

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM (M) 1140/2018**

Judgment reserved on : 20.12.2018
Date of decision : 06.09.2019

GEETANJALI DOGRA Petitioner
Through: Mr. Azhar Qayum, Adv.
versus

STATE & ORS Respondents
Through: Mr. Prabhsahay Kaur, Adv.
with Ms. Aakansha, Adv. for R-
1.
Counsel for R-2.
Mr. Rajiv Pandit, the
Intervenor.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The petitioner, the mother of the minor child Saarthik Mehta aged 9 months on the date 14.09.2018 i.e. the date of the impugned order passed by the Child Welfare Committee (CWC), District South bearing D.No.CWC/LN/2018-19/982 seeks the setting aside of the said impugned order of the CWC (South), vide which the CWC observed to the effect that considering the best interest of the child who was just nine months old, the Committee decided to give permission to the father of the child, Commander Rahul Mehta to have access to the child Master Saarthik Mehta to meet his child for two

hours on every Saturday/ Sunday during the day time with mutual convenience of the both parents at the residence of the mother.

2. The respondent no.2, Mr. Rahul Mehta, father of the minor child is indicated to have filed an application under Section 2 (14) (iii) of the Juvenile Justice (Care and Protection of Children) Act, 2015 to restore the basic right of the child under Article 9 of the United Nation Convention on the Rights of the Child (UNCRC) which provides that in the event of separation of parents, children have the right to live with their parents unless it is bad for them and the children whose parents do not live together have the right to stay in contact with both parents, unless this might hurt the child which convention has been ratified by India on 11th December, 1992.

3. Vide the impugned order, it is indicated that the CWC interacted with both parents and conducted an enquiry on 13.08.2018 when the mother of the child had been called upon to produce the child by the CWC when the respondent no.2 herein i.e. father of the child had moved an application through a child right activist that the child was being denied love, care and protection of his biological father by the biological mother, the child was, however, not produced by the petitioner herein stating that the child was unwell. The CWC is indicated to have considered the S.I.R. of the mother and the father and thereafter passed the impugned order dated 14.09.2018.

4. The grievance of the petitioner is to the effect that the impugned order of the CWC is contrary to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 and is beyond the jurisdiction of the CWC. The petitioner has further submitted that the

terms and provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 have been misunderstood by the CWC and that the CWC does not have the authority to ignore and traverse the provisions of neither the Hindu Minority & Guardianship Act, 1956 nor of the Hindu Marriage Act, 1955 nor of the Guardians and Wards Act, 1890.

5. Other submissions were also made by the petitioner mother of the minor child that the CWC had not considered the request for grant of maintenance of herself and for the child, which has not been paid by the respondent. The petitioner submits that it is the Family Court or the Guardian Court, which is the competent Court to deal with the matters to decide the visitation rights after hearing both parties and also to determine the maintenance that may be awarded in given circumstances after ascertaining the income of either side.

6. During the course of the hearing on 20.09.2018, when notice of the petition was issued and accepted on behalf of the respondent no.1 and notice of the petition was issued to the respondent no.2, it had been submitted on behalf of the petitioner that there are litigations pending between the petitioner and the respondent no.2 i.e. the mother and the father of the minor child in question in relation to the proceedings under the Domestic Violence Act pending before the Family Court in the petition under Section 125 of the Cr.PC, 1973 as filed by the petitioner herein against the respondent no.2 and that there have been mediation proceedings entered into between the petitioner and the respondent no.2 on the date 10.08.2018 and that the impugned order is *de hors* the provisions of the Juvenile Justice (Care and

Protection of Children) Act, 2015 and in violation of the Guardians and Wards Act, 1890 and in violation of the Hindu Minority & Guardianship Act, 1956 as well and that the CWC had no jurisdiction whatsoever to pass the impugned order dated 14.09.2018. Vide order dated 20.09.2018, without any observations on the merits or demerits of the prayer taking into account the provisions of the Guardians and Wards Act, 1890 and the Hindu Minority & Guardianship Act, 1956, it was considered appropriate to stay the operation of the impugned order dated 14.09.2018 as signed by the members of the CWC on 07.09.2018 till further orders.

