance. Therefore, while deciding the question of proper custody of the child the principle is well ingrained that the welfare of the child is of paramount consideration.

29. Section 12 of the GW Act, 1890 vests discretion in the Court to make an order for the temporary custody and protection of the person or property of

the minor as the Court may think proper. The provisions contained in Section 12 of the GW Act, 1890, find their practical utility when an Application is filed under Section 25 of the GW Act, 1890, seeking the custody of the child.

30. In the backdrop of the aforesaid elementary provisions, the pivotal question that wrenches to the fore is whether the learned District Judge correctly exercised the discretion to decline the prayer of the Petitioners to grant interim custody of the child 'Y' during the pendency of the Application under Section 25 of the GW Act, 1890.

31. As noted above, the instant case stands on a different footing in the sense that the contest for custody of the child 'Y' is not between the parents or one of the parents and the relatives of the other, which is usually the fact-situation in the custody dispute.

32. In the case at hand the Respondent claims that the child 'Y' was given in adoption while she was barely one and half months of age. It would be contextually relevant to note that the purported adoption ceremony is not evidenced by any document. The Respondent claims that the Petitioners had agreed to execute the document and later on reneged from their promise.

33. Dr Kayande would urge the alleged adoption is a ruse. In the absence of any evidence to *prima facie* support the claim of adoption, the Respondent has no semblance of any right or authority to retain the custody of the child

which was given as a temporary measure in good faith. Therefore, the principle that welfare of the child is paramount consideration may not govern the facts of the case with full rigour.

34. The distinction sought to be drawn by Dr Kayande in the cases where the custody of the child is sought by one parent from another parent and the cases where the custody of the child is sought by the parent from a person who is not the parent / lawful guardian, in the matter of application of the principle of paramountcy of the welfare of the child, cannot be acceded to unreservedly. Even in a case where the custody of a child is sought from the person who is not a parent / lawful guardian, the question of interest and welfare of the child is required to be carefully examined as the Court exercises a *parens patriae* jurisdiction. The proposition that in the matter of determination of the issue of custody of child, it is not the right of the parties but welfare of the child, that is of determinative significance, applies also in a case where the person having the custody of the child is neither a parent nor a lawful guardian.

35. A situation may be conceived that there may be qualitative difference in the degree of application of the principle, to the facts of the given case. However, it cannot be urged that, the principle of paramountcy of the welfare of the child has no play.

36. As noted above, the language of the text of Section 25 incorporates the consideration of the welfare of the child in express terms. Even in the case of ***Tejaswini Gaud and others (Supra)***, on which reliance was placed by Dr Kayande, the Supreme Court reiterated that while deciding the child custody cases the Court is not bound by the legal right of the parent or guardian and the paramount consideration ought to be interest or welfare of the child. The observations in paragraphs 26 and 34 are instructive and hence extracted below :

“Welfare of the minor child is the paramount consideration:-

26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

... ..

34. As observed in Rosy Jacob¹¹ earlier, 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. 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. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of

her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.”

37. What constitutes, “welfare” of the child ? The expression ‘welfare’ is of wide and expansive connotation. ‘Welfare’ cannot be confined only to the physical comfort and well being of the child. Nor can the ‘welfare’ be judged from the perspective of the materialistic possessions, financial capacity and the resources of the persons seeking the custody of the child. ‘Welfare’, in its true sense, includes emotional, ethical, intellectual and overall holistic development of the child.

38. In the case of **Gaurav Nagpal vs. Sumedha Nagpal**,¹⁰ the Supreme Court explicated the connotation of the term, “welfare” as under:

“43. The word ‘welfare’ used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases.”

(emphasis supplied)

39. In the case of **Nil Ratan Kundu and anr. vs. Abhijit Kundu**,¹¹ the

¹⁰ AIR 2009 SC 557.

¹¹ (2008) 9 SC 413.

considerations that weigh with the Court in the determination of the proper custody of a child were instructively enunciated by the Supreme Court as under:

“.....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.” (emphasis supplied)

40. In the case of **Dhanwanti Joshi Vs Madhav Unde**,¹² the Supreme Court emphasised that the moral and religious welfare must also be considered alongwith the physical well-being of the child. The word ‘welfare’ must be taken in its widest sense.

“22.

