

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2844 OF 2023**

Anuradha Anuj Sharma	]	
Age: 42 years, Occ: Service,	]	
Today / At: D/6, Glogera Zygmunta	]	
39, Krakow - 31-222, Poland	]	
(Through her Power of Attorney)	]	
Mrs. Shalini Aggarwal	]	
Age: 46 years, Occu: Pvt. Job,	]	
R/at: F1/201 Ganga Carnation,	]	
Mundhwa, Pune 411 036.	]	Petitioner

Vs.

Mr. Anuj Sharma,	]	
Age: 41 Years, Occ: Business,	]	
R/at: House No.B2/135,	]	
Safdarjung Enclave,	]	
New Delhi - 110092.	]	Respondent

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Mr. Abhijit Sarwate, for Petitioner.

Dr. Abhinav Chandrachud a/w Mr. Ajinkya Udane, for Respondent.

.....

**CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 24th March, 2023.
PRONOUNCED ON : 11th April, 2023.**

ORDER:

1. Heard.

Rule.

Learned Counsel for the respondent waives service.

By consent, returnable forthwith and taken up for hearing and final disposal.

2. By this petition, the petitioner-wife not only seeks modification/revocation of the order of access granted by this Court (Coram: Bharati Dangre, J.) in Writ Petition No.6569 of 2022 dated 8th July, 2022 but also seeks modification of terms and conditions granted by the Hon'ble Supreme Court on 2nd August, 2022 in Civil Appeal No.5050 of 2022 (arising out of SLP (C) No.12687 of 2022) and Civil Appeal No.5051 of 2022 (Arising out of SLP (C) No.13063 of 2022).

3. Shorn of unnecessary details, a few facts germane for deciding this petition, can be summarized as follows.

4. The petitioner has made following substantive prayers;

"(a) The Writ Petition be allowed.

(b) That the **order of access** as granted by the honourable high court in WP No.6569/2022 be **modified and/or revoked**.

(c) That before passing order as prayed in clause (b) the honourable court may kindly interview the daughter Akshita to ascertain her wish.

Or in the alternative

(d) That in event, the Honourable court is unable to interview the child, an expert child physiologist/doctor/expert be appointed to evaluate the mental condition of the daughter Akshita and further her wish be ascertained.

(e) That on interview/report of the child, the honourable high court may kindly modify/revoked/rescind the portion of the order of access as granted in order dated 8/07/2022 in W.P. No.6569/2022.

(f) That pending the determination of the wish of the child and a report from the concerned person, all further access granted to the respondent be kept in abeyance.

(g) Interim and Ad Interim orders as may be just and necessary be passed in the interest of justice in regard to para f be passed;

(h) Any other just and equitable orders in the interest of justice may please be passed".

5. The petitioner and the respondent were married on 8th July, 2010 at Delhi. They are blessed with a daughter viz: Akshita from the wedlock. Akshita was born on 8th July, 2013.

6. The petitioner and respondent have been separated since March, 2015. The petitioner left matrimonial house in the year 2015 and went to her natal house. Due to acute differences, the

petitioner has filed a petition for divorce bearing P.A. No.1347 of 2017 on 14th November, 2017. The petitioner has also filed an application under the Protection of Women from Domestic Violence Act, 2005 bearing Criminal M.A. No.1245 of 2019 before the learned Judicial Magistrate First-Class, Pune on 12th December, 2019.

7. Custody of the daughter has been with the petitioner ever since she started residing separately from her husband. The petitioner has moved an application "Exhibit 23" under section 18 r/w 23 and 26 of the Protection of Women from Domestic Violence Act, 2005 on 28th February, 2022 in Petition D. No.31 of 2020.

8. Despite getting an opportunity to work in South Africa in the year 2017, she could not avail the opportunity owing to respondent's refusal to sign the form for Visa. The petitioner contends that though she was a star performer and was relieved from the job in India to join the new assignment, owing to non compliance of the formalities within stipulated time, not only did she lose the opportunity and a prospective career growth to go to South Africa but, eventually was demoted.

9. Ultimately, there was one more opportunity for her to relocate in Poland and, therefore, she sought permission from the Family Court, Pune to travel to Poland along with her daughter. An application to that effect was moved on 9th February, 2022 in the custody petition. The respondent too filed an application seeking a restraint order to stall the decision on the application moved by the petitioner. The respondent had sought injunction for not removing the child from her school where she was enrolled. The Judge, Family Court, Pune vide an order dated 13th April, 2022 rejected petitioner's application seeking permission to relocate and shift along with her minor daughter to Krakow, Poland. By the very same order, the learned Judge has partly allowed the application filed by the respondent-husband (Exhibit 18) seeking a restraint order from taking the minor daughter, out of the jurisdiction of the Court and further injunctioning the mother from changing the school of the daughter and for depositing the passport with the Family Court, Pune, during pendency of the petition.

