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

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Date of Decision : August 17, 2016

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MAT.APP.(F.C.) 99/2014

SOMESHWAR DAYAL

..... Appellant

Represented by: Ms.Malvika Rajkotia, Advocate with
Mr.Ramakant Sharma, Advocate

versus

ANUPAMA DAYAL

..... Respondent

Represented by: None

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J. (Oral)

CM Nos.29526-27/2016

1. For the reasons stated in the two applications 30 days' delay in filing the reply and 61 days' delay in re-filing the reply to CM No.8462/2016 is condoned.

2. Both applications are disposed of.

CM No.8462/2016

1. Developments statedly having taken place during pendency of the appeal are sought to be brought on record.

2. The application is allowed.

MAT.APP.(F.C.) No.99/2014

1. An interesting question arises for consideration and regretfully the

respondent has chosen to abstain from appearing. None appeared for the respondent yesterday. The appeal was re-notified for today. None appears for the respondent even today.

2. The interesting question which arises is : whether a spouse who seeks custody of the children by moving a petition under Section 25 of the Guardians and Wards Act and obtains interim orders can one day withdraw the proceedings and continue to take benefit of the interim orders? The question would subsume the question : whether the other spouse can seek to be transposed as the petitioner?

3. The respondent filed a petition under the Guardians and Wards Act seeking a declaration to be declared the sole guardian of Master Neel and Baby Teesta. The former being a male and the latter a female. She obtained the interim orders in her favour and on the strength thereof she put the children in Sri Ram School, Gurgaon. On the strength of the same she removed the children from Sri Ram School, Gurgaon and got them admitted at Sela Qui International School, Dehradun. After the issues were settled the respondent filed an application to withdraw the petition filed by her. The appellant opposed the petition pleading that having taken advantage of interim orders passed in the petition the respondent cannot simply walk out. The learned Judge Family Court allowed the respondent to withdraw the petition. The impugned order is dated July 28, 2014.

4. From the documents filed by the appellant we find that even post July 28, 2014 the respondent is taking the benefit of the interim orders in her favour. Writing letters to the Principal of Sri Ram School, Gurgaon the respondent has successfully ensured that the father cannot meet the children in the school. At Sela Qui, which is a boarding school, on the strength of the interim order the respondent has ensured that the school authorities do not

give any access to the appellant to the children. The letters and the e-mails shown to us evince that the school authorities are apprehensive of legal action taken by the respondent against them if without respondent's consent the school authorities permit the appellant to meet the children who, as noted above are in a boarding school. We find that as recent as on May 10, 2016 the respondent has written to the school that without her permission the school authorities cannot permit any interaction between the appellant and the children. She asserts her right on the strength of interim orders obtained by her during the pendency of the guardianship petition.

5. Now, an issue concerning appointment of a guardian focuses on the welfare of the child. The warring couple are not the parties affected. They may be parties interested. The affected party is the child. Thus, where one spouse files an application to be appointed as a guardian of the child which is opposed by the other and if the interim custody of the child is with the petitioner spouse, if the petitioner spouse seeks to withdraw the petition the respondent spouse can seek transposition, for the reason having taken advantage of interim orders the petitioner spouse cannot thumb the nose at the respondent spouse.

6. We allow the appeal and set aside the order dated July 28, 2014. Guardianship Petition No.25/11 before the Principal Judge Family Court Sakes Court Complex is restored with the appellant transposing as a petitioner therein. The respondent is transposed as a respondent therein. We declare that the interim orders obtained by the respondents have lapsed and on the strength thereof the respondents cannot assert any right.

7. Concerning visitation by the appellant to meet his children in the boarding school where they have been admitted by the respondent the learned Judge Family Court shall pass appropriate orders after serving the

respondent and interacting with the children.

8. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

AUGUST 17, 2016
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