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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 25th November, 2019

Pronounced on: 25 February, 2020

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MAT.APP.(F.C.) 30/2018 & C.M. APPL. 49507/2018

SMRITI MADAN KANSAGRA

....Appellant

Through : Mr.Prosenjeet Banerjee, Ms.Mansi
Sharma and Ms.Shreya Singhal,
Advocates

versus

PERRY KANSAGRA

..... Respondent

Through : Mrs.Inderjeet Swaroop, Mr.Anunaya
Mehta and Mr.Raghav Swaroop,
Advocates

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J.

CM 49507/2018

1. By this application, the appellant had sought a direction to the respondent for producing the chargesheet in CMCR 997/2018 titled *Republic v. Perry Mansukh Kansagra & Ors.* The application was heard on 20.12.2018 and it was decided that the application would be taken up for hearing along with the appeal.
2. During the pendency of the appeal, the appellant has filed a certified copy of the chargesheet with Diary No.141190 and the effect of the criminal proceedings has been noticed by us in our detailed judgment. As such, no further orders are required to be passed in the application and it is, accordingly, disposed of.

MAT.APP.(F.C.) 30/2018

3. The present appeal has been filed under Section 19 of the Family Courts Act, 1984 impugning the judgment dated 12.01.2018 passed by the Principal Judge, Family Courts, Saket (*'Family Court'*) whereby the petition filed by the respondent/father seeking guardianship of his minor child, Aditya Vikram Kansagra has been allowed. The Family Court has declared the respondent/father as the guardian of the child and the appellant/mother was directed to transfer the custody of Aditya at the end of the academic session of 2017-2018.
4. The necessary facts to be noticed for disposal of the present appeal are that the marriage between the parties was solemnised in New Delhi on 29.07.2007. The appellant is an Indian citizen, while the respondent holds citizenship of Kenya and the United Kingdom. After marriage, the appellant shifted to Nairobi, Kenya and settled into her matrimonial home with the respondent. A son, Aditya was born to the couple on 02.12.2009 at New Delhi. After delivery, the mother returned to Nairobi along with the child. Thereafter, the mother and Aditya travelled from Kenya to India on few occasions. Aditya holds a Kenyan as well as a British passport. During the pendency of the proceedings, the Kenyan passport was misplaced by the appellant.
5. On 10.03.2012, the family came to New Delhi holding return tickets to Nairobi. The appellant claims that the respondent started showing abnormal and belligerent conduct, which led to the filing of a civil suit [CS(OS) 1604/2012] before this Court against the respondent and his parents *inter alia* seeking permanent injunction against them from removing the child from the custody of the appellant and restraining

them from meeting him without the consent of the appellant. On 28.05.2012, interim orders were passed against the respondents restraining them from removing the son from the custody of the appellant. Thereafter, various visitation orders were passed in the matter. The father along with his parents was permitted to meet Aditya for 2 hours on Friday, Saturday and Sunday in the 2nd week of every month. According to the respondent, he flew from Nairobi to New Delhi every month to meet Aditya along with his parents. The matter was ultimately disposed of noticing the pendency of the proceedings under the Guardianship Act as adverted to by us in the next paragraph.

6. In the meantime, the respondent filed a Guardianship Petition before the Family Court bearing G-53/2012 on 06.11.2012 *inter alia* seeking declaration to be the legal guardian of Aditya, and seeking his permanent custody. The arrangement of visitation was modified by the Family Court by its orders dated 09.02.2016 and 09.03.2016. Thereafter, on 18.04.2016, the respondent filed an application in the Family Court praying that the Family Court may direct the Counsellor to bring the child to the Court for an in-chamber meeting, which was objected to by the appellant. The Family Court allowed the application by an order dated 04.05.2016 and directed the child to be produced before the Court on 07.05.2016.
7. Aggrieved by the order dated 04.05.2016, the appellant filed MAT. APP. (F.C.) 67/2016 before this Court. This Court, by an order dated 06.05.2016, referred the parties to mediation and also directed that Aditya may be produced before the Court on 11.05.2016. Thereafter,

this Court interacted with the child, Aditya on 11.05.2016 wherein it was informed that Aditya has interacted with the Mediator as well as the Counsellor in the Delhi High Court Mediation and Conciliation Centre and that the mediation efforts were underway. The Counsellor interacted with Aditya on 08.07.2016 and 11.07.2016, and thereafter, submitted a report dated 21.07.2016 in a sealed cover. On 11.08.2016, the sealed cover containing the report of the Counsellor was opened and the report was taken on record. In an application moved the next day, i.e. 12.08.2016, the father relied upon the report of the Counsellor dated 21.07.2016 and prayed for permission to speak to Aditya on telephone. While opposing the prayer, the mother objected to such reliance on the ground of confidentiality. The Mediator thereafter filed the final report in November, 2016 reporting failure of the mediation process. This Court, by judgment dated 17.02.2017 held that the mediation has failed and where the scope of mediation is the solution of a child parenting issue, report by a mediator or a child counsellor concerning the behaviour and attitude of the child would not fall within the bar of confidentiality for the reason no information shared by the couple is being brought on record.

8. Thereafter, on 18.03.2017, the mother filed Review Petition No.221/2017 questioning the judgment dated 17.02.2017. The Review Petition was allowed by this Court by the judgment dated 11.12.2017, and it was held that the reports of the Mediator and the Counsellor shall be disregarded by the Family Court, when it proceeds to decide the merits of the case. The said judgment dated 11.12.2017 was challenged by the father by way of a petition seeking special leave

bearing SLP(C) 9267/2018, which was later converted to CA 1694/2019. The Apex Court, by the judgment dated 15.02.2019, allowed the appeal and concluded as under:

“29. There is, however, one aspect which must also be considered and that is who is the “Counsellor” within the meaning of Rule 8 and whether the Counsellor who assisted the court in the present matter comes within the four corners of said provision. It is true that under Section 6 the Counsellors are appointed by the State Government in consultation with the High Court. It is also true that the Counsellor in the present case was not the one who was appointed in terms of Section 6 but was appointed by a committee of the High Court and her assistance had been requested for in connection with many matters. The order passed on 06.05.2016 had indicated that the Mediator could join “any other person” as may be deemed necessary for a holistic and effective mediation. The next order dated 11.05.2016 did mention the name of the Counsellor and the fact that the Counsellor had a fruitful meeting with Aditya. The Counsellor, thereafter, interacted with him on 08.07.2016 and 11.07.2016, based on which interaction, a report was submitted on 21.07.2016. The engagement of the Counsellor was thus in complete knowledge of the parties as well as with express acceptance of the High Court. It may be that said Counsellor was not appointed under Section 6 of the Act but if the paramount consideration is the welfare of the child, there cannot be undue reliance on a technicality. As a matter of fact, the width of Section 12 of the Act would admit no such restriction. The report given by the Counsellor in the present case cannot, therefore, be eschewed from consideration. It is noteworthy that there was absolutely nothing against the Counsellor and in the judgment under appeal, the High Court went on to observe in para No.30 that the Counsellor was well experienced and known for her commitment and sincerity to secure a settlement which would be satisfactory to all.

30. We do not, therefore, see any reason why the reports in the present case, be kept out of consideration.

31. We, therefore, allow this appeal, set aside the judgment dated 11.12.2017 passed by the High Court and restore the earlier judgment dated 17.02.2017 passed by the High Court of Delhi. There shall be no order as to costs.”

(Emphasis Supplied)

9. Having given a brief detail of the previous round of litigation between the parties, we proceed to analyse the case before us.
10. The grounds on which the Guardianship Petition was filed by the respondent were that the appellant was trying to isolate the child from the respondent and his family, and from his motherland, Kenya. It was stated that the child should be able to identify with the culture and lifestyle of Kenya. It was pleaded by the respondent that the child requires a wholesome upbringing and the company of both the parents, and should be raised at a place which affords him better lifestyle and greater future prospects. It was further stated that the respondent and his family are highly educated NRI industrialists having their business interests spread over in Kenya and the United Kingdom. Aditya, being the prospective heir of the respondent's vast business, should be exposed to the business environment at a young age. The child has better future prospects in Kenya than in Delhi. The respondent submitted that the mother, an advocate by profession, lives in a small accommodation and is busy taking care of her family litigations which are pending in India. It was contended that the appellant is a rude and impolite person running into numerous clashes with the respondent, his family and household help. She is staying alone with her aged mother, who is suffering from ill-health and is dependent on others for her upkeep. It was further pleaded by the respondent that since he has business interests in Kenya, and since he is conversant with English,

Hindi, Kiswahili and Gujrati, it is necessary for the child also to learn the language of his country and society. Numerous allegations have also been levelled against the appellant and her capability of upbringing the child. It was stated that the appellant is emotionally disturbed and has suicidal tendencies. She used to overclothe the child and give unnecessary medication.