7. The respondent no.2 vide CM No.48334/2018 sought the vacation of the interim order dated 20.09.2018 and sought that he be allowed to meet the minor child and that the basic right of healthy upbringing of the minor child be restored. The respondent no.2 submitted that the petitioner i.e. the mother of the minor child was depriving him i.e. the respondent no.2 of providing the minor child a healthy upbringing which is in gross violation of the Juvenile Justice (Care and Protection of Children), Act, 2015, CP CRC, Article 9 of the UNCRC & Article 21 of the Constitution. The respondent no.2 has further submitted that in the absence of both parents, the child suffers from a parental alienation syndrome, which amounts to cruelty on the child itself.

8. Placed on record is also an application under Section 151 of the CPC filed by Mr. Rajiv Pandit, the Child Rights Activist as an Intervenor in the present petition whose prayer for intervention was allowed vide order dated 20.12.2018 in as much as the said applicant

had in reply to a specific Court query submitted that he had assisted the CWC in drafting the impugned order. The said Intervenor, however, filed CM APPL.774/2019 seeking rectification of the stated typographical error in the proceedings dated 20.12.2018 submitting to the effect that he had merely assisted in the typing of the drafting of the application and not in the drafting of the order of the CWC. The said application was declined vide order dated 09.01.2019 observing to the effect that the observations dated 20.12.2018 were in reply to a specific Court query that had been put forward to the Intervenor and thus prayer could not be granted. **It was, however, made expressly clear that it was essential to observe that the pronouncement of the order, which had been reserved in the matter could only be on the merits of either side and it did not matter as to who assisted in the drafting of the order.**

9. At the outset, it is essential to observe that undoubtedly for the well being of a minor child, care and affection of both parents is necessarily required. However, the grievance of the petitioner relates to the jurisdiction exercised by the CWC vide the impugned order dated 14.09.2018.

10. Section 2(14)(iii) of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides to the effect:

2. In this Act, unless the context otherwise requires-

.....

.....

.....

(14) "child in need of care and protection" means a child—

(i).....

(ii).....

(iii) *who resides with a person (whether a guardian of the child or not) and such person—*

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out.

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person;”

11. It is essential to observe that in terms of Section 2 (23) of the very same enactment provides to the effect:

*2 (23) "court" means a civil court, **which has jurisdiction in matters of adoption and guardianship** and may include the District Court, Family Court and City Civil Courts. ”*

12. The petitioner has placed reliance on the provisions of Section 26 of the Hindu Marriage Act, 1955 which provides as follows:

*“Section 26. In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, **all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.**”*

13. Inter alia the petitioner places reliance on the provisions of Sections 6(a) & 13 of the Hindu Minority and Guardianship Act, 1956, which read to the effect:

“Section 6. The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

and

Section 13. (1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

14. The petitioner has also placed reliance on the provisions of Sections 12 & 25 of the Guardians and Wards Act, 1890, which reads to the effect:

“12. (1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

(2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-

section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

(3) Nothing in this section shall authorise—

(a) the Court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any, or

(b) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.

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

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.”

15. Significantly, Section 7 of the Family Courts Act, 1984 provides for the jurisdiction conferred on a Family Court and spells to the effect:

“7. (1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and

proceedings of the nature referred to in the Explanation;
and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) *a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.*

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.”

16. Section 20 in Chapter-6 of the Family Courts Act, 1984 provides to the effect:

“20. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

17. It is apparent thus that in view of the constitution of the Family Courts in Delhi, the provisions of Section 7 (i)(a)(g) r/w Section 20 of the said enactment makes it apparent that jurisdiction in relation to the proceedings qua the custody or access to any minor have essentially to be determined by the Family Court and cannot fall within domain of the Child Welfare Committee in terms of Section 2(14)(iii) of the Juvenile Justice (Care and Protection of Children), Act, 2015 specially when there are proceedings pending before the Family Court between the parents of the minor child Saarthik Mehta.

