R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 31ST DAY OF JANUARY 2023

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE S.VISHWAJITH SHETTY

M.F.A.NO.2786/2022(GW)

BETWEEN:

...APPELLANT

(BY SRI R.V.S.NAIK, SR. COUNSEL FOR
SRI OMAR SHARIFF, ADV.,)

AND:

...RESPONDENT

(BY SRI S.SRIVATSA, SR. COUNSEL FOR
SRI N.GOWTHAM RAGHUNATH, ADV., FOR C/R)

THIS M.F.A. IS FILED UNDER SECTION 47 (C) OF GUARDIANS AND WARDS ACT, PRAYING AGAINST THE JUDGMENT AND AWARD DATED 03.03.2022 PASSED ON G AND WC NO.128/2018 ON THE FILE OF THE IV ADDITIONAL

PRINCIPAL JUDGE, FAMILY COURT, BENGALURU, ALLOWING THE PETITION FILED U/S 25 OF GUARDIAN AND WARDS ACT.

THIS APPEAL HAVING BEEN HEARD AND RESEVED, COMING ON FOR PRONOUNCEMENT THIS DAY, ***VISHWAJITH SHETTY J.,*** DELIVERED THE FOLLOWING:

JUDGMENT

This miscellaneous first appeal is filed under Section 47(C) of the Gurardian and Wards Act, 1890 (for short, 'the Act'), against the judgment and decree dated 03.03.2022 passed by the IV Addl. Prl. Judge, Family Court, Bengaluru (hereinafter referred to as 'the Family Court'), in G & WC.No.128/2018, wherein the Family Court has allowed the petition filed by the respondent-father under Section 25 of the Act and directed the appellant-mother to hand over the custody of the minor child to the respondent and further restrained the appellant from removing the child from the jurisdiction of the Family Court till the custody of the child is handed over to the respondent.

2. Heard the learned Senior Counsel for the parties and also perused the material available on record.

3. Brief facts of the case as revealed from the records which would be necessary for the purpose of disposal of this appeal are, the marriage of the appellant with the respondent was solemnized as per the Hindu rites and customs on 23.10.2011 and from the said wedlock, a girl child who was named Mayra Giri was born on 26.04.2015. Both the parties are Doctors by profession. It appears that the parties had come across each other through a marriage portal, and thereafter got married. At the time of marriage, the respondent's parents and his sister with her two years old daughter were staying with him and the appellant was fully aware of the same and she had allegedly consented for the marriage knowing that she had to reside with the respondent along with his family members.

4. After the marriage, the appellant allegedly started quarrelling with the respondent's family members and she also used to abuse them and created unpleasant atmosphere in the house. The ill-treatment to the family members by the appellant continued inspite of the respondent advising her and being unable to bear the ill-

treatment, the family members of the respondent were constrained to leave the house and they started residing separately. After the family members had left the house, the appellant had told the respondent that her plan to throw out his family members had worked out and the same trick was played by her mother to get rid of her in-laws. Even after the family members of the respondent started residing separately, the appellant continued her hostile attitude towards them and she even objected the respondent visiting them or supporting them. The appellant allegedly had grown up in her maternal grandparents house, and therefore, she did not value the family relationship and the bondage, and therefore, she always attempted to separate the respondent from his family members.

5. It is the specific case of the respondent that the appellant was short-tempered and she was in the habit of behaving aggressively even on petty issues. The respondent had, therefore, taken the help of trained counsellors in order to save his marriage and whenever the counsellors tried to point out the flaws in her, the

appellant retaliated and she also abused the counsellor and she did not cooperate for counselling. During one of the sessions, the Counsellor had advised that the appellant needs psychological evaluation. After one such counselling, the appellant allegedly fought with the respondent, abused him in filthy language, assaulted him and also broke his mobile phone which had forced the respondent to approach the police and file a complaint against her. The appellant was in the habit of picking up quarrel with the respondent in public. When the appellant was pregnant, inspite of request, her parents refused to take care of her, and therefore, the parents of the respondent who had gone to Tokyo for attending respondent's sister's delivery, had to fly back for taking care of the appellant. The respondent's parents after coming back from Tokyo had taken care of the appellant during her advanced stage of pregnancy and after she gave birth to the girl child, they also had taken care of the mother and the child.

6. In the month of February 2016, the appellant had joined Columbia Asia Hospital and started working

there on the administrative side. It appears that she came in contact with one who was also working in the said hospital on the administrative side and she developed illicit relationship with him. After developing illicit relationship with the said , the appellant gave priority to the said relationship and virtually abandoned the child who was being taken care of by the respondent and his parents. The appellant used to stay overnight in her working place and continued her adulterous affair with the said who was already married and had a child from the said marriage. Even when the child was sick, the appellant instead of attending the child, had gone to the hospital and the respondent with the help of his parents had to take care of the child.

7. The appellant merrily continued the relationship with and throughout lied to the respondent. After sometime, the appellant started misbehaving with the respondent's parents. Till the child was about three years old, the parents of the respondent stayed in his house, and thereafter, the appellant started picking up

quarrels intentionally and also started abusing them in filthy language and insisted that they should leave the house and during the first week of April 2018, the appellant allegedly threw her in laws out of the house in the midnight and left them with no choice but to approach the police and lodged a complaint against the appellant. When the respondent had gone to the police station to see his parents, the appellant allegedly took the child and left the house without even informing the respondent, and thereafter, filed a police complaint before the J.P.Nagar Police Station alleging domestic violence and dowry demand against the respondent and his parents.

8. After the birth of the child, for about three years, the parents of the respondent and the respondent only had taken care of the child and the appellant had no concern about the child and she never bothered to take care of her. As a vengeance against the respondent and his parents, respondent had taken away the child and left the house. The attempts made by the respondent to bring back the appellant and his child were all in vain and

the appellant expressed her unwillingness to rejoin the respondent and she had taken all her belongings from the house of the respondent. Inspite of the Counsellors advising the respondent that the child needs the love and affection of the father, the appellant did not cooperate with the respondent and she always tried to keep the child away from the respondent.

9. The family members of the appellant also were hostile towards the respondent and they did not properly advise the appellant and in fact because of their ill-advise, the appellant had left the company of the respondent and after separation, she had started demanding huge amount from the respondent for settlement of the dispute. The appellant was not spending quality time with the child and she denied the parental care, love and affection to the child which started affecting the growth of the child. On the other hand, the respondent made all attempts to meet the child and tried to spend some quality time with the child by taking her out and playing with her. The respondent's sister and her minor daughter also used to meet the child

whenever the respondent brought her home and the child Mayra Giri had developed a bondage with the daughter of the respondent's sister.

10. After the appellant moved out of the matrimonial home along with the child, she continued her immoral relationship with the said and they started moving out steadily and stayed together in various hotels and resorts overnight and on certain occasions even the child was taken along with her by the appellant. The said was also visiting the apartment which was taken on rent for the purpose of the appellant and he used to stay overnight in the apartment. The respondent subsequently came to know that on the day on which the appellant had left the matrimonial home with the child, the said had picked up her from the house and also accompanied her to the police station and assisted her for filing the complaint against the respondent and his parents. The relationship between the appellant and the said was known to her parents and inspite of the same they had supported her and on one occasion, her

father even had made arrangement for their stay together in a Club at Mysuru. After coming to know about the adulterous affair of the appellant, the respondent had lodged a complaint against the appellant and her paramour before the J.P.Nagar Police Station on 05.06.2018, who after investigation have filed a detailed charge sheet against them for the offences punishable under Sections 420, 497, 109, 504, 506, 418 read with 34 IPC and Sections 75 & 87 of Juvenile Justice Act.