10. A Writ Petition bearing No.6569 of 2022 impugning the orders of the Family Court came to be filed. The said Writ Petition was disposed of on 8th July, 2022 by a Single Judge of this Court

permitting the petitioner to travel to Poland along with minor daughter, *inter alia*, directing the procedural formalities to be completed by the parents. The learned Single Judge, in the elaborate order, considered all the minute details as well as various precedents as regards visitation rights/access and maintenance of the child while disposing of the petition. It is needless to reiterate and delve deep into the said aspects at this stage.

11. Feeling aggrieved, the respondent had challenged the order passed by this Court dated 8th July, 2022 in the Hon'ble Supreme Court vide Civil Appeal No.5050 of 2022 (arising out of SLP (C) No.12687 of 2022). The petitioner too challenged the said order of this Court dated 8th July, 2022 vide Civil Appeal No.5051 of 2022 (arising out of SLP (C) No.13063 of 2022) being aggrieved with the harsh conditions of physical access granted to the respondent.

12. Both Appeals came to be disposed of vide a common order dated 2nd August, 2022.

13. The petitioner along with her daughter and mother travelled to Poland on 28th August, 2022. The daughter has been admitted

in a school at Poland.

14. I have heard Mr. Abhijeet Sarwate, learned Counsel for the petitioner and Dr. Abhinav Chandrachud, learned Counsel for the respondent, extensively.

15. At the outset, Mr. Sarwate, would argue that there are infractions of the directions issued by the Hon'ble Supreme Court while disposing of Civil Appeals No.5050 of 2022 and 5051 of 2022 and, therefore, the petitioner is constrained to file this petition in view of the liberty granted by the Hon'ble Supreme Court. According to him, the respondent had flouted the orders of access of the daughter which is essentially an infraction and, therefore, he sought modification/revocation of the order of access passed by this Court in Writ Petition No.6569 of 2022, *inter alia*, making alternative prayers, as stated hereinabove. He invited my attention to paragraph 27 (A) of the order passed by this Court in Writ Petition No.6569 of 2022 wherein the access has been granted only to the respondent-father and not to other members of the respondent's family.

Clause A, B and C of paragraph 27 read thus;

"A) December/Winter break:- Father shall be granted three hours access everyday, when the child shall be brought to India on 23rd December and she shall continue to stay here till 31st December, 2022. The father shall be entitled to avail overnight access in the first year i.e December, 22 for two days.

B) During April/Spring Break:- Father will be entitled to avail overnight access of the child for four days and will be entitled for access of five hours for the remaining days.

c) During June to August/Summer Break:- Father shall be entitled for 25 days overnight access, which could be either separated or continuous, as per the convenience of the parties. He shall be entitled to have access for five hours for the remaining twenty-five days".

16. Mr. Sarwate would maintain that there was absolutely no order granting access to any of the family members of the respondent, except him. As per the directions of this Court, the petitioner travelled to India from 23rd December, 2022 to 31st December, 2022 and had provided three hours physical access daily to the respondent as well two overnight accesses. Physical access continued from 24th December, 2022 to 28th December, 2022 with the respondent dropping the daughter an hour or half an hour than

the scheduled drops most of the days. He would argue that the daughter did not at all want to stay with the respondent-father, however, she was convinced by the petitioner to spend time with the respondent and his family. Mr. Sarwate has invited my attention to various incidents during which there was conversation between the daughter, petitioner and the respondent, where it has been reflected that the daughter was not at all comfortable with the respondent and his family members. Mr. Sarwate would submit that the daughter was so scared due to the conduct of the respondent and his family members that it has mentally affected her to such an extent that she started blaming herself for the various incidents occurred at the respondent's house.

17. Mr. Sarwate would argue that under such circumstances, the child needs to be interviewed either by this Court or by any expert child psychologist to evaluate her mental condition and to ascertain her wish, as according to him, this Court while passing the order of access in Writ Petition No.6569 of 2022 did not ascertain the wish of the child. As per section 26 of the Hindu Marriage Act, before grant of access, wish of the child is required to be ascertained. He would further submit that even the Hon'ble Supreme Court did not

ascertain wish of the child at the time of disposing of the aforesaid two Special Leave Petitions. The subsequent acts, as has been enumerated in minute details in the writ petition, according to Mr. Sarwate have traumatized the child which will have to be taken into account, as such acts, according to him, amount to infraction of the directions issued by the Hon'ble Supreme Court. Mr. Sarwate, would, therefore, submit that order of access is not in the betterment of the child. When the order was passed by this Court, the petitioner did not have exact timetable of the daughter and, therefore, there was no occasion to consider suitable dates so that necessary arrangement/s can be made to bring her to India from Poland. He would further submit that lodging of a non cognizable offence against the petitioner by the respondent is against the spirit of her coming to India and giving access to the respondent, especially when the respondent and his family members were at fault.