11. The appellant contested the petition. In her written statement, she contended that since the respondent herein is the biological father, therefore, he is not entitled to seek a declaration to be appointed as the guardian. It was submitted that the respondent is only contesting the petition to appease his ego and is not interested in the upbringing of the child. Since the child is of tender age, he needs the love and affection of his mother.
12. The appellant further submitted that the father is unfit to be granted custody of the child as he is habituated to alcoholic beverages. The appellant submitted that the respondent is a racist, who considers the people of African descent to be beneath him. He is also in an adulterous liaison with a lady named Ms.Sonia, and has a temper problem. He was not interested in the child before the commencement of the litigation. Further, he is a very busy businessman who travels 18 days a month. It was averred that the respondent essentially wants to entrust the upbringing of the child to his parents, i.e. the paternal grandparents of the child, who are no replacement for the biological mother and father. The paternal grand-parents are very old senior citizens who would not be able to bring up the child. Reference was made to proceedings dated 25.04.2013, wherein the respondent had

stated that he is not inclined to settle with the appellant. It was further submitted by the appellant that the father had threatened the appellant by stating that the Kansagras always have their way, therefore, she should not dream of denying what they want. It was alleged that the child is nothing but a tool to inherit the share of the father in the Kansagra Estate and carry on the business. The appellant further submitted that she never deprived the respondent of the company and interaction with Aditya. She facilitated visitations in addition to the ones granted by the court. It was further submitted that Kenya is a politically unstable country which has a high rate of crime and suffers from rampant human rights violations. The child was now being brought up in an atmosphere of Indian culture and moralities, at New Delhi. It was also pleaded that the respondent and his family only wanted the upbringing of the child in India in order to attain Indian values and culture and to this effect that noted the schedule of the child in his notebook.

13. In her para-wise reply, the appellant pleaded that after getting married, she got to know that the respondent and his family are arrogant, insensitive people who only care about their money and their business and show off the same. The respondent and his family were not present at the time of delivery of the child, and only came to India, after getting to know that the appellant had given birth to a male child. She pleaded that her mother in-law had insisted that the child be born at the maternal grand parents' place. She further stated that the respondent had expressed his desire that the child be brought up in an Indian upbringing and therefore, insisted that the child and the mother

remain in India. Reference was made to a notebook drawn up immediately after the child was born wherein, the father laid down a framework which required that the child spend most of the time at New Delhi and the stay at Kenya was minimized. She admitted that the father and his family are in a superior financial position, however it was pleaded that better financial status does not ensure better upbringing. It was denied that the father would visit India every month during the delivery period and even post-delivery. She denied that she is indecisive or mercurial in nature. She also denied that she attempted to commit suicide by slitting her wrists.

14. The mother had further pleaded that the child has been studying in India since 2010 and is being brought up with Indian values and culture. He engages in various outdoor and indoor extra-curricular activities. The contents of the rest of the petition were denied and the grounds raised for seeking custody were disputed.
15. The respondent had filed a replication reiterating that the appellant was trying to isolate the child. It was stated that the appellant was telling the child about *rakshas* (demons) in Kenya and that the plane might crash during his flight there in order to dissuade him from travelling to Kenya. The respondent claimed to have a work-life balance and having working hours between 8 AM to 4 PM. The remaining allegations were denied.
16. The following issues were framed by the Family court:
 - “1. Whether the present petitioner is not maintainable in its present form? (OPD)
 2. Whether the petitioner is entitled to be declared the Guardian and entitled to the custody of the minor child? (OPP)

3. Relief”

17. In support of his case, the respondent (petitioner before the Family Court) examined 12 witnesses. He examined himself as PW-1 and his father appeared as PW-2. Whereas the mother, in support of her case examined herself as RW-1 and 2 other witnesses including her mother as RW-3.
18. The Family Court after examining the pleadings and the evidence on record, rendered a finding to the effect that the respondent/father, shall remain the guardian of the minor, by his status of being the natural guardian, in terms of Section 6(a) of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as ‘*HM&G Act*’). Accordingly, the father was declared the guardian of the minor child and the child’s permanent custody was also granted to the father. The mother was directed to transfer the custody of Aditya at the end of the academic session of 2017-2018.
19. Aggrieved by the decision, the mother/appellant has preferred the present appeal before this Court.
20. Mr. Banerjee, learned counsel for the appellant contended that the respondent was not competent to institute proceedings under the Guardians and Wards Act, 1890 (‘*G&W Act*’) as HM&G Act overrides G&W Act as stated in Sections 2 and 5(b) of the HM&G Act. Section 1(2) of the HM&G Act stipulates invocation only by a Hindu Male domicile and the respondent is a Kenyan domicile. The finding of the Family Court is perverse and based on an incorrect reading of Section 3 of HM&G Act as the proviso is not restricted only to children. The judgment in *Sondur Gopal v. Rajini Gopal*,

(2013) 7 SCC 426 (paragraphs 24 and 27) has been incorrectly relied upon.

21. On the factual aspect, learned counsel contended that the finding of the Family Court that the respondent is a domicile of India was incorrect and contrary to his stand before the Family Court. Attention of this Court was drawn to paragraph 3 of the petition and paragraphs 13 and 15 of the evidence by way of affidavit. Contradictory findings regarding the residence of the respondent and his father in Kenya have also been rendered. According to Mr. Banerjee, the finding that the issue is a mixed question of fact and law is also incorrect as the case of the respondent was always that he is a domicile of Kenya and not India. The same being an admitted fact, was never an issue in view of Section 58 of the Indian Evidence Act, 1872. As regards the residence of the child, again contradictory findings have been given, i.e. that the child is ordinary resident of Delhi and is also an illegal resident. Reliance was placed on *Bharat Vats v. Garima Vats*, ILR (2011) 6 Del 198 and *Bhagyalakshmi v. Narayana Rao*, AIR 1983 Mad 9.
22. Learned counsel for the appellant submitted the impugned judgment passed by the Family Court has been passed in utter disregard to the welfare and the best interest of the child ignoring the legal precedents. It was contended that the child is well settled in India and is getting exposure to both his parents. The child is stated to be attached to Indian circumstances and has close friends in Delhi. He is studying in one of the best schools in Delhi, i.e. Delhi Public School, Mathura Road, and is doing well in his studies and extra-curricular activities. It was contended that the paramount consideration ought to be the best

interest and welfare of the child and not the rights of the parties. According to the learned counsel for the appellant, Section 6(a) of HM&G Act has to be read in conjunction with the best interest principle. Reliance was placed on ***Prateek Gupta v. Shilpi Gupta***, (2018) 2 SCC 309. The said principle is also said to be enshrined in Section 17(1) of the G&W Act. It is submitted that the Family Court has ordered the reversion of custody based on untenable technicalities. The Family Court has incorrectly ignored the judgment in ***Prateek Gupta*** (Supra) holding principles governing writ jurisdiction to be different from statutory jurisdiction. The sole criteria utilized by the Family Court while granting custody to the father is the superior financial capability of the father and financial prospects. The said view is contrary to the judgment of the Supreme Court in ***Dhanwanti Joshi v. Madhav Unde***, (1998) 1 SCC 112 (paragraph 24).

23. Elaborating his submissions further regarding the welfare of the child, Mr. Banerjee further submitted that the child was born in India and has been residing here as per the wishes of the respondent. Reliance was placed on Ex.PW1/R1 being a note drawn up by the respondent recording his and his family's wish that the child is to predominantly stay in India. It is contended that the child is a domicile and ordinary resident of India. It was contended that the child is studying in 4th standard in Delhi and has had his education in Delhi and the school has been held to a reputed school by this Court by an Order dated 17.10.2013 in another appeal emanating from an order of the Family Court. The child enjoys the company of his friends and cousins in Delhi. He enjoys celebrating festivals like Diwali, Raksha Bandhan,

Janmashtami and Holi and as such, has deep cultural roots in India. The child is close to his maternal grandmother and is exposed to numerous relatives. The child also enjoys sports and has been taken on numerous holidays. It was submitted that the appellant is a full time mother devoting her time to take care of all the needs of the child.