11. Since the child was growing in a unholy atmosphere in the midst of an illicit relationship between the appellant and her paramour , the respondent started apprehending that the welfare of the child and its future was not safe with the appellant and the child was required to be brought up in a safe and stable environment. It is under these circumstances, he had approached the Family Court, Bengaluru, by filing the petition under Section 25 of the Act, with a prayer to grant custody of the child to him and also to restrain the appellant from removing the child from the jurisdiction of

the Family Court till the child is handed over to his custody.

12. In the said proceedings, the respondent had entered appearance and filed her objections denying the petition averments and allegations made against her, while admitting the marriage and the birth of the child. She contended that the respondent and his parents had demanded dowry at the time of marriage, and therefore, in addition to cash, lot of jewellery was also given to the respondent and his family members by her parents at the time of marriage. She has stated that prior to the marriage, the respondent had never told her that his parents and his sister who had a minor daughter were staying with him. She also stated that there were many people living in respondent's house, and therefore, there was no sufficient food for her in the house and on the other hand, the respondent's family members were abusing her and demanding money from her and she was not allowed to go out anywhere. She also stated that they did not allow her parents to visit her nor they allowed her to visit her parents, and therefore, her father

would stay in a hotel nearby and would meet her outside the house. She has stated that she was made to do all the household work and even food was served by her to all the members of the family in their home. She was being ill-treated, abused and assaulted in the house, and therefore, she had lodged a police complaint, and thereafter, appellant's parents moved out of the house.

13. She also stated that the previous marriage of the respondent was broken because he and his family members had demanded money from his first wife and her parents. She has stated that the respondent had no love and affection towards her but he only had physical relationship with her to satisfy his lust. The respondent used to come home late and start shouting at her and inspite of she tolerating all the ill-treatment, the respondent and his family members always treated her in hostility and she was not properly taken care of even during the period of her pregnancy. She further contended that the parents and the sister of the respondent who were at home never took care of the child even after she started working in Columbia Asia

Hospital. The respondent allegedly was in the habit of taking all her money, and therefore, she was always dependent on her father for financial help.

14. She has stated that on 02.04.2018, she had prepared food for her daughter and when she was about to feed her daughter, she noticed that the entire food was eaten by her in-laws and she had no food to feed her child. When the appellant questioned them, they had abused and assaulted her and thereafter, threw her out of the house along with the child, and therefore, she was constrained to lodge a police complaint and thereafter she took shelter in her parents house. Subsequently, she had taken a premises on rent and she has been residing in the said premises along with the child. She has stated that she has taken utmost care of the child and provided her with all basic facilities and also admitted her in a play school. She has stated that she is capable of taking care of the child and the child has a emotional bonding only with her and not with the father. She has denied the alleged relationship with and has stated that a false criminal complaint was lodged by the respondent

against them. She has also stated that the girl child will not be safe in the custody of the respondent, and therefore, prayed to dismiss the petition.

15. Before the Family Court, in order to substantiate his case, the respondent examined himself as PW-1 and two other witnesses were examined on his behalf as PWs-2 & 3. Thirty four documents were marked through PW-1 as Exs.P-1 to P-34 and through PW-3, Exs.P-35 to P-53 were marked. On behalf of the appellant, she had got herself examined as RW-1 and examined another witness as RW-2. She got marked 18 documents as Exs.R-1 to R-18 in support of her defence. The Family Court, thereafter, heard the arguments addressed on both sides and vide the impugned judgment and decree allowed the petition filed by the respondent under Section 25 of the Act and directed the appellant to hand over the custody of the minor child Mayra Giri to the respondent within one month from the date of the order and also passed an order restraining the appellant from removing the minor child from the jurisdiction of the Family Court till the custody of the

child is handed over to the respondent. Being aggrieved by the said judgment and decree, the appellant is before this Court.

16. Learned Senior Counsel for the appellant has raised the following contentions:-

- That the Family Court has erred in directing handing over of custody of the minor girl child to the father.

- That there is nobody to take care of the girl child in the house of the respondent.

- That the Family Court has placed reliance on the morphed photographs and cooked up electronic documents produced by the respondent.

- That most of the documents relied upon by the Family Court are electronic documents and in the absence of a certificate under Section 65B of the Indian Evidence Act, the Family Court could not have placed reliance on the same. He submits that oral and documentary evidence placed

on record have been misread and misunderstood by the Family Court which has resulted in passing an erroneous order.

- That the girl child has been in the custody of the mother ever since the mother and the child were thrown out of the matrimonial house and the child is now growing in a good atmosphere and pursuing her studies and at this juncture, if the custody is handed over to the respondent, the same will have an adverse effect on the overall growth of the child.

- That the appellant is a doctor having a good income and she is capable of taking care of the child and while considering the issue regarding custody of a minor girl child, the welfare of the child alone should be the priority. In support of his arguments, he has placed reliance upon the following judgments:

(i) ARJUN PANDITRAO KHOTKAR VS KAILASH KHUHANRAO GORANTYAL & OTHERS - (2020)7 SCC 1;

(ii) ANVAR.P.V. VS P.K.BASHEER & OTHERS - (2014)10 SCC 473;

(iii) VISHWAS SHETTY VS PREETHI K.RAO - W.P.No.13165/2019 disposed of on 30.11.2022;

(iv) DEVNATH RATRE VS SMT. MALTI RATRE - FAM No.251/2018 of High Court of Chattisgarh disposed of on 13.12.2022;

(v) SAKSHI MITTAL VS GAURAV RAJENDRA MITTAL - 2022(4) Kar.LJ 640;

(vi) GAURAV NAGPAL VS SUMEDHA NAGPAL - (2009)1 SCC 42;

(vii) RAVINDER SINGH VS STATE OF PUNJAB - (2022)7 SCC 581.

17. Per contra, learned Senior Counsel appearing on behalf of the respondent has urged the following contentions:

- That ever since the appellant abandoned the matrimonial home, she has kept the child away from the respondent and for the last more than six years, the appellant has denied the respondent even the visitation rights though the courts have permitted the same.

- That the appellant has not even disclosed anything about the welfare, health and education of the child to the respondent.

- That the character of the appellant disentitles her the custody of the girl child.

- That the police after investigation have filed a charge sheet against the appellant and her paramour for the offence punishable under Section 497 and other offences under the IPC and Sections 75 & 87 of the Juvenile Justice Act.

- That various hotel bills, correspondences between the appellant,

and her father, photographs of the appellant in the company of her paramour and the evidence of PWs-1 & 3 would clearly establish the illicit relationship of the appellant with her paramour

- That though in normal circumstances, the mother would be the right person to have the custody of the minor girl child, having regard to the facts and circumstances of the present case and taking into consideration the environment in which

the child is being brought up, it is not safe for the child to continue in the custody of the mother.

- That the material on record would go to show that the appellant has no love and affection towards the child and she has not been taking care of the child and the child is being exposed to an unholy environment around it.

- That in view of Section 14 of the Family Courts Act, 1984, non-compliance of the requirement of Section 65B of the Indian Evidence Act would not come in the way of the Family Court in taking into consideration the electronic documents and photographs produced by the respondent.

- That the appellant has no respect to the orders passed by the Court and she has flouted all the interim orders passed by various courts including the High Court and the Hon'ble Supreme Court.

- That the Family Court has taken lot of pain in appreciating the voluminous evidence on record and has arrived at a just and right conclusion which does not call for any interference by this Court, and accordingly prays to dismiss the appeal. In support of his arguments, he has placed reliance on the following judgments.