18. Dr. Chandrachud, has, at the outset, questioned the maintainability of the petition itself principally on the ground that the order of this Court dated 8th July, 2022 in W.P. No.6569 of 2022 has merged with the order of the Supreme Court dated 2nd

August, 2022. Once leave is granted by the Hon'ble Supreme Court in a Special Leave Petition and Civil Appeal is thereafter disposed of, order of the High Court which is appealed against has merged into the order of the Hon'ble Supreme Court. He would further argue that under the garb of modification, in fact, the petitioner has sought review of the order of this Court dated 8th July, 2022 r/w the order of the Hon'ble Supreme Court dated 2nd August, 2022. Such an ingenuous method of seeking review under the garb of modification, according to Mr. Chandrachud, needs to be strongly deprecated. He has, therefore, placed reliance on a judgment in the case of **Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited and others**,¹ which shall be considered hereinafter.

19. On the aspect of non consideration of the child's wish by this Court as well as by the Hon'ble Supreme Court, Dr. Chandrachud has invited my attention to ground (R) and (S) in SLP (C) No.13063 of 2022 filed by the petitioner in the Hon'ble Supreme Court which was latter converted into Civil Appeal No.5051 of 2022 wherein the petitioner-wife had expressly asked the Hon'ble Supreme Court

¹ 2022 LiveLaw (SC) 771

to interview the child or to ascertain the wishes of the child before determining the question of access to the father, however, the Hon'ble Supreme Court, in its wisdom, decided not to interview the child before passing the order dated 2nd August, 2022. Since the order dated 2nd August, 2022 is silent on the said relief sought, then it is deemed to have been refused.

20. According to Dr. Chandrachud, there is absolutely no infraction of the directions contained in the order of the Hon'ble Supreme Court dated 2nd August, 2022, since there is no violation of any of the directions. Since the order of this Court has merged with the order of the Hon'ble Supreme Court dated 2nd August, 2022, the petitioner cannot seek review of the order of the Hon'ble Supreme Court under the pretext of seeking modification of the said order. It is only the Hon'ble Supreme Court which will have jurisdiction to entertain any such modification or review.

21. Mr. Sarwate is fair enough to concede that the doctrine of merger would come into play as has been submitted by Dr. Chandrachud. Learned Counsel for the parties are *ad idem* on the point that an order of this Court dated 8th July, 2022 passed in

Writ Petition No.6569 of 2022 has merged into the order of the Hon'ble Supreme Court and, therefore, the order of this Court does not exist. Now, there is only one order passed by the Hon'ble Supreme Court in Special Leave Petition dated 2nd August, 2022. Mr. Sarwate would also submit that he is not seeking review of the order passed by this Court.

22. Real controversy, in light of the submissions made across the bar, can be narrowed down to the extent as to whether present petition can be entertained by this Court in light of merger of the order of this Court passed in Writ Petition No.6569 of 2022 dated 8th July, 2022 into the order of the Hon'ble Supreme Court dated 2nd August, 2022. Secondly, whether the petitioner can seek to modify/revoke or rescind the order of access by raising grounds No.5.16 and 5.22, which read thus;

"5.16. That while passing the Judgment the Honorable Supreme Court did not take into consideration the incidence that happened during the access dated 30/07/2022 as per the order dated 25/07/2022 of the Honorable Supreme Court.

5.22. The order of access is not in the betterment of the child".

23. Dr. Chandrachud has placed a useful reliance on a judgment of the Hon'ble Supreme Court in the case of **Kunhayammed and others Vs. State of Kerala and another**². This is essentially a judgment on the doctrine of merger. This doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognized. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. It is held that doctrine of merger and the right of review are concepts which are closely interlinked. If the judgment of the High Court has come up to the Supreme Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of the Supreme Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of the Supreme Court. But where the special leave petition is dismissed - there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. It

2 (2000) 6 Supreme Court Cases 359

would be apposite to extract paragraph 44 of the judgment, which reads thus;

"44. To sum up, our conclusions are :-

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger

can therefore be applied to the former and not to the latter.

iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C.