24. As regards the findings of the Family Court regarding Ex.PW1/R1, it was submitted that the Family Court gravely misappreciated the nature, scope and effect of the document. It was contended that the finding that Ex.PW1/R1 was prepared in Kenya sometime between July 2010 and 10.03.2012 is contrary to the record and the depositions of the respondent (PW-1) on 14.12.2015 and of the mother of the appellant (RW-3) on 30.08.2017. According to Mr. Banerjee, the vintage of Ex.PW1/R1 was in the first or second week of December, 2009, i.e. right after the birth of the child, and was prepared in New Delhi. It was also submitted that the record clearly showed that Ex.PW1/R1 was acted upon and despite the same, the Family Court held to the contrary. Attention was drawn to the cross-examination of the respondent (PW-1) wherein he stated that “[i]t is correct that *Schedule Ex.PW1/R1 running into two pages on two sheets in the note book was more or less acted upon by me and Smriti.*”
25. It was further contended that the removal of the child to Kenya would make his life full of uncertainties. Mr. Banerjee submitted that once the child is taken to Kenya, this Court would lose jurisdiction to implement any order regarding the welfare of the child. The appellant would be rendered without any remedy if the orders of this Court are violated and this Court would not be in a position to implement its

orders. Further, once the child is removed to Kenya, the Kenyan legal system would prevail and its principles have not been disclosed to this Court.

26. It was next contended that the respondent is not best suited to get the custody of the child as *first*, he has a bad temper; *second*, he is a racist considering persons of African descent to be inferior to him; *third*, he has a drinking problem; *fourth*, he is in an adulterous liaison; *fifth*, he is seeking custody as an ego issue; *sixth*, criminal cases are pending against him in Kenya being CMCR 997/2018 titled *Republic v. Perry Mansukh Kansagra* initiated owing to breaking of a dam causing the death of 48 persons; and *seventh*, the respondent is going to be busy with the criminal trial and would be unable to devote time to the child.
27. Mr. Banerjee submitted that the respondent had sought relief under Section 7 of the G&W Act and the respondent has failed to dislodge the appellant in terms of Section 7(2) of the Act. The tests of dislodging the guardian are given in Section 39 of the G&W Act. Despite the Family Court holding that none of the allegations against the appellant are made out, it proceeded to declare the respondent as the guardian of the child. It was also submitted that the child was protected by the order of this Court dated 28.05.2012 passed in CS(OS) 1604/2012 and the same continues till date and hence, the custody of the appellant was not unlawful.
28. It was contended that the Family Court erred in ignoring that the appellant also had an equal right to the custody and guardianship of the child. Reliance was placed on the judgment in ***Githa Hariharan v. RBI***, (1999) 2 SCC 228 (paragraphs 31 and 32).

29. Learned counsel submitted that the findings of the Family Court that the custody of the mother was unauthorised or illegal are preserve and contrary to the best interest principle. Reliance was placed on the decisions rendered by the Hon'ble Supreme Court in ***Rosy Jacob v. Jacob A. Chakramakkal***, (1973) 1 SCC 84 (paragraph 15); ***Ashish Ranjan v. Anupama Tandon***, (2010) 14 SCC 274 (paragraph 18 and 19) and ***Gayatri Baja v. Jiten Bhalla***, (2012) 12 SCC 471 (paragraph 14).
30. Learned counsel also relied upon ***Jai Prakash Khadira v. Shyam Sundar Agarwalla & Anr.***, (2000) 6 SCC 598 to submit that in instances where both the parties seem to be quite affluent, that by itself cannot be the only criteria to decide the custody of the child. It was also submitted that the approach taken by the Family Court smacks of gender bias and the separation of the concept of guardianship and custody by the Family Court was not warranted in view of the pleadings of the respondent.
31. Impugning the finding of the Family Court that the child's stay in India was unauthorised, it was submitted that the child was born in India and held an 'Overseas Citizen of India' Card. The child was ordinarily residing in New Delhi and was the basis of the assumption of jurisdiction by the Family Court. The handwritten schedule Ex. PW1/R1 clearly showed that the child primarily lived in India even prior to the suit having been filed.
32. Mr. Banerjee submitted that the filing of the suit [CS(OS) 1604/2012] was *bona fide* and owing to a genuine apprehension. Attention of the Court was drawn to the various averments in the Plaint of the previous

suit regarding threats extended by the respondent and discovery of marital infidelity. Prayer (c) could not have been held to be for parental alienation as the appellant always consented to visitation orders. It was submitted that the appellant could not return to Nairobi, Kenya to join back the company of the respondent as the respondent was having an extra-marital affair with one Ms. Sonia from Mozambique in April, 2012 and when the appellant confronted the respondent, threats were extended by him.

33. Mr. Banerjee submitted that the testimony of RW-2 had been incorrectly discredited and the same was permissible only on the grounds mentioned under Section 155 of the Indian Evidence Act, 1872. It was submitted that being a friend of the counsel for the appellant cannot be a ground to discredit the witness. Reliance was placed on the decisions rendered by the Apex Court in ***Gurjit Singh alias Gora v. State of Haryana***, (2015) 4 SCC 380 (paragraph 17) as well as ***Kartik Malhar v. State of Bihar***, (1996) 1 SCC 614 (paragraph 15).
34. Learned counsel submitted that the finding rendered by the Family Court that the appellant is residing in a multi-storeyed building in a market place is also contrary to the record as the existence of a commercial establishment on the ground floor was never pleaded or argued. Similarly, the finding that the child had entered India on a Tourist Visa, which has expired is also liable to set-aside. The same is contended to be based in complete speculation. It was submitted that the appellant in her cross-examination on 31.07.2017 stated that the child had an OCI card. Again, the fact was neither pleaded nor

proved. The finding that the respondent was wealthier than the appellant was also sought to be impugned based on the Income Affidavit filed by the respondent in maintenance proceedings pending between the parties.

35. Mr. Banerjee also contended that the report of the Counsellor dated 21.07.2016 cannot be relied upon. The contentions were raised under Rule 9(xi) of the Family Court (Procedure) Rules, 1992 notified by this Court. It was submitted that the Report does not address the best interest principle and was confined to an interlocutory issue. Learned counsel contended that the comfort level of the child showed the encouragement of a healthy relationship by the appellant and belies the contention that the appellant was trying to alienate the child. It was contended that the Counsellor did not have the necessary material nor the adequate time to give a conclusive report. The respondent has, by abusing his visitation rights, been lavishing the child with gifts, while the appellant was giving a wholesome upbringing. Attention was drawn to the order of this Court dated 11.05.2016 in MAT.APP.(F.C.) 67/2016. The Counsellor herself wanted to gauge the progress of the child after couple of months and as such, her report was temporary in nature. Reliance was also placed by the counsel for the appellant on the report of the Mediator dated 22.07.2016.
36. *Per contra*, Mrs. Swaroop has submitted that the judgment of the Family Court is well reasoned and has been passed after due appreciation of the voluminous evidence before it. Learned counsel submitted that as admitted by the appellant (RW-1) in her deposition, the appellant, respondent and their son had come to New Delhi from

Nairobi on a routine visit on 10.03.2012. The return tickets were booked for 06.06.2012, however, the appellant clandestinely filed a civil suit being CS(OS) 1604/2012 and obtained interim orders. Learned counsel also drew our attention to the written statement filed by the appellant before the Family Court to submit that the appellant had admitted that fact that after marriage, she agreed to live and settle in Kenya and that the respondent and his family were in a superior financial position.