(i) BANDHUVA MUKTI MORCHA VS UNION OF INDIA - (1997)10 SCC 549;

(ii) ROSY JACOB VS JACOB A CHAKKARAMAKAL - (1973)1 SCC 840;

(iii) VIVEK SINGH VS ROMANI SINGH - (2017)3 SCC 231;

(iv) SHILPI THAPAR VS SHRI MANAN THAPAR - CM(M).No.1425/2013 of Delhi High Court disposed of on 23.11.2015;

(v) ROHIT THAMMANNA GOWDA VS STATE OF KARNATAKA & OTEHRS - 2022 SCC OnLine SC 937;

(vi) NIL RATAN KUNDU VS ABHIJIT KUNDU - (2008)9 SCC 413;

(vii) RITU SAIGAL VS RAKESH SAIGAL - FAO- 4720/2017 OF Punjab & Haryana High Court disposed of on 04.03.2022.

18. The point that arises for consideration in this appeal is,

> "whether the Family Court was justified in allowing the petition filed by the respondent under Section 25 of the Act and directing the appellant to hand over custody of the minor child to the respondent and also restraining the appellant from removing the child from the jurisdiction of the Family Court till the custody of the child is handed over to the respondent?"

19. The minor child whose custody has been sought by the respondent in the present case was born on 26.04.2015. The appellant allegedly removed the child from the custody of the respondent on 02.04.2018. The respondent has, thereafter, approached the jurisdictional Family Court by filing a petition under Section 25 of the Act. As on the date of filing the petition, the child was aged about three years and now she is aged about 7 years and 9 months.

20. Section 6 of the Hindu Minority and Guardianship Act, 1956 (for short, 'the Act of 1956') provides that the father of the child is the natural guardian. However, an exception is made in respect of

the child who is below the age of five years and in normal circumstances, the custody of the child below five years should be given to the mother unless the father establishes that the welfare and interest of the child will be jeopardized if the custody is given to the mother. Even though Section 6 of the Act of 1956 provides that the father is the natural guardian of the Hindu minor child, it automatically does not disentitle the mother from claiming the custody of the child and when the question of custody of a minor child is brought before the Court, the Court is required to adjudicate the dispute notwithstanding Section 6 of the Act of 1956 and the question of custody is principally required to be decided keeping in mind the paramount interest and welfare of the child. The Court, therefore, is required to appreciate the conduct, behaviour and character of the respective parties, keeping in mind as to who would be the better suitable person when it comes to taking care of the welfare of the child. The Court for the said purpose is not only required to consider the bonding and comfort of the child, but also the environment in which it is presently growing keeping in mind about the welfare and future

growth of child. In addition to financial security, the Court is also required to take into consideration who would be available for the child when it is in need of their love and affection and under whose care and protection the child would have a better future. The Court is also required to take into consideration that if the child is allowed to continue in the custody of the parent with whom it is presently growing whether it may have any adverse effect on the mental and physical growth of the child.

21. In the case of **SAKSHI MITTAL VS GOURAV RAJENDRA MITTAL - 2022(4) KAR.L.J.640**, the Division Bench of this Court at paragraph No.15 has observed as follows:-

> *"15. The object and purpose of guardian and wards Act, 1890 is not mere physical custody of the minor but due protection of rights of ward's health, maintenance and education. In considering the question of welfare of minor due regard has to be given to the right of father as natural guardian but if the custody of father cannot promote the welfare of children, they may be refused such guardianship. [See:*

'ROSY JACOB VS. JACOB A.CHAKRAMAKKAL', (1973) 1 SCC 840]. It is a well settled legal principle that there is a difference between custody and guardianship. Guardianship is a more comprehensive and more valuable right than mere custody. The court while exercising parens patriae jurisdiction is guided by sole and paramount consideration of what would best subserve the interest and welfare of the child to which all other consideration must yield. The welfare and benefit of the child would remain the dominant consideration.[See: 'SMRITI MADAN KANSAGRA VS. PERRY KANSAGRA', (2020) SCC ONLINE SC 887]."

22. The Hon'ble Supreme Court in the case of **GAURAV NAGPAL VS SUMENDRA NAGPAL** at paragraph Nos.50 & 51 has observed as follows:-

"50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mausami Moitra Ganguli case [(2008) 7 SCC 673 : JT

(2008) 6 SC 634] , the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. 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."

23. The High Court of Chhattisgarh, Bilaspur in the case of **DEVNATH RATRE VS. SMT. MALTI RATRE - FAM NO.251 OF 2018 DATED 13.12.2022**.

"17. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and

not rights of the parents under a statute for the time being in force."

"26. Reiterating the well settled legal position that while deciding the dispute pertaining to custody of minor, Courts should keep in mind the paramount interest of the minor, the Supreme Court, in yet another decision rendered in Purvi Mukesh Gada v. Mukesh Popatlal Gada and Another reported in (2017) 8 SCC 819, has held that it was incumbent upon the High Court to find out the welfare of the children before passing the order regarding custody because the welfare of the child is the supreme consideration in such matters."

"27. In the light of what has been discussed above, it is also important to bear in mind a very germane biological aspect of the matter concerning puberty, privacy and care needed to a girl child at age between 10 to 15 years. At this juncture of life, the girl needs special care and attention of the mother. There are certain biological changes, which a girl child undergoes during this age, which cannot be taken care of by the father. (See:2017 SCC Online Chh 1247, Balram v. Sushma)"

24. The Hon'ble Supreme Court in the case of **BANDHUA MUKTI MORCHA VS UNION OF INDIA, (1997) 10 SCC 549** at paragraph No.4 has observed as follows:-

> *"4. The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood — socially, economically, physically and mentally — the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order,*

the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development. Dr Bhimrao Ambedkar, who was far ahead of his time in his wisdom projected these rights in the Directive Principles including the children as beneficiaries. Their deprivation has deleterious effect on the efficacy of the democracy and the rule of law."

25. The Hon'ble Supreme Court in the case of **ROSY JACOB VS JACOB A. CHAKRAMAKKAL, (1973)1 SCC 840** at paragraph No.15 has observed as follows:-

"15. In our opinion. Section 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian to properly look after the ward's health, maintenance and education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian the necessary assistance from the Court in effectively discharging his duties and obligations towards

his ward so as to promote the latter's welfare. If the Court under the Divorce Act cannot make any order with respect to the custody of Ajit alias Andrew and Maya alias Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under Section 19 during his lifetime, if the Court does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is Section 25. Without, therefore, laying down exhaustively the circumstances in which Section 25 can be invoked, in our opinion, on the facts and circumstances of this case the husband's application under Section 25 was competent with respect to the two elder children. The Court was entitled to consider all the disputed questions of fact or law properly raised before it relating to these two children. With respect to Mahesh alias Thomas, however, the Court under the Divorce Act is at present empowered to make suitable orders relating to his custody, maintenance and education. It is, therefore, somewhat difficult to impute to the legislature an intention to set up another parallel Court to deal with the question of the custody of a minor which is within the power of a competent Court under the Divorce Act. We are unable to accede to the respondent's suggestion that his application should be

considered to have been preferred for appointing or declaring him as a guardian. But whether the respondent's prayer for custody of the minor children be considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan, J., with which observation we entirely agree, "the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents". It was not disputed that under the Indian Divorce Act this is the controlling consideration. The Court's power under Section 25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom — if ever — identical. The contention that if the husband is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading. It does not take full notice of the real core of the statutory

purpose. In our opinion, the dominant consideration in making orders under Section 25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of their children, the approach has to be somewhat different from that adopted by the Letters Patent Bench of the High Court in this case. There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible

right to their custody under Section 25 merely because there is no defect in his personal character and he has attachment for his children—which every normal parent has. These are the only two aspects pressed before us, apart from the stress laid by the husband on the allegations of immorality against the wife which, in our firm opinion, he was not at all justified in contending. Such allegations, in view of earlier decisions, had to be completely ignored in considering the question of custody of the children in the present case. The father's fitness from the point of view just mentioned cannot override considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute generally to be better fitted to look after the children — being normally the earning member and head of the family — but the Court has in each case to see primarily to the welfare of the children in determining the question of their custody, in the background of all the relevant facts having a bearing on their health, maintenance and education. The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they get their due share of affection and care from both the parents in their normal parental home. Where, however, family dissolution due to some unavoidable circumstances becomes

necessary the Court has to come to a judicial decision on the question of the welfare of the children on a full consideration of all the relevant circumstances. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them. The children are not mere chattels : nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned Single Judge, in our view, was correct and we agree with him. The Letters

Patent Bench on appeal seems to us to have erred in reversing him on grounds which we are unable to appreciate."