18. Reliance has been placed on behalf of the petitioner on the verdict of the Hon'ble High Court of Calcutta in *Dr. Sharmistha Kar Purokayastha Vs. State of West Bengal & Ors.* in WP 21904/2010 in which the order of the CWC directing to place the child in a safe and peaceful environment away from the mother of the child till further orders was stayed with it having been observed to the effect:

“After hearing counsel for the parties and closely examining the provisions of the Act, I am of the prima facie view that a Child Welfare Committee constituted under s. 29 of the Act has no power or jurisdiction or authority to initiate proceedings for care and protection of a child who is under the care and protection of its father who seeks a seal of approval of the committee

with a view to depriving the mother of the custody of the child.

My tentative opinion is that the proceedings initiated by the committee and the order passed therein are absolutely without jurisdiction. In my opinion, on the facts, there is no reason to say that in view of the provisions of S.52 the petitioner is not entitled to approach the Writ Court. I am of the considered view that it is a fit case for making an appropriate interim order.

For these reasons, I admit the petition, stay the operation of the order, and order that during pendency of this petition no step shall be taken in the proceedings before the committee.

It is made clear that the petitioner and the sixth respondent will be free to proceed with the proceedings pending before the other Courts and forums, and that it will be open for the other Courts and forums to decide the question of custody of the child.”

19. Reliance was placed on behalf of the petitioner on the verdict of the Hon'ble High Court of Calcutta in ***Tasleema Begum Vs. The State of West Bengal & Ors.*** in WP No.19557(W)/2017 in which it was observed that the aspect as to who is the guardian of the child has to be decided by an appropriate forum and that Section 40 of the Juvenile Justice (Care and Protection of Children) Act, 2015, which allows the Child Welfare Committee to restore the custody of the child to the parents or the guardians or a fit person that it deems proper in the facts of a given case has to relate to first the determination as to who are the guardians of the child or the fit person involved.

20. Section 40(3) of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides to the effect:

“40(3) The Committee shall have the powers to restore any child in need of care and protection to his parents, guardian or fit person, as the case may be, after determining the suitability of the parents or guardian or fit person to take care of the child, and give them suitable directions.

Explanation.— For the purposes of this section, “restoration and protection of a child” means restoration to—

- a. parents;*
- b. adoptive parents;*
- c. foster parents;*
- d. guardian; or*
- e. fit person”*

21. Reliance was also placed on behalf of the respondent no.2/father on the verdict of the Hon’ble Supreme Court in WP (Crl.) 102/2008 in ***Re: Exploitation of Children in Orphanages in the State of Tamil Nadu Vs. Union of India & Ors.*** with specific reference to observation in para 62 (1) of the said verdict which are to the effect:

- 1. The definition of the expression “child in need of care and protection” under Section 2(14) of the JJ Act should not be interpreted as an exhaustive definition. The definition is illustrative and the benefits envisages for children in need of care and protection should be extended to all such children in fact requiring State care and protection.”*

to submit that the definition of the expression ‘*child in need of care and protection*’ under Sections 2 (14) of the Juvenile Justice (Care and

Protection of Children) Act, 2015 should not be interpreted as an exhaustive definition and the contention sought to be made on behalf of the respondent no.2 is to the effect that the same would include the aspect of grant of visitation rights to estranged parents of a child.

22. It has been submitted on behalf of the respondent no.2 as also submitted by the Intervenor that the welfare of the child is of paramount interest and the infant has the right to love, care and warmth of both his parents and denial of love, care and warmth of parents to the child is a gross violation of the rights of the child as per Article 9 (Separation from Parents) of UNCRC- 1989 ratified by India in 1992 according to which children have the right to live with their parents, unless it is bad for them and the children whose parents do not live together have the right to stay in contact with both parents, unless this might hurt the child. The respondent no.2 further submitted that Master Saarthik Mehta then just above 9 months old would be bound to live his life without the love, care and warmth of one parent and its extended family members if a proper solution is not found and the mother Ms. Geetanjali Dogra did not deny before the Child Welfare Committee that the father of the child Shri Rahul Mehta i.e. the respondent no.2 has a right to meet his child and for the same he should obtain order from the Court.