(Emphasis supplied)

24. Essentially, the Hon'ble Supreme Court while disposing of Civil Appeal No.5051 of 2022 has granted leave and disposed of the appeals by a speaking order. The petitioner cannot be permitted to seek review of the said order under the garb of modification before this Court. It is especially in the light of the various grounds raised by the petitioner in her petition. As rightly argued by Dr. Chandrachud, entire thrust of the petitioner is that neither this Court nor the Hon'ble Supreme Court interviewed the child and, therefore, wishes of the child could not be ascertained. This would definitely tantamount to seeking review of the order of the Hon'ble Supreme Court. As a matter of fact, as already stated above, in grounds (R) and (S) of the SLP of Civil Appeal No.5051 of 2022, the petitioner had expressly asked the Hon'ble Supreme Court to ascertain the wishes of the child before determining the question of granting access of the child to the respondent. Since the Hon'ble Supreme Court, in its wisdom, has decided not to interview the

child before passing the order dated 2nd August, 2022, the said relief is deemed to have been refused. Learned Counsel has, therefore, pressed into service a judgment of the Hon'ble Supreme Court in the case of **State Bank of India Vs. Ram Chandra Dubey**³, especially paragraph 8, which reads thus;

"8. The principles enunciated in the decisions referred by either side can be summed up as follows:

Whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit can approach Labour Court under Section 33-C (2) of the Act. The benefit sought to be enforced under Section 33-C (2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under Section 33-C (2) of the Act while the latter does not. It cannot be spelt out from the award in the present case that such a right or benefit has accrued to the workman as the specific question of the relief granted is confined only to the reinstatement without stating anything more as to the back wages. Hence that relief must be deemed to have been denied, for what is claimed but not

3 (2001) 2 Supreme Court Cases 73

granted necessarily gets denied in judicial or quasi-judicial proceeding. Further when a question arises as to the adjudication of a claim for back wages all relevant circumstances which will have to be gone into, are to be considered in a judicious manner. Therefore, the appropriate forum wherein such question of back wages could be decided is only in a proceeding to whom a reference under Section 10 of the Act is made. To state that merely upon reinstatement, a workman would be entitled, under the terms of award, to all his arrears of pay and allowances would be incorrect because several factors will have to be considered, as stated earlier, to find out whether the workman is entitled to back wages at all and to what extent. Therefore, we are of the view that the High Court ought not to have presumed that the award of the Labour Court for grant of back wages is implied in the relief of reinstatement or that the award of reinstatement itself conferred right for claim of back wages".

25. The learned Counsel also placed reliance on the judgment in the case of **Naraindas Dwarkadas (Deceased) through L.Rs. Vs. State of Maharashtra**⁴, especially on paragraphs 5 and 6, which read thus;

"5. From the above order, we find that the Petitioner has been granted only one relief namely, that his request that the screening committee should be asked to re-consider his case has been granted. The learned Counsel appearing for the

4 (1995) 97 Bom LR 523

contesting Respondents submitted that the present Writ Petition is not maintainable and is barred by principles of res judicata since same prayers made in the previous Writ Petition were not granted by this Court. The learned Counsel for the Petitioner did not dispute the principle that the principles of res judicata apply to Writ Petitions. In our view Explanation 5 to Section 11 C.P.C is attracted to this case which reads as follows:

"Section 11-

Explanation V._ Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused".

6. It clearly says that any relief which is claimed in the plaint and not expressly granted is deemed to have been refused. No authority is necessary when the legal position is very clear. The learned Counsel for the Petitioner invited our attention to a decision reported in *Narain Das v. Improvement Trust, Amritsar*, (1973) 2 SCC 265: AIR 1972 SC 865. But in our view, the said decision has not direct bearing on the point under consideration, and is distinguishable on facts. Since the Petitioner had asked identical reliefs in the previous Writ Petition and he has not been granted any relief except one relief, the Petitioner cannot re-agitate the same reliefs once again in the present Writ Petition".

26. In view of the ratio laid down hereinabove, the petitioner cannot re-agitate the same grounds which were already raised by her in the aforesaid Special Leave Petition in the Hon'ble Supreme Court.