26. The Hon'ble Supreme Court in the case of **VIVEK SINGH VS ROMANI SINGH - (2017) 3 SCC 231** at paragraph Nos.11 and 16 has observed as follows:-

"11. This Court in Gaurav Nagpal v. Sumedha Nagpal [Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1] stated in detail, the law relating to custody in England and America and pointed out that even in those jurisdictions, welfare of the minor child is the first and paramount consideration and in order to determine child custody, the jurisdiction exercised by the court rests on its own inherent equality powers where the court acts as "parens patriae". The Court further observed that various statutes give legislative recognition to the aforesaid established principles. The Court explained the expression "welfare", occurring in Section 13 of the said Act in the following manner: (SCC p. 57, paras 51-52)

"51. 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.

52. The trump card in the appellant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments."

16. In the instant case, the factors which weigh in favour of the appellant are that child Saesha is living with him from tender age of 21 months. She is happy in his company. In fact, her desire is to continue to live with the appellant. Normally, these considerations would have prevailed upon us to hold that custody of Saesha remains with the appellant. However, that is only one side of the picture. We cannot, at the same time, ignore the other side. A glimpse, nay, a

proper glance at the other side is equally significant. From the events that took place and noted above, following overwhelming factors in favour of respondent emerge."

27. The Hon'ble Supreme Court in the case of **ROHITH THAMMANA GOWDA VS STATE OF KARNATAKA AND OTHERS - 2022 SCC ONLINE SC 937** at paragraph No.13 has observed as follows:-

"13. We have stated earlier that the question 'what is the wish/desire of the child' can be ascertained through interaction, but then, the question as to 'what would be the best interest of the child' is a matter to be decided by the court taking into account all the relevant circumstances. A careful scrutiny of the impugned judgment would, however, reveal that even after identifying the said question rightly the High Court had swayed away from the said point and entered into consideration of certain aspects not relevant for the said purpose. We will explain the raison d'etre for the said remark"

28. In the case of **NIL RATAN KUNDU V. ABHIJIT KUNDU - (2008) 9 SCC 413,** the Hon'ble Supreme Court while considering the principles governing custody of minor at paragraph No.52 of its judgment has observed as follows:-

*"**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."*

29. From the pronouncements made in the aforesaid judgments, it is trite law that the courts while considering the question of a minor child's custody, has to keep in mind the overall well being of the child and the paramount consideration should be only its welfare. In addition to the moral and ethical welfare, the Court should also consider the physical well-being of the child. The provision of the statute cannot come in the way of the courts exercising its parens patriae jurisdiction arising in such cases. The Court is required to evaluate the material available before it and keeping in mind the welfare and paramount interest of the child should order custody to the parent who can provide and assure a conducive environment for the child's overall growth and who can provide safety, stability and security to the child. Home is the first school of the child and parents are its first teachers. When the child is deprived of a proper parenthood, its overall growth and happiness gets effected and in such situation, the Courts are not only required to consider the comforts and attachments of the child but should also take into consideration the

surroundings in which the child is growing, the moral and ethical values which the child learns by observation, availability of care and affection when the child needs it most and thereafter strike a balance which would be more beneficial for the child's welfare and interest. The preference and desire of the child is to be considered only if the child is mature enough to form an intelligent preference and judgment, otherwise the Court has to take the onus for providing an environment which would be more conducive to the welfare of the child. The material evidence available on record is, therefore, required to be evaluated keeping these aspects in mind.

30. In the present case, the parents of the child are qualified doctors. The appellant is working in a private hospital on the administrative side, while the respondent is a Post Graduate i.e., MD in Pathology. Both of them are divorcee from the earlier marriage and they do not have any children from their earlier marriage. The parties came to know each other on a marriage portal, and thereafter, they decided to marry each other. The material on record would go to show that at the time of

marriage, the respondent's parents, sister and her minor daughter were staying with him and many relatives also used to visit them. Whereas, the appellant was brought up by her grandparents and it appears that her parents were not in good terms, and therefore, she had not received parental love, care and affection when she was growing. It appears therefore that she has no respect or value for the relationships and she was in the habit of quarrelling on silly issues. She also did not want the respondent's parents and family members to stay with him, and therefore, she saw to it that they left the house. Inspite of such behaviour of the appellant, the respondent's parents came back to the house of the respondent when the appellant was pregnant and they not only took care of the appellant during her pregnancy, but also took care of the appellant and the child after the appellant gave birth to the child. Inspite of all these, the appellant deliberately raised quarrel with them and threw them out of the house.

31. The material on record would go to show that the appellant was not only behaving rudely with the

respondent and her in-laws, but she also had behaved rudely during the family counselling. She was in the habit of quarrelling with the respondent in public and she was never truthful to the respondent or her in-laws. After the birth of the child, she started working in a private hospital where she came into contact with one who was already married and had a child, and inspite of the same, she developed illicit relationship with him. The material on record would go to show that in the guise of attending the hospital, she used to be away during weekends and spend time with the said while the respondent and his parents with the help of a housemaid had to take care of the minor child.

32. If the issue regarding the relationship of the appellant with the said juxtaposition the welfare of the child is considered, it appears that the appellant has given more importance to the illicit relationship of hers with the said and has neglected the child. On 02.04.2018, she had left the matrimonial home along with the child and the material on record would go to show that thereafter she stayed in

a rented premises which was taken on rent by the aforesaid in the month of March 2018 itself, which would go to show that even prior to the alleged incident on 02.04.2018, the appellant had decided to leave the company of the respondent. Thereafter, she had handed over custody of the child to her parents who were residing at Panchakul in Chandigarh while she continued to stay at Bengaluru with .

33. The appellant had given birth to the girl child in the month of April 2015, and thereafter, in the year 2016, she had joined Columbia Asia Hospital in Bengaluru and started working on the administrative side. It is in the said hospital, she came in contact with , who was also working on the administrative side and even after knowing he was married and had a child from the said marriage, the appellant developed intimacy with him and she spent most of the weekends with him and hardly gave any time to the child who was being taken care by the respondent and his parents with the help of housemaid. The material on record would go to show that after the appellant developed illicit

relationship with the said , till the time she left the matrimonial home in the month of April 2018, the appellant and the said had stayed overnight in many hotels and lodges in and around Bengaluru and this aspect is prima facie proved by the respondent by producing necessary documents which proves the stay of the appellant with the said in various hotels and lodges overnight and on certain dates, they had even checked in as husband and wife. There are several photographs in Ex.P-8 - series which shows the appellant in the company of the said and in certain photographs even the minor child is present with them.

34. The respondent, after coming to know about the illicit affair of the appellant, had lodged a complaint before the jurisdictional police against the appellant and the said , and the police after investigation have filed a detailed charge sheet against the appellant and for the offences punishable under Sections 420, 497, 109, 504, 506, 418 read with 34 IPC and Sections 75 & 87 of Juvenile Justice Act. The police during the course of investigation have secured the

records relating to the hotel stay of the accused persons, their call records, their bank statements and also their e-mail correspondences which prima facie show that the accused persons were in illicit relationship.