23. Reliance was placed on behalf of the respondent no.2 on Section 29(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015, which provides to the effect:

“29 (2) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything

contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection.”

submitting thus that the parent alienation syndrome has an impact which is irreversible as a consequence of which, a child suffers throughout his/her life.

24. The respondent no.2 and the Intervenor have sought to submit that children in need of parental care of both parents fall within the definition of the expression ‘*child in need of care and protection*’ in terms of Section 2 (14) of the Juvenile Justice (Care and Protection of Children) Act, 2015 and that thus to ensure the principle of participation and family responsibility as per Section 31 and in terms of Section 29(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015, the CWC has the powers to give directions to allow the child to exercise his basic rights.

25. The respondent no.1 adopts the submissions made by the respondent no.2.

26. It is essential to advert to the powers of the CWC in relation to a child in need of care and protection on such child being produced before it.

27. Section 31 of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides to the effect:

“31. (1) Any child in need of care and protection may be produced before the Committee by any of the following persons, namely:—

(i) any police officer or special juvenile police unit or a designated Child Welfare Police Officer or any officer of

District Child Protection Unit or inspector appointed under any labour law for the time being in force;

(ii) any public servant;

(iii) Childline Services or any voluntary or non-governmental organisation or any agency as may be recognised by the State Government;

(iv) Child Welfare Officer or probation officer;

(v) any social worker or a public spirited citizen;

(vi) by the child himself; or

(vii) any nurse, doctor or management of a nursing home, hospital or maternity home:

Provided that the child shall be produced before the Committee without any loss of time but within a period of twenty-four hours excluding the time necessary for the journey.

(2) The State Government may make rules consistent with this Act, to provide for the manner of submitting the report to the Committee and the manner of sending and entrusting the child to childrens home or fit facility or fit person, as the case may be, during the period of the inquiry.

Section 37 of the Juvenile Justice (Care and Protection of Children) Act, 2015, provides to the effect:

“37. (1) The Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child’s wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders, namely:—

(a) declaration that a child is in need of care and protection;

(b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;

(c) placement of the child in Children’s Home or fit facility or Specialised Adoption Agency for the purpose of adoption

for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;

(d) placement of the child with fit person for long term or temporary care;

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;

(h) declaration that the child is legally free for adoption under section 38.

(2) The Committee may also pass orders for—

(i) declaration of fit persons for foster care;

(ii) getting after care support under section 46 of the Act; or

(iii) any other order related to any other function as may be prescribed.”

28. The verdict of the Hon'ble High Court of Madhya Pradesh in ***Priya Yadav Vs. State of M.P. & Others. 2017 (2) MPLJ 404*** is on facts *pari materia* to the instant case.

29. It is apparent as has been observed by the Hon'ble High Court of Madhya Pradesh in the aforesaid verdict vide paras 8, 9, 10, 11, 12, 13, 14 & 15 which read to the effect:-

“8. Bare reading of the aforesaid, it is apparent that Police Officer or Special Juvenile Police Unit or designated Child Welfare Officer or any officer of the District Child Protection Unit or Inspector appointed under Labour Law, any public servant, childline service or any voluntary or non-voluntary Governmental organisation or any agency recognized by the Government, Child Welfare Officer or Probation Officer, Social Worker, Public Spirited Citizen, Nurse, Doctor, Management of Nursing Homes, Hospital and Maternity Home may bring the child in need of care and protection before the CWC or otherwise the child himself may remain present asking relief as conferred to the Committee. In the said provision, no space has been provided to take action by the CWC on an application submitted by the husband against a wife to produce the child who are litigating in the Court of law.