... the welfare of the child is not to be measured by money alone nor by physical comfort only. The word 'welfare' must

¹² I (1998) DMC 1 (SC).

be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded." (emphasis supplied)

41. In the case of **Rakesh Tulsidas Rathod (Supra)**, pressed into service by Dr. Kayande, after adverting to the judgments which exposit the concept of the welfare of the child, this Court had observed as under:

"42. Welfare of the minor is thus a broad and elastic expression. Every factor which bears upon the overall development of the child needs to be given due weight. The approach of the Court in ascertaining and determining the welfare of the minor ought to be well informed and pragmatic. It is thus said that the Court is called upon to deal with a human problem with a humane touch."

42. At this juncture, it is necessary to note that the learned District Judge on the basis of the interview of the child observed that the child 'Y' had expressed complete disinclination to join the company of the Petitioners. The child even refused to recognize the Petitioners. Before this Court as well, the child 'Y' demonstrated complete indifference towards the Petitioners. This Court could perceive that there was a feeling **of** animosity towards the Petitioners, probably on account of the quarrels that had ensued between the Petitioners and the Respondent over the custody of the child and the attempts on the parts of the Petitioners to take the child away from the Respondent. It

could be a learned trait. The influence of the Respondent and his wife on the behaviour of, and articulation of choice by, the child “Y”, cannot be totally discounted. Nonetheless, it is a fact that the child expressed total disinclination to part with the company of the Respondent and his wife and join the Petitioners.

43. It is well recognized that where the child is old enough to form an intelligent preference, the Court must consider such preference as well though that preference cannot be decisive. Ultimately, the Court must decide the matter on the principle of paramountcy of the welfare of the child. Thus, the reliance by Dr. Kayande on the judgments in the cases of **Venkatarama Ayyangar (Supra)** and **S Rama Iyer (Supra)** to bolster up the submission that a child of tender and impressionable age cannot form an intelligent preference, is required to be appreciated in the light of the the aforesaid principles.

Grant of Interim Custody :

44. The preliminary objection on behalf of the Respondent that the grant of the interim relief under Section 12 of the GW Act, 1890 would amount to granting the final relief at an interim stage, need not detain the Court. If the Court is satisfied that even during the pendency of the Application for custody under Section 25 of the GW Act, 1890, the dictate of welfare of the child

commands the transfer of the custody of child 'Y' to the Petitioners, the objection that it amounts to virtually granting the final relief at an interim stage pales in significance as general principle that ordinarily final relief cannot be granted at an interim stage cannot override the paramount consideration of the welfare of the child.

45. At the same time, the Court has to bear in mind the principles that govern a prayer for interim custody of the child. Whether the transfer of custody at an interim stage would promote the welfare of child? Would it be conducive for or impede the development of the child? Whether the transfer of the custody would have an adverse impact on the state of mind and psychological well-being of the child ? Are there sufficient and compelling reasons to transfer the custody of the child during the pendency of the Application for the permanent custody? These are the questions which the Court may be required to pose unto itself while determining the aspect of interim custody.

46. In the case of **Athar Hussain (Supra)**, on which reliance was placed by Mr. Pawar, the Supreme Court emphasises that while deciding the question of interim custody the Court must be guided by the welfare of the child since Section 12 empowers the Court to make an order as it deems fit. The Court must determine whether there are sufficient and compelling reasons to

persuade the Court to change the custody of the minor child with immediate effect. Stability and consistency in the affairs and routines of children is also an important consideration.

47. The observations of the Supreme Court in paragraphs 30, 36 and 37 are material. They read as under:

“30. Reasons are as follows: Section 12 of the Act empowers courts to "make such order for the temporary custody and protection of the person or property of the minor as it thinks proper." (emphasis supplied). In matters of custody, as well settled by judicial precedents, welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the Court to make any order as it deems proper.

... ..

36. The appellant placed reliance on the case of R. V. Srinath Prasad V Nandamuri Jayakrishna (2001) 4 SCC 71. This Court had observed in this decision that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children. In that decision, while granting interim custody to the father as against the maternal grandparents, this Court held :

“10.The Division Bench appears to have lost sight of the factual position that the time of death of their mother the children were left in custody of their paternal grand parents with whom

their father is staying and the attempt of the respondent no.1 was to alter that position before the application filed by them is considered by the Family Court. For this purpose it was very relevant to consider whether leaving the minor children in custody of their father till the Family Court decides the matter would be so detrimental to the interest of the minors that their custody should be changed forthwith. The observations that the father is facing a criminal case, that he mostly resides in USA and that it is alleged that he is having an affair with another lady are, in our view, not sufficient to come to the conclusion that custody of the minors should be changed immediately."
(emphasis supplied)

What is important for us to note from these observations is that the Court shall determine whether, in proceedings relating to interim custody, there are sufficient and compelling reasons to persuade the Court to change the custody of the minor children with immediate effect.

37. Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in the case of Mausami Moitra Ganguli Vs Jayant Ganguli (2008) 7 SCC 673. This Court held :

"24. We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression on him."

After taking note of the marked reluctance on part of the boy to

live with his mother, the Court further observed :

"26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that 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." (emphasis supplied)"

Prima facie appraisal of facts :

48. On the aforesaid touchstone reverting to the facts of the case, the following factors, in the considered view of this Court, are of critical salience.

49. First, the age at which the child 'Y' came in the custody of the Respondent. Even if the case of the Petitioners, as narrated in the pre-application notice is taken at par, the Respondent and his wife came in the custody of the child in the month of February 2015, while the child was barely two months of age. For the child, the Respondent and his wife were the parents since infancy. *Prima facie*, the child has not seen, perceived and understood the Petitioners as her parents. The extreme reluctance of the child 'Y' to acknowledge and join the Petitioners probably stems from this understanding of the child as to who her parents are.

50. Secondly, the initial custody of two months old child with the Respondent was not wrongful or surreptitious. *Prima facie* it appears the initial transfer of the custody was voluntary and there was no dispute till the child grew up to the age of being enrolled in a pre-school. In the pre-application notice the Petitioners have asserted that Petitioner No.1 had delivered the documents to the Respondent to facilitate the admission of the child in a pre-school. The disputes seem to have started when the Respondent admitted the child in the pre-school under the name "Ovi Anil Ravhav"

51. Thirdly, a period of almost four and half years had passed by the time the Petitioners started raising objections and addressed letters to the school authorities, culminating in the cancellation of the admission. *Prima facie*, for almost four and half years, in the least, the child 'Y' had an impression that, the Respondent and his wife were her parents.

52. When this Court interviewed the child, she stated that she was studying in 4th standard. Though the child was young, she appeared to be certain about the preference she was making. Although the wishes of the child are not decisive, yet, her wishes cannot be brushed aside completely as immaterial or inconsequential. The aspect of the stability in the life and affairs of the child from the perspective of her surroundings, school, persons whom the child considers near and dear assume importance when the Court is

called upon to deal with the prayer for transfer of custody of the child, especially at an interim stage.

53. Prima facie, this Court is of the view that the extreme position taken by the parties resulted in the loss of education of the child. It seems that the admissions taken by the Respondent in Little Angle Nursery School, Kalyan and Don Bosco School were cancelled in view of the objections raised by the Petitioner No.1. Conversely, the Petitioners claimed, in the year 2023, the Respondent enrolled the child in Narayani School by forging documents and making false declarations. The veracity of these allegations and counter-allegations is required to be adjudicated post recording of evidence in the main application, as in the pre-application notice, it was asserted by the Petitioners that the Petitioners had delivered a true copy of the birth certificate of the child to the Respondent to secure admission of the child in the school.

Approach of the Court :

54. In the backdrop of the aforesaid facts, which prima facie emerge, the approach expected of the Court in deciding the application for custody, especially when the child has been in the custody of the person, who is ex-facie not the biological parent or guardian, deserves to be kept in view. Ordinarily, the following factors weigh with the Court in such a case. First, the age since which the child has been in the custody of the person who is not the

biological parent/guardian, the length of time for which the child has been in custody of such person, the age of the child at the time the Court is called upon to make the decision, the wishes of the child where she is in a position to convey her preference in clear terms. Lastly, the element of stability in the life and affairs of the child.

55. In **Somprabha Rana and Ors. (supra)**, the child was two years and 7 months of age. After the death of the mother in unnatural circumstances, the sisters of the mother took away the minor child allegedly without the consent of the father. The High Court had allowed the writ of habeas corpus directing the Appellants / sisters of the mother to hand over the custody of the child to her father. The Supreme Court considered the question whether the High Court was justified in disturbing the custody of the child whose age was one year and five months at the time of passing the judgment by the High Court. The Supreme Court culled out the broad propositions of law governing the custody matters, as under :

“9.1 Writ of habeas corpus is a prerogative writ. It is an extraordinary remedy. It is a discretionary remedy;

9.2 The High Court always has the discretion not to exercise the writ jurisdiction depending upon the facts of the case. It all depends on the facts of individual cases;

9.3. Even if the High Court, in a petition of habeas corpus, finds that custody of the child by the respondents was illegal, in

a given case, the High Court can decline to exercise jurisdiction under Article 226 of the Constitution of India if the High Court is of the view that at the stage at which the habeas corpus was sought, it will not be in the welfare and interests of the minor to disturb his/her custody; and

9.4 As far as the decision regarding custody of the minor children is concerned, the only paramount consideration is the welfare of the minor. The parties' rights cannot be allowed to override the child's welfare. This principle also applies to a petition seeking habeas corpus concerning a minor."