35. The respondent has examined himself as PW-1 and he has reiterated the petition averments and also has deposed in detail with regard to the adulterous relationship of the appellant. Nothing has been elicited during his cross-examination to disbelieve the said version of his. The respondent has produced sufficient material before the Family Court in support of his allegations against the appellant regarding her adulterous relationship. Ex.P-8 - photographs of the appellant with the said were got marked and Ex.P-9 is the charge sheet filed by the jurisdictional police against the appellant and for the offence of adultery and other allied offences. Ex.P-15 is a document evidencing the appellant's stay with in various hotels and lodges in and around Bengaluru and the said document is part of the charge sheet filed by the police. Ex.P-17 is a e-mail correspondence between the appellant,

and appellant's father which would throw light on the relationship of the appellant with .

36. In order to prove the relationship of the appellant with , the respondent had examined PW-3 who has deposed that after leaving the company of the respondent, the appellant started residing in a premises in Sai Deep Apartments, wherein PW-3 was also residing. The said apartment allegedly was taken on rent by in the month of March 2018 and he had paid advance amount of Rs.75,000/- for taking the said apartment on lease. PW-3 has deposed that was frequently visiting the said apartment and on certain occasions, his car was also parked in the basement of the said apartment. He has also produced certain photographs which he had taken which shows that the appellant was in the company of in the apartment premises and the child is also seen in the photographs. He has also spoken to certain incidents where had misbehaved with the child.

37. The respondent has also produced sufficient material before the Family Court to show that, after the

appellant started working in a private hospital, the respondent and his family members with the help of housemaid was taking care of the minor child. He has produced Ex.P-2 - lab report and medical bills of the child, Ex.P-4 - Health Insurance of the child and he also has deposed that he had admitted the child to a play school and also had paid the fee for the same. PW-2 is the housemaid who was working in the house of the respondent and she has deposed that the respondent and his parents were taking care of the child when the appellant was away from home and she has also stated that the appellant did not bother to take care of the child.

38. A reading of Ex.P-9 - charge sheet would go to show that the allegations made by the respondent are all found in the charge sheet and the charges levelled against the appellant and in the charge sheet are supported by material which include the statement of the witnesses and the documents secured by the police during investigation. Exs.P-12 & 13 are the bank statement of the appellant and which show that their relationship was personal and beyond business.

Ex.P-14 is the statement of credit card belonging to which shows that his credit card was swiped during his stay with the appellant on various occasions as found in Ex.P-15 which is a statement providing the details of various hotels in which the appellant and the said had stayed prior to she leaving the matrimonial home. Ex.P-16 is the letter issued by the Columbia Asia Hospital which shows that the appellant and the said were punching in and out in the hospital at the same time and they were also absent from duty on the same dates and timings and the said dates and timings tallies with the dates they had stayed in the hotels and lodges as found in Ex.P-15. Ex.P-17 is a email correspondence dated 08.05.2018 which speaks about the appellant's relationship with . Ex.P-20 is the call details of the appellant and the same shows that she was in constant touch only with and the said document does not disclose that she used to call Dr. Samir Singh - RW-2 who was allegedly one of the partner in their startup business. Ex.P-25 is the hospital record which shows that the appellant had faked the medical documents relating to the child and Ex.P-26 -

email message discloses that the appellant had not honoured the court orders and denied visitation rights to the respondent. Exs.P-29 & P-30 would go to show that the appellant had brought her father to the mediation centre in violation of the court order on 17.08.2019 and on the said date, the respondent and appellant's father had exchanged blows and a charge sheet as per Ex.P-31 has been filed on the complaint of the respondent.

39. Ex.P-32 is a crucial document which shows the relationship of the respondent with the child. The said document is the letter dated 18.11.2019 issued by the Mediation Centre to the Registrar of the High Court in respect of the meetings held in the Mediation Centre. The report of the meeting that was held on 16.11.2019 would go to show that on the said date the minor child and the father spent time in the mediation centre and the child was comfortable with the respondent. The report dated 07.12.2019 would go to show that the child was not cooperative with the father as the mother followed the child by video recording the meeting and her presence

during the meeting encouraged the child to cry loud and seek mother's attention.

40. The appellant had examined herself as RW-1 and also examined Dr. Samir Singh as RW-2. It is her specific case that she was not in relationship with and her meetings with was in relation to a business which she intended to start with Dr. Samir Singh and the said in the name of a company called ARCORE. However, she has not produced any material before the Family Court to show that the aforesaid three persons intended to start a company known as ARCORE. She has not produced any material before the Family Court to show that the meeting that was held in the hotel was related to starting the company known as ARCORE. She has produced certain minutes of meeting proceedings of the company, but the fact remains that she has not produced any material to show that there existed a company known as ARCORE. Further, in the photographs at Ex.P-8, the presence of Dr. Samir Singh is not seen. If the meetings were in relation to any business transaction, they were required

to be held in the coffee shop or in the lobby of the hotel or in a meeting room. However, Ex.P-15 document clearly shows that the appellant and the said
had checked into the hotel room and they had stayed in the room on certain occasions even overnight.

41. There are certain text messages available on record which has been forwarded by the appellant to the respondent and a reading of the same would clearly go to show that the appellant has apologised for her mistakes on number of occasions and had promised to mend her ways and not to repeat the mistakes. The said messages would also go to show that it was the respondent who was taking care of the child. From the cross-examination of RW-1, it is seen that a LEECO mobile phone was gifted by the respondent to the appellant and the possession of the said mobile phone was in the custody of the respondent. The suggestion made on behalf of the appellant would go to show that the photographs and e-mail communications produced by the respondent were extracted by him from the said phone without her permission.

42. RW-2's deposition is of no help to the appellant. The said witness has not produced any material before the Court to prove that he along with the appellant and intended to start the company known as ARCORE nor has he produced any material to show that he was part of the meetings that were held in various hotels as evidenced from the photographs at Ex.P-8. As evidenced from Ex.P-15, it is only the appellant and had checked in and stayed together in hotels. It is the specific contention of the appellant that the photographs and the electronic documents are morphed and created documents and reliance cannot be placed on the same. However, no efforts were made by the appellant either to send the disputed photographs for scientific examination nor did she make any attempt to examine any witness to prove that the electronic documents produced by the respondent were created documents.

43. The material on record would also go to show that after the appellant left the company of the respondent, she was in the habit of filing false and

frivolous criminal complaints against him. Immediately after leaving the matrimonial home, she had filed a complaint against the respondent and his family members for the offences punishable under Section 498A IPC and the provisions of Dowry Prohibition Act and in the said case a final B report was filed. The appellant also had filed Crime No.2833/2018 before the Cyber Crime Police Station alleging that the respondent had hacked her phone and bank account and no action is taken in respect of the said complaint till date. At the instance of the appellant, the aforesaid had filed a PCR making false allegation against the respondent and a case was registered in Crime No.76/2019 against the respondent in J.P.Nagar Police Station pursuant to the said PCR and even in the said case, a final B report has been filed. The appellant had filed a complaint against the respondent in J.P.Nagar Police Station for the offence punishable under Section 307 IPC and even in the said case, final B report has been filed in the year 2021. The appellant had also filed a complaint against the respondent and PW-3 - Vijayamurthy and his wife for the offence punishable under Section 354B IPC and even in

the said case, final B report was filed in the year 2021. In respect of the incident that had taken place on 17.08.2019 in the Bengaluru Mediation Centre play area, the appellant had filed a complaint against the respondent which was treated as an NCR, wherein the appellant had alleged that the respondent had put poison in the food of the minor child. The said complaint was closed subsequently. In the month of August 2020 and December 2020, she had filed two separate complaints before the J.P.Nagar Police Station alleging that the respondent was sending goons after her and the said complaint was also treated as NCR and closed subsequently. All these aspects would clearly go to show the attitude and hostility of the appellant towards the respondent, inspite of she continuing her illicit relationship with the aforesaid after leaving the matrimonial house.