37. Learned counsel submitted that the stay of the child in India is illegal. Though the child was born in India, the child took the dual citizenship of United Kingdom and Kenya and hence, ceased to be a citizen of India by virtue of Explanation to Rule 7 of the Registration of Foreigners Rules, 1992; Section 9 of the Citizenship Act and Article 9 of the Constitution of India. The travel to India was on a Kenyan Passport and the OCI card was also attached to the said passport. The passport has been cancelled in 2016 after the lodging of an FIR by the appellant, as such OCI card also stand cancelled making the stay of the child illegal.
38. It was next contended that the interest and welfare of the child would be best protected in being with his father. It was submitted that *first*, the respondent is an established businessman and industrialist in Kenya; *second*, the child is deeply attached to his father and paternal grandparents; *third*, the parental home in Kenya offered pollution free air and good environment; *fourth*, the respondent knows number of languages and has greater global exposure; *fifth*, numerous orders passed by this Court and Family Court record the bonding between the

child and his father; *sixth*, the Report dated 21.06.2016 of the Counsellor appreciates the relation between the respondent and the child; and *seventh*, the records of the schooling of the child showed low attendance in school. The photographs placed on record by the appellant are of the year 2016-17 and taken for the specific purpose of litigation. Attention was drawn to the Emails dated 16.12.2013 Ex.RW1/DA122 and 30.12.2013 Ex.RW1/D123 to submit that the appellant keeps her well-being over the interests of the child and even refused to consider the proper education of the child until complete settlement was reached between the parties including aspect of alimony. It was also contended that the appellant and her mother set a bad example for the child being mere rent collectors.

39. Mrs. Swaroop further submitted that the appellant was guilty of indulging in inter-parental alienation. Reliance was again placed on Prayer (c) of the plaint in CS(OS) 1604/2012 to submit that the appellant had clandestinely filed the suit and wanted to stop the respondent from even meeting the child. It was next contended that the appellant had always obstructed the free access of the father/respondent and grandparents to the child and the respondent was left to seek visitations from this Court and the Family Court. Attention was also drawn to the records of UIDAI Ex.PW9/1 wherein the name of the father has not been mentioned in the Aadhaar card of the child. The records of the school of the child Ex.PW4/B, Ex.PW4/D and Ex.PW4/G were also shown to show that the admission was taken in the school by showing the mother to be a “Single Parent”. It was also submitted that the appellant (RW-1) had

admitted that the child was admitted to the school without the knowledge of the respondent. Incidents were highlighted when the appellant had hindered in the visitation of the respondent. It was also pointed out that in December, 2012, when the child was unwell, the appellant had refused to take advice of the second doctor Ex.RW1/DA103. It was also submitted that the appellant had tried to obstruct free telephone access to the child when an application was filed by the respondent in this regard. Learned counsel also submitted that when the respondent had sought the documents relating to the schooling of the child, the same was opposed by the appellant and ultimately, the Family Court had to record the undertaking of the appellant in this regard.

40. Mrs. Swaroop then highlighted numerous incidents where alleged false averments have been made by the appellant before this Court and the Family Court. It was contented that the story of loss of Kenyan passport was a calculated move to obstruct the overnight visitations of the child. Relying upon Ex.RW1/DA2, Ex.RW1/DA3 and Ex.RW1/DA5, it was submitted that persons of African descent had attended the marriage of the respondent and hence, the allegation of the appellant that the respondent is a racist is false. In response to the allegation that Kenya is not a fit country for the child, learned counsel submitted that Kenya was a better place than New Delhi and reliance has been placed on Ex.RW1/DA125 to Ex.RW1/DA128. It was also argued that the appellant and her mother had visited Kenya and observed the atmosphere before marriage. The contention that the respondent and his parents were indifferent towards the child during

functions was sought to be rebutted and reliance was placed upon various photographs exhibited as Ex.RW1/DA12 to Ex.RW1/DA60.

41. It was next contended that the Family Court has rightly disregarded the testimony of RW-2. In this regard, Mrs. Swaroop contented that *first*, the incidents are not mentioned in the pleadings; *second*, the wife of the witness never worked in the same office as shown from Ex.RW2/DA8 and Ex.RW2/DA7; *third*, no explanation is forthcoming as to why the wife of RW-2 did not depose despite allegedly being a close friend of the appellant; *fourth*, RW-2 and the counsel for the appellant are from the same chamber as shown by Ex.RW2/DA1 to Ex.RW2/DA6 and Ex.RW2/DA9; *fifth*, the witness had contradicted himself by admitting that he did not attend various ceremonies of the child; *sixth*, the story that the respondent is an admirer Adolf Hitler is false and on the contrary, in Ex.RW2/DA10 to Ex.RW2/DA14, the counsel for the appellant is dressed as Adolf Hitler with RW-2; and *seventh*, RW-2 had appeared for the appellant on 11.08.2016 in MAT.APP.(F.C.) 67/2016 Ex.RW2/DA16 contrary to the Rules framed by the Bar Council of India.
42. Mrs. Swaroop further submitted that the testimony of the mother of the appellant (RW-3) was also not reliable. RW-3 had stated in her examination in-chief that she keeps good health, however, records emanating from Ex.RW3/DA1 showed that she was suffering from numerous diseases and was unable to look after the child. It was also submitted that RW-3 admitted that during the visit of the respondent in March-April, 2012, the witness used to cook for the respondent and the same was relished by him and thus, the same belied any contention

of threat or ill-treatment. As regards the adulterous liaison, it was submitted that the a comparison of Ex.RW1/4 with Mark-B and the timing of the e-mails Ex.RW1/4 show the same to be fake and forged.

43. As regards the temperament of the appellant, the learned counsel for the respondent relied upon the statement of the accused under Section 313 of Code of Criminal Procedure, 1973 recorded in the judgment dated 18.07.2009 (Ex.PW2/5A). Attention was also drawn to the cross-examination of the appellant (RW-1) on 03.08.2017 wherein the slitting of the wrists has been admitted. Learned counsel for the respondent submits that the explanation offered is not plausible and ought to be rejected.
44. Mrs. Swaroop further submitted that the indictment of the respondent in a criminal case was nothing more than the bursting of a dam at Solai Farms owned by M/s Kensalt Limited, of which, the respondent was the Managing Director and had been charge-sheeted in such capacity. Even otherwise, the respondent must be presumed to be innocent. Attention was drawn of paragraph 6 of the Rejoinder to CM 49506 of 2018 filed before this Court wherein it has been stated that “[i]t is further clarified that it is not the case of the Appellant in her application that the Respondent is guilty or likely to be found guilty on the criminal charges framed against him” and was only that the incident would engross the respondent in the trial and hostile environment in Kenya would be against the best interests of the child. It was also stated that the mother of the appellant (RW-3) had been facing trial since 1996 and at the same time was able to look after her family.

45. Learned counsel submitted that the age and sex of the child are relevant factors to be considered in view of Section 17(2) of the G&W Act and even the child's preference is also relevant under Section 17(3) of the G&W Act.
46. Opposing the submission that the child had developed roots in India, Mrs. Swaroop contended that the child came to India on 10.03.2012 with return tickets already pre-booked for 06.06.2012, however, the mother/appellant instituted a civil suit being CS(OS) 1604/2012 in this Court and obtained interim orders. Ever since, the parties are litigating before various *fora* and the period of stay is the period taken in judicial process and was not in the control of the respondent. Reliance was placed on *Elizabeth Dinshaw v. Arvand M. Dinshaw*, (1987) 1 SCC 42 (paragraph 9 and 10); *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42 (paragraph 51 and 52); and *Vivek Singh v. Romani Singh*, (2017) 3 SCC 231 (paragraphs 16 to 16.3). Even otherwise, it was submitted the entire life of the child ought to be considered and 7 years would be insignificant as compared to the entire life of the child.
47. We have heard the learned counsel for the parties, perused the impugned judgment and the evidence led by the parties before the Family Court and considered their various contentions.
48. It cannot be gainsaid that the welfare of the child is best protected in residing and growing up with both his parents. With this objective in mind, we had interacted with the parties and their counsel on 18.03.2019 and 19.03.2019, however, a mutually acceptable solution could not be found. Similar efforts were made by the Family Court as

recorded in paragraph 15.1 of the impugned judgment to no avail. Hence, we must assume the daunting task of adjudicating the matter on merits.