27. The Hon'ble Supreme Court in the case of **Ghanashyam Mishra and Sons Private Limited** (supra) has categorically observed about growing tendency of indirectly seeking review of the orders by filing applications either seeking modification or clarification of the orders amounts to wasting of the valuable time of the Court. It is observed that there is a growing tendency of indirectly seeking review of the orders of the Court. The Hon'ble Supreme Court has observed that such applications are total abuse of process of law and, therefore, dismissed the application by imposing exemplary costs. Relevant part of the judgment is extracted below;

"4. Having heard learned senior counsel for the parties and having perused the relevant materials placed on record, we are of the considered view that the present applications are nothing else but an attempt to seek review of the judgment and order passed by this Court on 13th April 2021 under the garb of miscellaneous application.

5. We find that there is a growing tendency of indirectly seeking review of the orders of this Court by filing applications either seeking modification or clarification of the orders passed by this Court.

6. In our view, such applications are a total abuse of process of law. The valuable time of Court is spent in deciding such applications which time would otherwise be utilized for attending litigations of the litigants who are waiting in the corridors of justice for decades together.

7. The applications are therefore dismissed with cost of Rs.10,00,000/- (Rupees ten lakhs) each to be paid by the applicants within four weeks from the date of this order. The cost of Rs.10,00,000/- imposed on the applicant in M.A. No. 1166 of 2021 shall be deposited in the Supreme Court Advocates-on-Record Association Welfare Fund (SCAORAWF) (Account No.02070110092378 and IFSC Code - UCBA0000207) and the cost of Rs.10,00,000/- imposed on the applicant in I.A. No.52435 of 2022 shall be deposited with the Supreme Court Bar Association Advocates Welfare Fund (Account No.02070110049617 and IFSC Code UCBA0000207)".

28. It is pertinent to note that the petitioner has specifically raised, amongst others, following few grounds which, according to me, tantamount to seeking review of the order of the Hon'ble Supreme Court. Ground Nos.5.16 and 5.22 read thus;

"5.16. That while passing the Judgment the Honorable Supreme Court did not take into consideration the incidence that happened during the access dated 30/07/2022 as per the order dated 25/07/2022 of the Honorable Supreme Court.

5.22. The order of access is not in the betterment of the child".

29. This Court cannot, under its writ jurisdiction, examine the said aspects as the same would amount to an abuse of process of law or even breach of judicial discipline.

30. No doubt, in matters relating to custody of child, the Courts must remember that they are dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings, custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs

of the child.

31. In support of his submission, Mr. Sarwate has placed reliance on the judgment in the case of **Vikram Vir Vohra Vs. Shalini Bhalla**⁵. The appeal before the Hon'ble Supreme Court was restricted to the custody and visitation rights of the child in view of section 26 of the Hindu Marriage Act. However, as already discussed, the petitioner has essentially sought review of the order of the Hon'ble Supreme Court and, therefore, it would only be the Hon'ble Supreme Court and not this Court where the petitioner is required to approach for the reliefs which she has sought before this Court. The ratio laid down by the Hon'ble Supreme Court in the case of **Vikram Vir Vohra** (supra), can, therefore, be distinguished accordingly with that of the judgment of the Hon'ble Supreme Court on doctrine of merger in case of **Kunhayammed and others** (supra).

32. Mr. Sarwate has also placed reliance on a judgment in the case of **Nita Ratan Kundu and Anr. Vs. Abhijit Kundu**⁶. This is essentially on the aspect of custody of a child under sections 7 and 17 of Guardians and Wards Act. In this judgment, it is held by the

5 AIR 2010 Supreme Court 1675

6 AIR 2009 SC (Supp) 732

Hon'ble Supreme Court that paramount consideration is welfare of the child. Custody of the child is a humane and, therefore, it must be solved with human touch. In paragraph 56, the Hon'ble Supreme Court has observed thus;

"56. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations.

If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as

well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor".

Orders of Courts below not in consonance with law".

33. As already stated, there cannot be any second thought on the aspect of welfare of a child. Nevertheless, the remedy in view of the attending circumstances, enumerated hereinbefore, is before the Hon'ble Supreme Court.

34. The Hon'ble Supreme Court in its order dated 2nd August, 2022 granted liberty to the parties to enforce its orders before this Court, *inter alia*, move this Court in case of any infraction of the directions viz: violation of any of the directions issued by the Hon'ble Supreme Court. However, it cannot be lost sight of the fact that the Hon'ble Supreme Court has not granted liberty to the parties to seek modification or review of the order of the Hon'ble Supreme Court in which the order of this Court dated 8th July, 2022 has already been merged. Thus, an application seeking modification/revocation of the order can only be preferred in the Hon'ble Supreme Court.

35. Corollary of the aforesaid discussion is that the petition is devoid of merits and hence, stands dismissed.

36. Rule is discharged.

37. Petition is disposed of.

[PRITHVIRAJ K. CHAVAN, J.]