44. The material on record would also go to show that the appellant was not only rude to the respondent and his family members, but on certain occasions, she had not cooperated even with the court during the course

of trial and she had shouted at the respondent's advocate and also at the court. This has been taken note of by the court while recording the evidence. The material on record would also go to show that the appellant was not only in the habit of lying with her husband and his family members, but she also has lied even before the court.

45. The material on record would go to show that the appellant has got scant respect to the court orders and she has violated the court orders with apparent impunity. Several orders of the court providing visitation rights to the respondent were not honoured by her and she had successfully kept the child away from the respondent. The Family Court had permitted visitation rights to the respondent by order dated 15.12.2018 passed on IA-10/2018. The said order was not honoured by the appellant and on the other hand, she had questioned the same before this Court in W.P.No.2487/2019 contending that the child was staying in Panchkula at Chandigarh in the care of her parents, and therefore, it was not possible for providing visitation rights to the respondent. The respondent, therefore, had

agreed for the visitation and interim custody of the minor child in the month of April and May 2019 during which period the child had summer vacation, and accordingly, the order of the Family Court was modified by this Court in W.P.No.2487/2019. Even the said order was not honoured by the appellant, and therefore, the respondent had initiated contempt proceedings against her in CCC.No.1013/2019 and inspite of she giving an affidavit of undertaking that she will hand over the custody of the child as per the orders of this Court in W.P.No.2487/2019, she had failed to honour her commitment.

46. Thereafter, on number of occasions, she was absent before this Court in the contempt proceedings and this Court was compelled to issue bailable warrant to her. Subsequently, the appellant had appeared before this Court and had undertaken to appear regularly on all the dates of hearing. Since the appellant had not complied the orders passed in favour of the respondent granting him visitation rights, in order to facilitate the same, this Court on 29.09.2020 in CCC.No.1013/2019 had

appointed a Court Commissioner with a direction for handing over the custody of the minor child to the respondent at a designated place. The material on record would go to show that as and when the child met the respondent under the supervision of the Court Commissioner, the child was always comfortable with the respondent and had spent quality time with him. The order sheet dated 16.10.2020 recorded by this Court in CCC.No.1013/2019 would go to show that the appellant's interference when the child was in the company of the respondent was deprecated by this Court. The contempt petition was ultimately disposed of by this Court on 05.11.2020 and in paragraphs 8 & 10 of its orders, this Court has taken note of the fact that the child was comfortable in the company of the respondent.

47. The order passed by this Court disposing of the contempt proceedings was questioned by the respondent before the Hon'ble Supreme Court and the Hon'ble Supreme Court after issuing notice in the said proceedings, having taken note of the fact that the order of visitation rights was not being honoured by the

appellant, had passed an order permitting the respondent to have visitation rights on alternative Sundays of every month i.e., the Second and Fourth Sundays. The said order was also not honoured by the appellant on one pretext or the other.

48. The material on record would go to show that out of 52 dates of visitation rights to the respondent, the appellant had permitted him to have visitation rights only on 12 dates and that too was interrupted by her by recording the meetings of the respondent with the child. Therefore, it is very clear that after the appellant had taken away the child from the custody of the respondent in the month of April 2018, she hardly allowed the child to be with the respondent and the Family Court as well as this Court in the contempt proceedings have recorded a finding that the appellant was in the habit of tutoring the child and always filled its mind with negativity about the respondent.

49. The Hon'ble Supreme Court in the case of GAURAV NAGPAL VS SUMEDHA NAGPAL - (2009)1 SCC 42 at paragraphs 50 to 53 has observed as under:

"50. *When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mausami Moitra Ganguli case [(2008) 7 SCC 673 : JT (2008) 6 SC 634] , the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.*

51. *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.*

> ***52.*** *The trump card in the appellant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments.*
>
> ***53.*** *The conclusions arrived at and reasons indicated by the High Court to grant custody to the mother do not in our view suffer from any infirmity. It is true that taking the child out of the father's custody may cause some problems, but that is bound to be neutralised."*

50. The learned counsel for the appellant has strenuously contended that the respondent has not produced necessary certificate under Section 65B of the Indian Evidence Act, 1872 and therefore, the documents at Exs.P-7 & P-8 which are the photographs of the parties and also the various other electronic documents on which reliance has been placed by the respondent cannot be taken into consideration as the said documents are not

admissible in the absence of certificate under Section 65 of the Indian Evidence Act. In support of his arguments, he has relied upon the judgment of the Hon'ble Supreme Court in the case of **ARJUN PANDITRAO KHOTKAR VS KAILASH KHUHANRAO GORANTYAL AND OTHERS - (2020) 7 SCC 1**, **ANVAR P.V. VS. P.K. BASHEER AND OTHERS - (2014) 10 SCC 473** and **RAVINDRA SINGH ALIAS KAKU VS STATE OF PUNJAB - (2022) 7 SCC 581**. He also placed reliance on the judgment of this Court in the case of **MR. VISHWAS SHETTY** in W.P.No.13165/2019 dated 30.11.2022.

51. Though we are in respectful agreement with the aforesaid judgments on which reliance has been placed by the learned counsel for the appellant, in view of Section 14 of the Family Courts Act, 1984, the Family Court is authorized or empowered to receive as evidence any report, statement, documents, information if any, in its opinion, the same would assist it to deal effectually with a dispute, irrespective of whether it is relevant or admissible under the Indian Evidence Act, 1872. Section 14 of the Family Courts Act reads as follows:

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

52. The Division Bench of Kerala High Court in the case of **SABITHA UNNIKRISHNAN VS VINEET DAS - 2021 SCC ONLINE KER 2995** at paragraph No.15 has observed as follows:

> *"15. The technicalities of the Evidence Act cannot be imported to a proceedings before the Family Court because Section 14 of the Family Courts Act authorizes a Family Court to receive as evidence any report, statement, document, information or matter that may, in its opinion assist it to deal effectually with a dispute irrespective of whether it is relevant or admissible under the Indian Evidence Act, 1972. It is discernible*

from Section 14 that the technicalities of Indian Evidence Act regarding the admissibility or relevancy of evidence are not strictly applicable to the proceedings under the Family Court and in the matrimonial dispute before the Family Court, a discretion has been given to the court to rely on the documents produced if the court is satisfied that it is required to assist the court to effectively deal with the dispute."

53. The aforesaid view has been also reiterated by the Division Bench of High Court of Punjab and Haryana in the case of **RITU SAIGAL VS RAKESH SAIGAL - FAO-4720-2017 DATED 04.03.2022,** wherein it has been held that Section 14 of the Family Courts Act given wider powers to the Family Court on the issues of relevance and admissibility of evidence which are led in a dispute between husband and wife. As per the above said Section, it is the discretion of the Family Courts to receive any evidence, reports, statement, document, information or matter which in its opinion, is necessary to deal effectively with the dispute event if it is not admissible in Indian Evidence Act, 1872. Therefore, we find no merit in the contention of the appellant that

photographs and electronic documents on which reliance has been placed by the Trial Court is required to be discarded in view of non-compliance of Section 65B of the Indian Evidence Act.