49. Mr. Banerjee had raised a preliminary objection regarding the competency of the respondent to maintain proceedings before the Family Court. According to him, as Sections 2 and 5(b) give an overriding effect to the provisions of the HM&G Act over the G&W Act, the provisions of G&W Act can only be invoked when the petitioner is a Hindu having domiciled in India. We are unable to agree with such a proposition as it would be contrary to the express language of the statutes.
50. Section 7(1) of the G&W Act provides a remedy of seeking to be (1) appointed as a guardian and (2) declared to be a guardian. The latter remedy is merely the recognition of a pre-existing right and not creation of any new right. The territorial jurisdiction is provided under Section 9 of the G&W Act. Sub-section (1) deals with territorial jurisdiction in respect of an application made for guardianship of the person of the minor, while Sub-sections (2) and (3) govern where the application is with respect to the guardianship of the property. Since we are concerned with the guardianship of the person, we may refer to Sub-section (1), which reads as under:

*“9. Court having jurisdiction to entertain application.—
(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.”*

(Emphasis Supplied)

51. The ordinary residence of the minor in question was at New Delhi as having come here with the appellant herself with the intention of indefinite stay. The term “District Court” has been defined in Sub-section (4) of Section 4 of the G&W Act as the meaning assigned to the expression under the Code of Civil Procedure, 1908. However, by virtue of explanation (g) to Section 7(1) of the Family Courts Act, 1984 read with Section 7(1)(b), the Family Court established under the said Act is deemed to be a district court for proceedings in relation to the guardianship of a person or the custody of a minor. As such, the respondent had rightly invoked the jurisdiction of the Family Court.
52. As regards the interplay between the G&W Act and the HM&G Act, we may refer to Sections 2 and 5 of the latter Act, which read as under:

“2. Act to be supplemental to Act 8 of 1890.—The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardian and Wards Act, 1890 (8 of 1890).”

“5. Over-riding effect of Act.— Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act.

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.”

(Emphasis Supplied)

53. The HM&G Act has two provisions giving it overriding effect, one expressly governing its interplay with the G&W Act (Section 2) and another general clause (Section 5), the likes of which are included in numerous statutes created for a specific purpose. In our opinion, the interplay between HM&G Act and the G&W Act is to be governed by Section 2 and not Section 5 as the former has been incorporated for the specific purpose by the draftsman. If Section 5 were to apply, Section 2 would be rendered otiose, which is against the settled principles of statutory interpretation. An interpretation which renders any portion of the statute unnecessary or superfluous is to be avoided. Now, Section 2 expressly clarifies that the HM&G Act is not in derogation of the G&W Act, but is in addition to the same. Of course, with the caveat where such departure from the G&W Act has been expressly provided for. There is no express provision in the HM&G Act relating to the applicability of the G&W Act or saying that G&W Act would only apply to Hindus if the HM&G Act were to apply. Hence, the applicability of the HM&G Act is irrelevant at the time of invocation of the G&W Act. Assuming Section 5 were to apply, even then, the G&W Act would have to first be read harmoniously and only in case of irreconcilable inconsistency, the G&W Act would have to bow to the HM&G Act. There being nothing in the HM&G Act related to the applicability of the G&W Act or the powers of a Court under Section 7 of the G&W Act, Section 1(2) would still have no bearing.
54. We may also add that even assuming Section 1 of the HM&G Act to apply, the petition was still maintainable. Section 1 of HM&G Act reads as under:

“1. Short title and extent.—(1) This Act may be called the Hindu Minority and Guardianship Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.”

(Emphasis Supplied)

55. Section 1(2) deals with territorial applicability of the Act and has two prongs: *first*, it applies to the whole of India, and *second*, to Hindus outside the territory of India, but domiciled to territories where the Act has been extended. An identical clause under the Hindu Marriage Act, 1955 came for interpretation before the Supreme Court in **Sondur Gopal** (Supra). The Supreme Court while noticing the judgment of the Calcutta High Court in **Prem Singh v. Dulari Bai**, AIR 1973 Cal 425 differed with the view of the High Court that the Act applied to all Hindus irrespective of domicile. At the same time, it observed that *“One may concede to the applicability of the Act if one of the parties is Hindu of Indian domicile and the other party a Hindu volunteering to be governed by the Act.”* The Family Court took notice of the observations and held as under:

12.8 ...In the present case, respondent is a Hindu of Indian domicile & petitioner, who has invoked the jurisdiction under Guardian & Wards Act, is apparently willing to be governed by this Act. It may be noticed that the provision of sec.-1 of the Hindu Minority & Guardianship Act and sec.-1 of Hindu Marriage Act are exactly the same.

56. We agree with the reasoning of the Family Court. As such, we reject the preliminary objection raised by the learned counsel for the appellant and hold that the respondent was competent to invoke the

jurisdiction of the Family Court. As such, the relevance of the domicile of the father/respondent pales into insignificance.

57. As regards the guardianship and custody of the minor, it is settled law that while deciding any matter as to the custody of a minor, the Courts in India are to give predominance to the welfare of the minor and all other considerations are secondary. The Family Court had segregated its decision between guardianship and custody, however, such a recourse was not permissible. The dispute *inter se* the appellant and the respondent regarding the guardianship and custody of the child was to be essentially decided on the basis of where the welfare of the child would have been best protected and Section 6(a) of the HM&G Act would have no bearing. We are fortified by the following observations in the opinion of Dr. A.S.Anand, C.J. (as he then was) in ***Githa Hariharan*** (Supra):

8. Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a court of law, the word "after" in the section would have no significance, as the court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. ..."

58. Before deciding where the welfare of the child would be best protected, we may also deal with another submission raised by the learned counsel for the appellant. It was submitted before us that the Family Court could not have granted guardianship to the father without finding any of the grounds under Section 39 of the G&W Act made out. The said contention must also be rejected as being opposed to the express language of Section 39 itself. Section 39 only deals

with the removal of a guardian “*appointed or declared by the Court*” and the appellant was neither appointed by any Court nor declared as the guardian of the minor child, as such, the provision would not have any bearing on the *lis* before us.

59. Numerous allegations have been made by the parties against each other. The Family Court had found them to be unnecessary. We have examined the allegations and find that most of them to have been discredited during trial.
60. The appellant had contended that the respondent is a racist considering persons of African descent to be beneath him. We find the allegation to be mere *ipsi dixit*. The appellant had merely stated that the respondent believed Africans to be inferior to him without substantiating the same. Similarly, one incident of 24.10.2007 of a Diwali get-together at the house of the appellant is mentioned, however, the same was never mentioned in the pleadings before the Family Court. As such, we are unable to agree with the contention. The respondent admittedly has a vast business interest in Kenya, which was established by his grand-father and now is being run by him. It would be difficult, if not impossible, for such a person to run such a business enterprise and at the same time, have such disparaging view of the natives of the country. Learned counsel for the respondent had also drawn our attention to Ex.RW1/DA2, Ex.RW1/DA3 and Ex.RW1/DA5, being photographs of various ceremonies of the marriage of the parties, wherefrom it is clear that persons of African descent were even invited to the functions. This clearly contradicts the case of the appellant.

61. Similarly, we find the contention that the respondent to have a drinking problem to be unsupported by any evidence. Only a vague and general statement was made by the appellant (RW-1) in her examination in chief. Both allegations, i.e. the respondent being a racist and a heavy drinker, were sought to be supported by the testimony of RW-2. However, the Family Court had discredited his testimony holding (1) the alleged incidents were not included in the testimony of RW-1, despite her being present; and (2) the witness was close to the counsel for the appellant.
62. We are also unable to rely upon the testimony of RW-2, however, for wholly different reasons. RW-2 claimed to have known the appellant through his wife, who used to work in the same law office as the appellant. The witness deposed in detail regarding two incidents, one being a Diwali party having been hosted by the appellant's mother in October, 2007 and the other in October, 2011 which was also at the residence of the appellant's mother. The witness has deposed in detail regarding the drinking behaviour of the respondent at the party and his subsequent conduct. Interestingly, despite both the events having taken place at the residence of the mother of the appellant and the appellant being victim to the incidents, neither the appellant (RW-1) nor her mother (RW-3) deposed regarding the same. The testimony of RW-1 is limited to the following deposition: “[i]n fact the Petitioner has got drunk at a Diwali get together at my house on 24.10.2007 and abused Africans with racist comments”; while the testimony of RW-3 is completely silent. The nature and extent of incidents deposed by RW-2 could not have taken place without numerous other persons,

including RW-1 and RW-3 noticing the same. RW-1 has been stated to be the victim of the rude and abrasive behaviour, however, RW-1 is completely silent as to the details. It also came on record during cross-examination that the wife of RW-2 was close to the appellant (RW-1), again, she never deposed before the Family Court.