56. Thereafter, the Supreme Court, in the facts of the said case, observed that, the High Court was dealing with the custody of the child whose age at that time was one year and five months. The child has been in the custody of the parents from the tender age of 11 months after her mother died. The child, when the Supreme Court passed the order, had been in the custody of the appellants for more than one and a half years. When the Court deals with the issue of Habeas Corpus regarding a minor, the Court cannot treat the child as a movable property and transfer custody without even considering the impact of the disturbance of the custody on the child. Such issues cannot be decided mechanically. The Court has to act based on humanitarian considerations and the Court cannot ignore that it is exercising a *parens patriae* jurisdiction. The Supreme Court emphasised that the Court under the GW Act, 1890, would be the appropriate Court to decide the issue of child

custody and guardianship. The observations in paragraph No.13 read as under :

“13. We believe that considering the peculiar facts of the case and the child's tender age, this is not a case where custody of the child can be disturbed in a petition under Article 226 of the Constitution of India. Only in substantive proceedings under the GW Act can the appropriate Court decide the issue of the child custody and guardianship. Regular Civil/Family Court dealing with child custody cases is in an advantageous position. The Court can frequently interact with the child. Practically, all Family Courts have a child centre/play area. A child can be brought to the play centre, where the judicial officer can interact with the child. Access can be given to the parties to meet the child at the same place. Moreover, the Court dealing with custody matters can record evidence. The Court can appoint experts to make the psychological assessment of the child. If an access is required to be given to one of the parties to meet the child, the Civil Court or Family Court is in a better position to monitor the same.” (emphasis supplied)

57. With regard to the impact of the transfer of the custody on the child, the Supreme Court emphasised that, the child had not seen the father and grandparents for over a year and if the custody of the child was immediately transferred to the father and grandparents at the tender age of two years and seven months, the child will become miserable as the child has not met them for a considerably long time.

58. In the case of **Nirmala V/s. Kulwant Singh and Ors.**¹³, where the child was in the custody of the maternal grandparents since the father had placed the child in the custody of the grandmother, the Supreme Court observed that, it cannot be said that the grandmother had illegally kept the custody of the minor child. Compelling a minor child at the tender age of 7 years to withdraw from the custody of his grandparents with whom he has been living for the last about 5 years may cause psychological disturbances. Thus, an exercise for promoting the bond between the minor child and the respondent-father in a graded manner and thereafter considering the grant of custody of minor child to the respondent-father taking into consideration the paramount interest of the welfare of the minor child would be required to be done in the present matter. Such an exercise would not be permissible in the extraordinary jurisdiction under Article 226 of the Constitution of India.

59. In the case of **Shazia Aman Khan and Anr. V/s. State of Orissa and Ors.**¹⁴, wherein the child was 14 years of age and had been living since birth with the persons who were not her biological parents and natural guardians and the High Court had directed the transfer of the custody of the child to the father, the Supreme Court while setting aside the order of the High Court reiterated the pristine principle that, in deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant

¹³ (2024) 10 SCC 595

¹⁴ (2024) 7 SCC 564

statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. The welfare of the child is of paramount consideration and not personal law and statute. The Supreme Court adverted to the precedents which make the wish of the child a relevant consideration in the matter of custody of the child. Referring to the interaction the Hon'ble Judges had with the child, keeping in view her age, and the capacity to form an opinion in regard to her welfare and custody and the fact that the child was quite categoric in that regard, when the Court interacted with her, the Supreme Court emphasised that, the child cannot be treated as a chattel at the age of 14 years to hand over her custody to the father, where she has not lived ever since her birth. Stability of the child was also of paramount consideration.

60. In the case of **Roshan Lal and Anr. V/s. Gautam Khanna and Ors.**¹⁵, where the children then aged 7 and five years, were in the custody of the Petitioners and the High Court had directed that the custody of the children shall be handed over to their father, the Supreme Court again reiterated that the issue of custody of minor children cannot be decided on the basis of rights claimed by the rival parties and the only paramount consideration is the welfare of the children. The Supreme Court, inter alia, observed as under :

“4. Looking to the tender age of the children and

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looking to the fact that at least from November, 2021, the children are with the Petitioners, we are of the view that the issue of welfare of the children should be best left to be decided by the Competent Family Court in the pending Custody Petition and it will not be proper at this stage to disturb the custody of the children.”