9. As per section 32, it has been made mandatory on the aforesaid persons to make report regarding a child found separated from guardian and in case of non-reporting, it would be an offence as per section 33 and section 34 who provides for penalty. Thereafter the committee shall take steps as specified in section 35 for surrender of the children following the procedure as specified.

10. Section 37 is relevant which clarifies what type of orders can be passed by the CWC with respect to the child in need of care and protection, hence it is reproduced as under:

(1) The committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view; pass one or more of the following orders, namely—

(a) declaration that a child is in need of care and protection;

(b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;

(c) placement of the child in Children's Home or fit facility or Specialized Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;

(d) placement of the child with fit person for long term or temporary care;

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) directions to persons or Institutions or facilities in whose care the child is placed regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention; psychiatric and psychological support including need-based counselling, occupational therapy or behavior modification therapy, skill training, legal aid, educational services and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;

(h) declaration that the child is legally free for adoption under section 38.

(2) The Committee may also pass orders for--

(i) declaration of fit persons for foster care;

(ii) getting after care support under section 46 of the Act; or

(iii) any other order related to any other function as may be prescribed. Any other function as may prescribed.

11. For the purpose of chapter 5 of the Act of 2015 and chapter 5 of the Rules, it is clear that any child who is in need of care and protection is required to be produced before the committee during the working hours at its place and beyond working hours before members as per duty. What is supposed to be done by the committee has been specified under the Act as well as the in the Rules. Thus

primary function of the committee starts when child is produced before them or otherwise in case any intimation has been received by the CWC, on verification by the Protection Officer or Probationary Officer or by own visit, after passing the order by all three members. Thus the powers as conferred under the Act and the Rules to initiate the proceedings and to pass the order have been specified under section 37 and the power can be exercised to the extent as indicated. No other power can be exercised by the members of the CWC with respect to a child who is not in conflict with law and in need of care and protection, not brought before them.

*12. In the context of aforesaid legal position, arguments advanced by the counsel for the respondent referring the provisions of Commission for Protection of Child Rights Act, 2005 and as per United Nations Conventions is required to be adverted. Counsel referring the said convention urged that Madhya Pradesh High Court vide order dated 20.3.2014 has accepted the applicability of those conventions but on perusal of the order, it is apparent that Chief Justice of the Madhya Pradesh High Court has directed for circulation of the 'Child Access and Custody Guidelines and pertaining Plan for guidance, among the Additional District Judges, Family Court Judges and marriage counselors in the State of Madhya Pradesh. Whereby it is clear that High Court was conscious enough that said convention ought to be followed by the competent court of law to which the power has been conferred to declare guardian, therefore said convention is required to be observed by those Courts or Forums having competence conferred to them under the law. **Under the Act of 2015 and the Rules framed thereunder, CWC is not conferred with a power to give the custody of the child. It is a case wherein due to dispute in between the husband and wife, proceedings are pending between them, however CWC, Indore cannot direct visitation right to meet the child either to husband or to wife in the facts of the case. In the said context the provisions of the Guardians and Wards Act,***

1890 are relevant whereby as per section 7, the court may make an order as to guardianship on submitting an application by a person as specified in section 8 before the competent Court having jurisdiction to entertain such an application in a form as prescribed. As per section 7 the Court may have power to decide who would be the guardian of the child. Similarly in the Family Courts Act, as per section 7(1)(b), explanation (g) the proceedings may be brought before the Family Court in a suit or proceeding asking guardianship of the child or the custody or access to any minor.

13. Thus, it is apparent that under the provisions of Guardians and Wards Act as well as under the provisions of Family Courts Act, the powers are conferred to the Court of competent jurisdiction who shall have powers to decide those application and in the said context if the letter of the High Court dated 20.3.2014 is interpreted applying the United Nations Conventions then it is rightly communicated to the Courts having power to decide guardianship or to give visitation right to or access to the minor child, therefore argument advanced by the counsel for respondent No. 5 asking benefit of convention through CWC, Indore is misplaced and repelled.