54. From the oral and documentary evidence available on record, it can be gathered that after the child was born to the appellant, the respondent's parents had initially taken care of the child and after the appellant joined Columbia Asia Hospital, the respondent, his parents and the housemaid were taking care of the child. Exs.P-1 to P-4 would go to show that it is the respondent who has taken care of the health and medical needs of the child. Even PW-2 - housemaid has clearly deposed that it was the respondent and his parents who were taking care of the child in the absence of the appellant in the house. It has also come on record that after she joined Columbia Asia Hospital, she developed illicit relationship with who was working in the said hospital and the material on record would prima facie show that after she joined Columbia Asia Hospital till she left the matrimonial home in the month of April

2018, she had stayed in various hotels and lodges in and around Bengaluru along with the said and the material on record would also go to show that they had checked into the hotels as husband and wife and they were punching in and out in the work place always together and they were also absent from duty on the same dates and timings and the said dates and timings tallied the dates on which they had stayed together in the hotels.

55. The material on record would also go to show that after the appellant left the matrimonial home on 02.04.2018, she started staying in an apartment along with the child, which was taken on rent by the aforesaid in the month of March 2018 itself and even the advance deposit amount for the said apartment was paid by him. Though she continued to stay in the said apartment , thereafter, the custody of the minor child was handed over by her to her parents who were residing at Panchkul in Chandigarh. This aspect is very clear from the orders passed by this Court in W.P.No.2487/2019 and it is under these circumstances, the order passed by

the Family Court regarding visitation rights was modified by this Court in the said writ petition only for the reason that the appellant was not in a position to comply with the said order as the child was in the custody of her parents at Panchkul in Chandigarh.

56. The material on record would also go to show that after the Hon'ble Supreme Court had passed an order of visitation rights in favour of the respondent in SLP.No.15871/2020 directing the maternal grandparents of the child to accompany the child to the house of the respondent, the maternal grandparents of the child viz., the parents of the appellant had filed an affidavit on 09.03.2021 stating that the child did not wish to go to the father and a submission was also made that the maternal grandparents may not be given the responsibility of taking the child to the respondent's house. Therefore, it can be presumed that the maternal grandparents viz., the parents of the appellant were not interested in cooperating for the welfare of the child, and on the other hand, they had shirked their responsibility. The Hon'ble Supreme Court had, therefore, modified its

earlier order and had directed the appellant to leave the child in the house of the respondent and further observed that the paternal grandparents of the child viz., the parents of the respondent will be there in the house and the child shall sleep with the paternal grandparents during the night. In compliance of the said order, the paternal grandparents were very much present in the house respondent to receive the child. However, the order passed by the Hon'ble Supreme Court could not be complied since the respondent was tested positive for COVID and additionally, the appellant had not cooperated for compliance of the orders passed by the Hon'ble Supreme Court granting visitation rights to the respondent.

57. The respondent who had taken care of the child prior to the appellant leaving the matrimonial house, has diligently initiated these proceedings seeking custody of the child without there being any delay. The material on record would also go to show that the respondent all along during the pendency of the proceedings before the Family Court was ready and

willing to take care of the child and he also had filed multiple applications seeking visitation rights of the child and though repeated orders were passed in his favour, the appellant had successfully seen that the said orders were not complied with and the respondent was denied visitation rights on most of the occasions. Out of 52 dates of visitation rights, the respondent was able to exercise his rights only on 12 dates. The Trial Court as well as this Court while disposing of the contempt proceedings has taken note of the conduct of the appellant and have observed that she was in the habit of tutoring the child and filled the child's mind with negativity as against the respondent. This Court had in fact deprecated the conduct of the appellant as found in the order dated 16.10.2020 passed in CCC.No.1013/2019. The material on record would also go to show that the appellant was in the habit of behaving rudely in the house with the respondent as well as with his parents and sister and in fact her rude behaviour during the course of cross-examination was taken note of by the learned Judge of the Family Court who had the

occasion to note the demeanour of the appellant while she was in the witness box.

58. The appellant having left the custody of the child in her parents house immediately after leaving the matrimonial house, had continued to stay at Bengaluru in the premises which was taken on rent by and the material on record, more so the evidence of PW-3 would go to show that was frequently visiting the said apartment. The appellant had not only kept the child in the custody of her parents at Panchkul in Chandigarh, but she had also not provided any information about the child to the respondent. In fact, even during her deposition, she had refused to provide such information inspite of the Court repeatedly questioning about the same. From the overall appreciation of all these aspects of the matter, it is very clear that after the appellant left the matrimonial house along with the child, she had handed over the custody of the child to her parents who were residing at Panchkul and the child was attending the school at Panchkul. Appellant's parents had shown their unwillingness to

shoulder the responsibility of the child and accordingly made a statement before the Hon'ble Supreme Court and it appears thereafter the child was shifted to Bengaluru and presently the child is admitted to a school at Bengaluru.

59. Therefore, it is very clear that prior to the appellant leaving her matrimonial house as well as after she left the matrimonial house, she had not taken care of the child and it was the respondent and his parents who were taking care of the child while she was staying from the matrimonial home. After appellant left the matrimonial home, she had handed over custody of the child to her parents at Panchakul and she continued her stay in Bengaluru and the material on record would go to show that she was constantly moving with the aforesaid during the said period. Therefore, it can safely presumed that appellant bothered least about the welfare and interest of the child and she had taken the child away from the respondent only out of vengeance. She has not stated anything touching the character of the respondent nor has she proved that the respondent had

no love and affection towards the child or that he had misbehaved badly with the child so as to raise a presumption against him. The respondent, on the other hand, has successfully proved before the Court that the relationship of the appellant with the said was beyond business meetings as sought to be contended by the appellant and she had given more priority to the said relationship of her's when compared to the welfare and well-being of the child.

60. The Family Court during the course of trial and this Court during the pendency of the contempt proceedings have observed that the child was comfortable in the company of the respondent. The photographs at Ex.P-8 as well as the evidence of PW-3 and the documents produced by him during the course of his examination would go to show that the appellant was found in the company of the said along with the child. The respondent is a qualified doctor who is a Post Graduate viz., MD in Pathology and he is working in a private hospital. He has a good income and he is financially secured. He has conducted himself in a decent

manner throughout in all the court proceedings and there are no allegations whatsoever against his character and morality. In addition to the same, he has the assistance of his parents at his home who have taken care of the child till the appellant had left the matrimonial home and even thereafter they had shown their readiness and willingness to take care of the child in compliance of the orders passed by the Hon'ble Supreme Court which directed visitation rights to the respondent, wherein the paternal were directed to stay with the child and sleep with it during night.

61. The Hon'ble Supreme Court in the case of LAHARI SAKHAMURI VS SOBHAN KODALI - (2019)7 SCC 311, at paragraph 49 has observed as under:

> *"49. The crucial factors which have to be kept in mind by the courts for gauging the welfare of the children equally for the parent's can be inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the*

child, as opposed to characteristics of the parent as an individual."