61. It is true, this Court in exercise of its plenary writ jurisdiction can direct the transfer of custody. Yet, this Court needs to be alive to the fact that the Court under the GW Act, 1890, is better equipped to carry out the exercise of determining the welfare of the child as such Court would have the benefit of interaction with the child at various stages, assistance of the expert psychologist (if found necessary), and can supervise the visitation of the non-custodial parents to foster the development of the bond, trust and confidence between such parents and the child and that would eventually ensure the stability of the child.

62. Applying the aforesaid principles to the facts of the case at hand, this Court is of the considered view that the transfer of the interim custody of the child ‘Y’ , at this stage, would not promote the welfare of the child for reasons more than one. Firstly, the child ‘Y’ has been in the custody of the Respondent since she was barely two months of age. Secondly, since infancy the child ‘Y’ has considered the Respondent and his wife as her parents. Thirdly, the initial entrustment of the custody of the child ‘Y’, prima

facie, appeared to be voluntarily. Fourthly, the custody of the child 'Y' with the Respondent appeared to be without any objection, at least till four and half years from the delivery of the custody. Fifthly, by the passage of period of almost 10 years, the child 'Y' finds herself comfortable in the company of the Respondent and his wife. Sixthly, the child 'Y' has made her preference explicitly clear. Seventhly, the element of stability in the life and affairs of the child 'Y' and continuity in the routine of child 'Y' would be seriously affected if the interim custody is transferred to the Petitioners. Eighthly, prima facie, there is an imminent risk of such abrupt transfer affecting the psychological well-being of the child 'Y'.

63. Undoubtedly, the Court under the GW Act, 1890 would be entitled to pass a final order under Section 25 of the Act, 1890, after having the resume of all the facts, which bear upon the aspect of the proper custody of the child 'Y' on the touchstone of her paramount welfare after the parties adduce evidence. All the questions including the justifiability of the claim of the Respondent that he and his wife are the adoptive parents of the child 'Y' as she was given in adoption on 23 January 2015, would be open for adjudication before the Court under the GW Act, 1890. The Court can on the basis of the evidence evaluate whether the continuance of custody of the child with the Respondent is detrimental to the welfare of the child. The proper course, in a situation of the present nature, may be to request the

learned District Judge to hear and finally decide the application in a time frame.

64. At the same time, in view of the acrimony that has developed between the Petitioners and the Respondent, the order passed by the learned District Judge, directing the Respondent to provide access to the child 'Y' twice a week, cannot be implemented, unless further directions are issued. It is, therefore, necessary to pass directions to ensure that the Petitioners have access to child 'Y'.

65. The conspectus of aforesaid consideration is that the Petition deserves to be dismissed, with directions for expeditious disposal of the Application under Section 25 of the GW Act, 1890 and for access of the child 'Y'.

66. Before parting, it must be clarified that, this Court considered it in the fitness of things to delve into the matter in a little detail, in the backdrop of the peculiar facts of the case. Yet none of the observations in this order to the extent they bear upon the facts of the case and relative merits of the claim of the parties, shall influence the trial Court. By way of abundant caution, it is clarified that this Court was considering the issue of transfer of interim custody of child 'Y', and, these observations will not bear upon the determination of the application for permanent custody under Section 25 of the GW Act, 1890, on its own merits and in accordance with law. All

contentions of both the parties are expressly kept open for adjudication at the final decision of the main application.

67. Hence, the following order :

ORDER

(i) The Writ Petition stands dismissed.

(ii) Learned District Judge, Kalyan, seized with M.A.No.85 of 2019 is requested to hear and finally decide the same, as expeditiously as possible, and preferably within a period of six months from 8 September 2026.

(iii) The parties shall appear before the learned District Judge, Kalyan, on 8 September 2026.

(iv) The parties shall cooperate with the learned District Judge, Kalyan, in the expeditious disposal of M.A.No.85 of 2019 and shall not seek unnecessary adjournments.

(v) Till the decision of M.A.No.85 of 2019, the Petitioners shall have access to the child 'Y' on every Friday and Saturday at the place to be decided by the learned District Judge, Kalyan, either within the precincts of the District Court, Kalyan, or beyond, for three hours, either in the morning or evening, as the learned District judge may specify.

(vi) The parties shall be at liberty to approach the learned District

Judge for modification of the aforesaid arrangement of access to the child 'Y'.

(vii) Rule discharged.

(viii) No costs.

(N.J.JAMADAR, J.)