14. In view of the discussions made hereinabove, it can safely be concluded that under the provisions of Juvenile Justice(Care and Protection of Children) Act, 2015 and Juvenile Justice (Care and Protection of Children) Rules, 2016, Child Welfare Committee does not confer power to give custody of a child taking it from mother and give to the father in the manner as done by the CWC, Indore in the present case. It is seen that CWC, Indore is passing orders granting custody of the children and one of such order has been brought to the notice of this Court dated 25.5.2015. In the said case also the proceedings were pending before the Family Court for custody of the child but CWC usurp the jurisdiction and during pendency of those proceedings directed custody of the child to the mother. Similar is the position in the present case wherein

also as per Annexure P-2, an application for custody of the child has also been filed before the Family Court but during pendency of the said application, respondent No. 5 applied to the CWC whereon the order of the visitation right has been passed directing to bring the child in the office of CWC, Indore on every Friday between 10:00 a.m. to 5:00 p.m. to the petitioner. In my considered opinion the aforesaid exercise of powers by the CWC, Indore is not in conformity with the Act and the Rules and also contrary to the powers conferred under the other law applicable for the time being in force, therefore the order impugned is set aside.

*15. As per the discussions made hereinabove, a note of caution is to be taken by the Court that such power should not be exercised by the other CWC functioning in the State of M.P. The aforesaid note of caution fortifies from the fact that the members appointed by the State Government either Chairman or Members may not possess legal education, not having acquaintance with law and they are also not well versed with the provisions of law, however it is necessary to bring to the notice of all the CWC, that what powers are required to be exercised by them. **In this respect it is directed that they may exercise the powers within the ambit of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Rules framed therein and not beyond the same.** It is directed that custody of child cannot be given by them in the facts discussed above, therefore the order passed today by this Court is required to be circulated to all the CWC of the State of M.P. directing them that visitation right or custody as guardian should not be invoked by them assuming the jurisdiction in this regard.”*
(Emphasis supplied)

which also persuades this Court to hold that no power other than that conferred on the Child Welfare Committee in terms of Section 37 of the Juvenile Justice (Care and Protection of Children) Act, 2015 can

be exercised by it which powers can also be exercised only to the extent as indicated thereby.

30. It is apparent thus that in terms of provisions of the Guardians and Wards Act, 1890 powers are conferred on the Court of competent jurisdiction to decide the aspects of guardianship, visitation and access to a minor child and as observed elsewhere hereinabove, in the circumstances of the instant case where there is litigation pending between the parties i.e. the petitioner and the respondent no.2 before the Family Courts, Delhi, the respondent no.2 could not have resorted to a mode to detract from the adjudication qua the rights of access to the minor child, which are to be made by a Court of law.

31. On a consideration of the submissions that have been made on behalf of either side, as observed hereinabove, in terms of Section 7(1) of the Family Courts Act, 1984, taking the same into account and the aspect that there is a litigation pending in the Family Court between the mother of the minor child and the father of the minor child as has been submitted on behalf of the petitioner and not refuted on behalf of the respondent no.1 in as much as the proceedings for maintenance are pending before the said Court, it is apparent that jurisdiction to grant permission or access to the respondent no.2 to the minor child in the circumstances of the instant case is vested with the Family Court concerned alone.

32. Furthermore, it cannot be overlooked that Article 9(1) of the UNCRC which reads to the effect:

“1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except

when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."

also makes it apparent that it cannot be read in isolation and cannot be read in disregard of the domestic law.

33. In view thereof, the impugned order dated 14.09.2018 of the Child Welfare Committee (CWC), District South is set aside. However, the same shall not preclude the respondent no.2 from seeking visitation rights qua the minor child of the petitioner and the respondent no.2 in accordance with law before the Family Court concerned.

34. The petition is disposed of accordingly.

ANU MALHOTRA, J.

SEPTEMBER 06th, 2019/vm