63. We may also notice that the witness had appeared on behalf of the appellant in MAT.APP. (F.C.) 67/2016 on 11.08.2016 as evidenced from the order sheet Ex.RW2/DA16 and as such, it was wholly inappropriate for RW-2 to depose before the Family Court in 2017. Having acted as the counsel, albeit 'proxy', for the appellant, RW-2 ought not have entered the witness box. Another reason for disbelieving the testimony is that RW-2 admitted as not having attended the social and cultural ceremonies of the child clarifying that his schedule as a lawyer did not permit the same. Again, the same is unbelievable as having alleged a close bond with the family of the appellant, it is unbelievable that none of the ceremonies would have been attended. Accordingly, we must eschew the testimony from our consideration.
64. It was next sought to be proved that the respondent was in an adulterous liaison with a woman from Mozambique named Sonia. As per the appellant, the same was revealed in April, 2012 when the appellant shared his desire to visit an old lady friend having fallen ill and admitted to a hospital in Paris. The appellant claimed to have stumbled on some exchange between them on Blackberry messenger on the very same day. The appellant claimed to have shared the messages on her e-mail. During the cross-examination of the

respondent (PW-1) on 06.05.2017, numerous suggestions in this regard were given to the respondent, however, all were denied by him. During the cross-examination, PW-1 was confronted with Mark-B. The witness proceeded to state that “*Text messages Mark-B (Colly.) in seven sheets each initialed [sic: initialled] by the Local Commissioner do not relate to me in any manner.*” Similar suggestions were denied by the father of the respondent (PW-2). Mark-B is a compilation of typed copies of the alleged messages, while the e-mails were exhibited as Ex.RW-1/4 when the appellant entered the witness box. A perusal of the e-mails Ex.RW-1/4 show that the e-mails are dated 05.05.2012 and 06.05.2012. At the same time, as per PW-1, he had left for Kenya on 26.04.2012. This has been admitted by the appellant (RW-1) stating in her examination in-chief that “*The Petitioner left India on 26th April, 2012 after reiterating his threats to me.*” If the respondent (PW-1) had left India on 26.04.2012 and the appellant (RW-1) stayed back, the appellant could not have had access to the mobile of the respondent on 05-06.05.2012. Hence, the alleged message exchange is not free from doubt and cannot be relied upon, and accordingly the appellant failed to prove the factum of the respondent having an adulterous liaison.

65. The registration of a criminal case in Kenya being CMCR 997/2018 titled *Republic v. Perry Mansukh Kansagra* owing to breaking of a dam causing the death of 48 persons was also sought to be pressed into service for contending that the respondent would be busy owing to the trial and a hostile environment would have been created in Kenya. The registration of such a criminal case has not been denied by the

respondent. But, in our view, the same would be completely irrelevant. The mere registration of a case cannot be read to mean the respondent is guilty nor is this Court in a position to conduct a mini-trial regarding the offences. Mrs. Swaroop, learned counsel for the respondent had also clarified that the charges were owing to a bursting of a dam and not owing to any personal act of the respondent. There is absolutely nothing before us to even suggest that the incident has created a hostile environment in Kenya. We are also unable to agree with the other contention that the respondent would be busy owing to the trial and unable to look after the child. Accepting such a plea would mean that all persons facing trials would *ipso facto* become incapacitated to look after their children, which is a plea we cannot subscribe to.

66. It was also argued before us that Kenya is an unstable country and therefore, unfit for the child. There is sufficient material on record to show that the respondent and his family are substantially well off and are capable of providing for the child and the circumstances of the country in general would be completely irrelevant. We may also add that the appellant (RW-1) had admitted travelling to Kenya prior to her marriage to judge the suitability of the country. During cross-examination on 28.07.2017, the appellant deposed as under:

“It is also correct that prior to my marriage me and my mother had visited the residence of the respondent in Kenya and stayed there for two or three days. ... During our said visit me and my mother also visited Solai Farms in Kenya. It is correct that the purpose of our said visit was to assess my adaptability to the country, social fabric, climate and environment.”

(Emphasis Supplied)

Similarly, her mother (RW-3) stated as under:

“It is correct that prior to the marriage of the petitioner and the respondent me and my respondent daughter had visited Kenya and had stayed there for approximately 6/7 days. I do not think if at all we stayed in Kenya on the said occasion for 10/12 days. During our said visit me and my respondent daughter also visited the petitioner's Solai Farm in Kenya.

Q. Is it correct that the purpose of your visit to Kenya alongwith your daughter prior to her marriage with the petitioner was to see the family background, social and financial status, lifestyle of Perry and his family?

Ans. It is wrong to suggest that the purpose of my visit to Kenya alongwith my daughter prior to her marriage with the petitioner was to see the family background, social and financial status, lifestyle of Perry and his family.

Volunteered - As a matter of fact I alongwith my daughter had gone to Kenya to see what kind of place Kenya is and also to see what kinds of people they as after all I was planning to marry my daughter in that family.

...

It is correct that the matrimonial home of my daughter Smriti is MS-166-167, James Gichuru Road, Lavington Green, Nairobi, Kenya. The criteria of our marrying my daughter to petitioner Perry Kansagra was, firstly my daughter Smriti liked the petitioner Perry Kansagra, secondly he was living in Kenya so she married there.”

(Emphasis Supplied)

67. Having gauged the country prior to her marriage, it is not open to the appellant to now contend that Kenya is not an appropriate place for raising a child.
68. On the other hand, the respondent had contended that the appellant was temperamental in nature and had suicidal tendencies. As regards

the former, learned counsel for the respondent had drawn the attention of the Court to the judgment dated 18.07.2009 in Case No.SC 67/2005 passed by the Additional Sessions Judge, Patiala House Court Ex.PW2/5A; more particularly paragraph 9.2. The case pertained to the murder of the father of the appellant wherein their servant was arrayed as the accused. The portion relied upon by the respondent is the statement of the accused under Section 313 of Code of Criminal Procedure, 1973 that has been recorded in the judgment. It is settled law that the statement under Section 313 is not a substantive piece of evidence and cannot be relied upon. As such, the contention must be rejected.

69. It was also submitted that the appellant had suicidal tendencies. Reliance was sought to be placed on the following responses of the appellant (RW-1) during cross-examination:

“It is wrong to suggest that my both wrist have self inflicted slit marks on them. Old scar of approximately 2 inch on my left wrist is of stitches given to me as a result of injury received from a broken window pane. Old scar of approximately 3/4 inch on my right wrist is result of broken glass bangle. It is wrong to suggest that so-called slit marks on my wrist explained by me hereinabove are reflective of my violent uncontrollable anger and behaviour.”

70. The respondent (PW-1) deposed that he had noticed the slit marks during one of the visits to Delhi, however, the date of the visit has not been disclosed. The existence of the scars has been admitted by the appellant and the explanation rendered by the appellant is a clear afterthought. It is highly unlikely that a broken window pane would result in an injury on the wrist. Additionally, for a person to obtain

scars on both wrists accidentally is highly unlikely. Hence, we find credence in the contention that the appellant might have slit her wrists in an attempt to end her own life, but the date of the incident has not been proved.