62. In the case of MAUSAMI MOITRA GANGULI VS JAYANT GANGULI - (2008)7 SCC 673, at paragraph 20 has observed as under:

"20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

63. In the case of MARY VANITHA VS BABU ROYAN - 1991 SCC OnLine Mad 843, the High Court of Madras at paragraph 17 has observed as under:

> *17. While considering the question of 'welfare of the minors' the right of the father as recognised by law has to be kept in mind and given its due weight, but the primary and paramount consideration undoubtedly remains to be the welfare of the minors. The expression 'welfare of the minors' though has not been defined, yet undoubtedly has to be given a very wide meaning It ought not to be measured in money only or by physical comfort alone. It has many facets, such as financial, educational, physical, moral and religious welfare. In the instant case, the mother/petitioner is getting a decent income of Rs. 3,000 per month by way of salary. She is well educated and she is physically and mentally all right to bring up the minor children. Further, she is also affectionate towards her children. Though some allegations have been made about her character, as stated earlier they have to be proved by the other side, before the appropriate forum. At any rate, that cannot be a ground at this stage for denying the custody of the two minor children to the mother/petitioner. The decision cited by the*

Respondent in Snehlata's case, AIR 1979 Raj 29, it is said that in the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration. The other decision reported in Chakki's case, (1988) 2 D.M.C. 140, is also to the same effect. As mentioned above, a number of decisions were referred to me in this context of conflicting claims between mother and father for custody and guardianship of minor children. The right of the natural guardian to have custody of the minor, unless he or she is disqualified or it is found that the welfare of the child requires recognition of the other; the other point of view emphasises, that the legal rights of the natural guardian may only be secondary consideration, the principal factor being the interest and welfare of the child. A passage in Halsbury's Laws of England (IV Edition) (Paras 533, 534-228) was also relied on by Mr. Alagarsamy, which is reproduced herein below:

> *"There is no rule of law that a child of tender years should remain with his mother and the question of whether it is better for a child to be with his mother or his father must depend upon the particular circumstances of the case and upon the view, which the*

Court takes of the characters and qualities of the respective parents."

64. In almost similar circumstances wherein the child was not given sufficient time to develop affinity or to be comfortable with the father and wherein the child was throughout kept in the custody of the mother, the Delhi High Court in the case of SMT. SHILPI THAPAR VS SHRI MANAN THAPAR (CM(M).No.1425/2013 and connected matters disposed of on 23.11.2015) has observed that any factor or influence which is injurious to the child his well-being and balanced psychological development should be removed. The mother's care for the child is stifling its emotional growth and her over protective concern is inhibiting the development of the individuality and personality, and it is, therefore, necessary to immediately remove this unhealthy influence from the child's mind. The respondent-father lives with his parents who are in their early 60s and are always available at home to take care of the child. Hence, when he comes back from school, he would always have the care of his grandparents. It was further observed in the said case that the father should have an

important role in the child's growth and cannot be overlooked that the development of the personality of any child, particularly that of a female child is inflicted.

65. Though in normal circumstances, the wish/desire of the child would also play a prominent role while deciding the custody of the said child, having regard to the material available on record and more so for the reason that the child was throughout kept away from the father and was being tutored by the appellant-mother, we are of the view that in the present case, no purpose would have been served by ascertaining from the child its desire or wish. Desire and wish of the child can be ascertained only if the child is mature enough to form an intelligent preference and judgment, otherwise, it is for the court to analyze the material and make a decision taking into consideration the paramount interest of the child. The Family Court, in our opinion, has properly exercised its jurisdiction and discretion, and therefore, we are of the considered opinion that the Family Court was fully justified in directing to hand over the custody of the child to the respondent-father.

66. The fight between the parents has resulted in denial of a proper parenthood to the child and resultantly, it has been denied of its childhood, happiness and family atmosphere during its growing years. The Hon'ble Supreme Court in Rosy Jacob's case supra in its conclusion paragraph of the judgment has observed as under:

> *"21. …….that the two spouses would at least for the sake of happiness of their own off-spring, if for no other reason, forget the past and turn a new leaf in their family life, so that they can provide to their children a happy, domestic home, to which their children must be considered to be justly entitled. The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses before us who are both educated and cultured and who come from highly respectable families must realise that reasonable wear and tear and normal jars and shocks of ordinary married life has to be put up with in the larger interests of their own happiness and of the healthy, normal growth and development of their off-spring, whom destiny has entrusted to their joint parental care. Incompatibility of temperament has to be endeavoured to be disciplined into compatibility and not to be*

magnified by abnormal impulses or impulsive desires and passions. The husband is not disentitled to a house and a housewife, even though the wife has achieved the status of an economically emancipated woman; similarly the wife is not a domestic slave, but a responsible partner in discharging their joint parental obligation in promoting the welfare of their children and in sharing the pleasure of their children's company. Both parents have, therefore, to co-operate and work harmoniously for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home."

67. We hope that the appellant and the respondent in the present case who are qualified doctors and responsible members of the society will realize the mistake committed by them and keeping in mind the interest and welfare of the minor child will come together atleast for the purpose of taking care of the welfare of the child, who in a short period of time would be attaining the age of maturity and would need them by her side at the time when she undergoes certain biological changes in her. The father is the natural

guardian of the minor child and he has a equal right to claim custody of the child and if the child is more than 5 years of age, his right cannot be denied unless court is of the opinion that in the interest of the child's welfare and growth, the custody should continue with the present custodian. After analyzing the material on record, we have recorded reasons as to why continuation of the child's custody with the appellant would not serve the interest and welfare of the child. Nothing adverse is found against the respondent to deny him the custody of the child. He has taken steps at the earliest point of time and has been fighting for the cause ever after. Having appreciated the material available on record, in the background of the various judgments referred to above and keeping in mind the interest and welfare of the child, we find no illegality or irregularity in the judgment and decree passed by the Family Court which is impugned in this appeal. We, therefore, answer the point for consideration in the affirmative. Accordingly, we proceed to pass the following order:

68. The appeal is dismissed. We feel that the interest of the minor child will be best served if the custody of the child is handed over to the respondent, but with sufficient access to the appellant to visit the minor at frequent intervals, and therefore, while confirming the judgment and decree dated 03.03.2022 passed by the Family Court in G & WC.No.128/2018 filed by the respondent under Section 25 of the Act, and directing appellant to grant custody of the minor child to the respondent, we are inclined to grant visitation rights to the appellant though she has not prayed for the same, on the following terms:

(i) The appellant is directed to hand over the minor child to the custody of the respondent after completion of the child's annual final examinations for the present academic year i.e., 2022-23.

(ii) The respondent shall make arrangements for the child to continue her studies in her present school and shall shift his residence to a place which is within the radius of 5 Kms. from the child's school.

(iii) The respondent shall provide the school calendar of the child with list of holidays along with dates of examination to the appellant.

(iv) The respondent shall meet all the expenses of the minor child towards her education, health, care, food and clothing and in the event the appellant also wishes to contribute towards the upbringing of the child, the respondent shall not create any obstruction to and/or prevent the appellant from also making such contribution.

(v) The appellant will be at liberty to visit the minor child either in the respondent's house or in the premises of a mutual friend or any other place as may be agreed upon on every Sunday. To enable the appellant to meet the child, the respondent shall ensure the child's presence either in his house or in the house of the mutual friend or in a public place agreed upon at 10.00 a.m. The appellant will be entitled to take the child out with her for the day, and to bring her back to the respondent's house or the premises of the mutual friend within 7.00 p.m. in the evening.

(vi) On all important festival days for which holiday is declared to the School, the appellant shall be entitled to take custody of the child between 10.00 a.m. and 1.00 p.m.

(vii) The appellant, upon prior intimation to the respondent, will also be entitled to meet the minor at her school once a week after school hours for about an hour.

(viii) The appellant will also be entitled to the custody of the minor for 10 consecutive days during the summer vacation on dates to be mutually settled between the parties.

(ix) During long holidays/vacations covering more than ten days, the child will be allowed to be in the company of the mother for half of the said long holidays/vacations.

(x) The mother is entitled to communicate with the child through phone/video call/skype etc., between 7.00 p.m. to 8.00 p.m. everyday.

(xi) The aforesaid arrangement will continue for the present, but the parties will be at liberty to approach the Family Court, Bengaluru, for fresh directions should the same become necessary on account of changed circumstances.

SD/-
JUDGE

SD/-
JUDGE

KK