71. Much emphasis was placed on the handwritten pages in the notebook Ex.PW1/R1. The note written by the respondent reads as under:

FIRST PAGE

“ 2010
JAN, FEB, MAR, APR, MAY - INDIA
JUN → KENYA
JUN, JUL → KENYA
JUL → U.K.
AUG, SEP, OCT → KENYA (HOLIDAY)
OCT → INDIA
OCT, NOV, DEC → INDIA

2ND DEC A.V. – 1ST B'DAY

7 MTHS – INDIA
1 MTH – UK & HOLIDAY
4 MTHS – KENYA”

SECOND PAGE

“ 2011
JAN, FEB, MAR → INDIA
MAR → KENYA
MAR, APR, MAY, JUN → KENYA
JUL → UK
JUL, AUG → KENYA (HOLIDAY)
SEP → INDIA
SEP, OCT, NOV, DEC → INDIA

2ND DEC A.V. 2ND B'DAY

7 MTHS – INDIA

*1 MTH – UK & HOLIDAY
4 MTHS – KENYA”*

72. During the cross-examination, the respondent (PW-1) admitted as having prepared the schedule soon after the birth of the child, but claimed it was dictated by the appellant as per her convenience. PW-1 further stated that he had requested the appellant to change the schedule. PW-1 further admitted that the schedule mentioned in Ex.PW1/R1 was more or less acted upon by the parties.
73. Mr. Banerjee had relied upon the document to submit that the same showed the respondent wanted the child to be brought up in India and has admitted the competency of the appellant. We are unable to agree with the submission. The schedule cannot be read to mean that the respondent wanted the child to be brought up in India. The note only pertained to the first two years of the child and cannot be extended to be read for the entire life. When the child would have started his education, the schedule could not have held up. In our opinion the vintage of the document having been wrongly assessed by the Family Court is completely irrelevant. Even otherwise, before us, both the parents are contesting for custody of the child and we must decide the same taking into consideration the best interest of the child irrespective of any prior arrangement or understanding between the parties.
74. It is not in dispute that the fact that despite the child being born in India, a conscious decision was taken by the parties to take dual citizenship of Kenya and United Kingdom also shows the intention of the parties not to have the upbringing of the child in India. This lends

credence to the stand of the respondent that Ex.PW1/R1 might have been created at the instance of the appellant.

75. Learned counsel for the appellant has primarily urged that this Court should uphold the *status quo* as the interest of the child was best protected. It was submitted that the child is well accustomed to India and should not be uprooted to Kenya. According to him, the child has developed roots in India having stayed in India since 10.03.2012. Reliance was placed on the judgment of the Supreme Court in ***Prateek Gupta*** (Supra) in this regard. However, we are unable to agree with this proposition. The judgment does not lay down that as a general principle of law that repatriation should not be preferred unless overwhelming exigency of the welfare of the child is shown. The Supreme Court had only reiterated the law enunciated in ***Dhanwanti Joshi*** (Supra), as upheld by a three judge bench of the Supreme Court in ***V. Ravi Chandran (2) v. Union of India***, (2010) 1 SCC 174 and recently reiterated in ***Nithya Anand Raghavan v. State (NCT of Delhi)***, (2017) 8 SCC 454, that while deciding the custody of a minor by a summary enquiry, the Court should only order repatriation “*if the applicant/parent is prompt and alert in his/her initiative and the existing circumstances ex facie justify such course again in the overwhelming exigency of the welfare of the child.*” However, after an elaborate enquiry, as in the present case, all relevant aspects must be taken into consideration.
76. We are fortified in our view by the factual matrix of the case in ***Prateek Gupta*** (Supra). The marriage was performed in India and thereafter the parties had shifted to the United States. Two children

were born out of the said wedlock. After sometime, the father abandoned the matrimonial household and returned to India. Subsequently, he went back and kept regular visits with the children, who otherwise continued to be reside with the mother. On one occasion, under the pretext of taking one of the children to the mall, the father returned to India. The mother invoked the jurisdiction of the Courts in United States of America and obtained the permanent custody, while the father initiated proceedings in India for custody and restitution of conjugal rights. In this background, the mother had approached the High Court seeking a writ of *habeas corpus*. The High Court had, after taking into consideration of the order of the US Court and the “closest concern” doctrine had ordered the repatriation of the child. The Supreme Court reversed the decision holding “*no material has been brought on record, persuasive and convincing enough, to take a view that immediate restoration of the custody of the child to the respondent mother in the native country is obligatorily called for in its interest and welfare*” and the decision was expressly made subject to the decision of the competent court deciding the issue of custody. The Supreme Court was hearing an appeal from a petition filed under Article 226, being a summary jurisdiction. The same principle cannot apply to a Guardianship Petition, wherein an elaborate enquiry has already taken place. The paramount and predominant consideration shall remain the welfare of the child and the father need not satisfy the test of “overwhelming exigency”.

77. As regards the period of stay in India during the pendency of litigation in the instant case, we are of the view that no advantage can be drawn

by the appellant. The record shows that the parties along with their child had come to India on 10.03.2012 and while the respondent returned in April, the child and the appellant were scheduled to return in June. In May, the appellant filed a civil suit being CS(OS) 1604/2012 and obtained interim orders from this Court. The respondent was deprived of the custody of the child for no fault of his. After contesting the suit, the respondent filed the Guardianship Petition before the Family Court. The stay of the child in India is only due to the time spent in the litigation between the parties and completely out of the control of the respondent. The respondent has been visiting the child every month and has repeatedly sought extended visitation. The respondent cannot have been said to have stopped caring for the child.

78. We may refer to the judgment of the Supreme Court in *Vivek Singh* (Supra) wherein the mother had been forced to leave her matrimonial home when the child was only 21 months old. She had instituted a Guardianship Petition subsequently. The Family Court had dismissed her petition, which was later reversed by the High Court. However, the decision was stayed by the Supreme Court and the child remained with the father for about 7 years. Before the Supreme Court, factors weighing in favour of the father were that the child had lived with him since the tender age of just 21 months. In this background, the Supreme Court upheld the decision of the High Court and observed that it is not permissible to ignore the other side of the story as to how the mother had been deprived of the custody. The relevant portion reads as under:

“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.

16.1. For first 21 months when the parties were living together, it is the respondent who had nursed the child. The appellant cannot even claim to have an edge over the respondent during this period, when the child was still an infant, who would have naturally remained in the care and protection of the respondent mother, more than the appellant father. Finding to this effect has been arrived at by the High Court as well. This position even otherwise cannot be disputed.

16.2. The respondent was forcibly deprived of the custody of Saesha from 4-8-2010 when she was forced to leave the matrimonial house. As per the respondent, on that date the appellant in a drunken state gave beatings to her and threw her out of the house. The respondent had called the police. The police personnel called the military police and a complaint was lodged. The respondent had also called her parents who had come to her house from Noida. Her parents took hold of the child and the respondent and when they were about to leave, the appellant pulled out the child from the hands of her mother and went inside the house and locked himself. He was drunk at that time. The police suggested not to do anything otherwise appellant would harm the child. It was assured that the child would be returned to her in the morning. In any case, the respondent and the appellant were instructed to come to the police along with the child, next morning. The appellant did not bring the child and threatened that he would not give the child to her. Since then, she had been running from pillar to

post to get the child back but appellant had been refusing. The respondent, therefore, cannot be blamed at all, if the custody of the child remained with the appellant, after the separation of the parties.

16.3. Within the few days i.e. on 26-8-2010, the respondent filed the petition seeking custody of the child and for appointment of her guardian. She did not lose any time making her intentions clear that as a natural mother she wanted to have the custody of the child. It was her misfortune that the trial court vide its judgment dated 7-12-2011 dismissed her petition. Though, she filed the appeal against the said judgment immediately, but during the pendency of the appeal, the custody remained with the appellant because of the dismissal of the petition by the Family Court. The High Court has, by impugned judgment dated 2-4-2013 [Romani Singh v. Vivek Singh, 2013 SCC OnLine Del 1264 : (2013) 136 DRJ 675] granted the custody to the respondent. However, the respondent has not been able to reap the benefit thereof because of the interim orders passed in the instant appeal. It is in these circumstances that child Saesha from the tender age of 21 months has remained with the appellant and today she is 8 years and 3 months old. Obviously, because of this reason, as of today, she is very much attached to the father and she thinks that she should remain in the present environment. A child, who has not seen, experienced or lived the comfort of the company of the mother is, naturally, not in a position to comprehend that the grass on the other side may turn out to be greener. Only when she is exposed to that environment of living with her mother, that she would be in a position to properly evaluate as to whether her welfare lies more in the company of her mother or in the company of her father. As of today, the assessment and perception are one-sided. Few years ago, when the High Court passed the impugned judgment, the ground realities were different.”

(Emphasis Supplied)

79. Similarly, the respondent cannot be faulted for being denied the custody of the child since 2012 as the time was taken in the litigation

process. The respondent had all along taken great interest in the upbringing of the child by filing numerous applications for visitation, seeking a say in the preference of school and even ensuring proper medical attention is extended to the child. The respondent had even voluntarily started paying maintenance towards the child.

80. Mr. Banerjee had argued that the filing of the suit was *bona fide* and owing to threats having been extended by the respondent. It was submitted that the appellant had discovered that the respondent had an extra-marital affair and upon confronting the respondent, threats were extended. We have already held that Ex.RW-1/4 cannot be relied upon and hence, the story regarding the adulterous liaison has not been proved. As such, there cannot be any question of the respondent having been confronted in this regard and extending threats. RW-3 had also admitted during cross-examination that the respondent while his stay in March-April, 2012 used to eat the food cooked by RW-3 and appreciate the same. The same hints towards an amiable environment at the home of RW-3 and not a situation where the respondent and his family would have been threatening the appellant for many months.
81. Learned counsel had also submitted that as the child remained with the appellant under interim orders granted by this Court, his custody is not illegal. We are unable to see any difference the same would make. Admittedly, the appellant was to return to Nairobi in June, 2012; however, she filed a suit making allegations against the respondent and his family. The appellant was granted *ex-parte* interim protection taking into consideration the allegations made by the appellant

(plaintiff therein) and the child being of a tender age. The allegations made stand disproved after an elaborate enquiry before the Family Court and as such, the appellant can no longer derive any benefit from the interim order in her favour.

82. We, accordingly, proceed to analyse where the welfare of the child would be best protected.
83. Despite the interim orders operating against the respondent, the respondent has continued to care for the interest of the child. The respondent has been visiting the child every month since 2012 has even sought extended visitation on numerous occasions. The respondent is a Hindu holding dual citizenship of Kenya and the United Kingdom. The business interest of the respondent is spread out in Kenya and the United Kingdom. The fact was admitted by the appellant in her written statement before the Family Court and all along during the trial. In comparison, the appellant and her mother both are not working and stay at home reaping rental income. They would not be an ideal role model for the child. We may hasten to add that though financial superiority can never be the sole ground to grant custody, however, the same can always be one of the factors to be considered while ascertaining where the overall welfare of the minor lies [See *Dhanwanti Joshi* (Supra) (paragraphs 22-24) and *Chandan Mishra v. Union of India*, (2017) 241 DLT 643 (DB) (paragraphs 36 and 64)].
84. The respondent stays in a joint family with his parents having a large house enabling the child to play around. The appellant stays with her aged mother in a flat. It has also come on record Ex.RW3/DA1 that

the mother of the appellant (RW-3) is unable to sit or stand for long hours as having been diagnosed with an ulcer in her left ankle. She also suffers from lumbar spondylosis with degenerative disc disease. As such, she may not be in the best position to take care of the child. We have also found that the appellant had at least on one occasion slit her own wrists.

85. The report of the Counsellor dated 21.07.2016 as well as the photographs placed on record show that the child shares a close bond with his father and paternal grandparents. Since 2012, the father has religiously travelled from Kenya to New Delhi to spend time with his son every month, which shows genuine love and affection towards the child and also his dedication to somehow, despite all odds, keep alive the bond with his only child. All the grounds which have been urged before us with regard to the activities of the child are not such which cannot be provided to him by the respondent in Kenya.
86. Certain objections were also raised before us regarding the report of the Counsellor, however, none of them dissuade us from relying upon the report. In the previous round of litigation, the coordinate bench of this Court and the Supreme Court had noticed that the Counsellor was well experienced and known for her commitment, as such, the objections are completely unwarranted.
87. We also find force in the submission made by the counsel for the respondent that the appellant had tried to alienate the child from the respondent. The appellant visited India on a return ticket and thereafter filed a suit in order to retain the custody of the child. Prayer (c) in CS(OS) 1604/2012 specifically sought to restrain the respondent

and his parents in perpetuity from even meeting the child without the consent or without the presence of the appellant. Ex.PW-1/F, a transcript of the conversation between the child and the respondent's family also shows that the appellant was feeding the child with stories regarding witches in Nairobi, Kenya and that the plane would crash in flight in order to desist him from going there. The child was also told that his paternal grandparents had abandoned him in Delhi. The name of the father was withheld from the Aadhar Card of the child Ex.PW9/1 and from the application form Ex.PW4/D submitted to the school of the child where the name of the respondent has been struck off and "Single Parent" has been written.

88. The record also shows that the appellant kept her interests before the interest of the child and used the interim custody of the child as a leverage for bargaining better settlement terms for herself. One such incident is highlighted in the e-mails dated 16.12.2013 (Ex.RW1/DA122) and 30.12.2013 (Ex.RW1/D123). By the former, the respondent had sought to impress upon the appellant to get the child admitted to another school. In response, the appellant responded by turning down the request stating "[t]he aspect of education forms part of the larger scheme of comprehensive settlement as mutually agreed" and went on to hinge the decision on her alimony as well. In another set of communication over e-mail in December, 2012 (Ex.RW1/DA103), the appellant refused the request of the respondent for consulting a second doctor at the residence of the appellant herself when the child was ill saying the request to be *mala fide*. The appellant may well be within her rights to seek alimony, however,

using the child as a chattel to be traded for alimony or other benefits can never be in the best interests of the child.

89. The Apex Court has reiterated time and again, that while deciding as to which parent would get the custody of the child, paramount consideration has to be given to the ‘welfare of the child’ and the ‘best interest’ principle. In the case of ***Yashita Sahu Vs. State of Rajasthan and Ors***, Criminal Appeal No. 127/2020, the Apex Court held as under:

“17. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

18. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very wary of what is said by each of the spouses.

19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every

re-union may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

20. The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

21. Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks, and holidays. In cases like the present one where the parents are in two different continents effort should be made to give maximum visitation rights to the parent who is denied custody.

22. In addition to 'Visitation Rights', 'Contact rights' are also important for development of the child specially in cases where both parents live in different states or

countries. The concept of contact rights in the modern age would be contact by telephone, e-mail or in fact, we feel the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained the child will have no difficulty in moving from one home to another during vacations or holidays. The purpose of this is, if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each.

23. As far as the present case is concerned, keeping in view what we have held above, we are not going into various allegations and counter allegations made by both the spouses. However, we record the statement of the husband that he has no intention of divorcing his wife. We can only hope that the couple can either by themselves or through mediation settle their disputes which would not only be in their own interest but also in the interest of Kiyara. Having said so, since at this stage the dispute between them remains unresolved we shall list out the factors and weigh them in a proper manner to see what is best in the interest of the child:

24. Age of the child - the child is less than 3 years old. She is a girl and, therefore, there can be no manner of doubt that she probably requires her mother more than her father. This is a factor in favour of the wife.

25. Nationality of the child - The child is a citizen of USA by birth. Her father was already working in the USA when he got married. We are told that the mother had visited the

USA once before marriage and when she got married it was done with the knowledge that she may have to settle down there. The child was born in a hospital in the USA and the mother did not come back to India for delivery which indicates that at that time the parents wanted the child to be a citizen of USA. Since the child is a citizen of USA by birth and holds a passport of that country, while deciding the issue of custody we have to take this factor into consideration.

x x x x x

31. There are various factors to be taken into consideration while deciding what is best in the interest of the child. No hard and fast Rules can be laid down and each case has to be decided on its own merits. We are also not oblivious of the fact that when two parents are at war with each other it is impossible to provide a completely peaceful environment to the child. The court has to decide what is in the best interest of the child after weighing all the pros and cons of both the respective parents who claim custody of the child. Obviously, any such order of custody cannot give a perfect environment to the child because that perfect environment would only be available if both the parents put the interest of the child above their own differences. Even if parents separate, they may reach an arrangement where the child can live in an environment which is reasonably conducive to her/his development. As far as the present case is concerned other than the age of the child nothing is in favour of the mother. She herself approached the jurisdictional court in Norfolk. She entered into an agreement on the basis of which a consent order was passed. She has violated that order with impunity and come back to India and, this is a factor which we have to hold against her."

90. Having regard to the evidence on record, we are of the view that the father/respondent is in a better position to take care of the child and the best interests of the child would be protected by granting his

custody to the father. Accordingly, we find no merit in the appeal and the same is dismissed.

91. With respect to the visitation rights of the appellant/mother, we list the matter for further directions.

G.S.SISTANI, J.

JYOTI SINGH, J.

FEBRUARY 25, 2020//



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