

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

FAO No.5116 of 2023 (O&M)

Reserved on:21.09.2023

Pronounced on:27.09.2023

Saurabh Sharma

... Appellant

Versus

Nishi

... Respondent

**CORAM : HON'BLE MR. JUSTICE RAJ MOHAN SINGH
HON'BLE MR. JUSTICE HARPREET SINGH BRAR**

Present: Mr. Anil Rathee, Advocate
for the appellant.

Mr. Shivansh Malik, Advocate
for the respondent.

HARPREET SINGH BRAR, J.

1. The present appeal has been preferred against the order dated 04.09.2023 passed by the Additional Principal Judge, Family Court, Sonapat whereby the application filed by the respondent-wife herein for interim custody of her minor child stands allowed and the appellant-husband is directed to hand over the custody of the minor child to her.

FACTUAL BACKGROUND

2. Brief facts of the case as culled out from the grounds of appeal are that marriage of the appellant and the respondent was solemnized on 18.02.2009 at Arya Samaj Mandir, Plot No.33, Ranaji Enclave, Najafgarh, New Delhi and out of the wedlock, a baby boy namely Seyon Sharma was born on 02.07.2018. In October, 2021, the respondent-wife had left the matrimonial home along with the

minor child. On 23.11.2021, the appellant-husband had undergone a hip replacement surgery at MAX Healthcare Hospital, Shalimar Bag, Delhi and after his recovery from the said ailment, he visited the respondent-wife on 03.12.2021. As the minor child was very attached to the appellant, therefore, on seeing him, he insisted to go along with the appellant. Since the appellant had undergone a major surgery, he requested the respondent-wife to come back to her matrimonial home but she refused to do so and sent the child along with the appellant. The minor child was suffering from a heart ailment for which he was required to undergo a surgery before completion of 4 years of his age and therefore, the respondent refused to keep the child as she was not ready to bear the medical expenses of the child. To the utter shock of the appellant, on 27.01.2022, the respondent filed a petition for divorce under Section 13 (1) (ia) of the Hindu Marriage Act, 1955 for dissolution of marriage before the Court of Principal Judge, Family Court, Sonapat. Along with the said petition, an application was also filed under Sections 7, 12 and 25 of the Guardians and Wards Act, 1890 (for brevity 1890 Act) for handing over the custody of the minor child to her. Not only this, the respondent had also registered false FIRs against the appellant and his family members. Despite the aforesaid conduct of the respondent, the appellant contacted the respondent on several occasions with regard to treatment of the minor child but she continued with her adamant behaviour and stated that she has no interest in the treatment of the minor child. Since the health of the minor child was deteriorating, the appellant admitted him to Sir Ganga Ram Hospital, New Delhi where his open-heart surgery was done on 15.06.2022. Even during the treatment of the minor child, the respondent made a false complaint against the appellant on 08.06.2022.

3. The appellant had filed a detailed reply to the application filed by the respondent under Sections 7, 12 and 25 of the 1890 Act stating therein that the respondent was not at all interested in the welfare of the child, rather she had refused to take care of the child when he was suffering from a heart ailment and was required to undergo a major surgery. The respondent had also filed an application for grant of visitation rights, which were granted to her vide order dated 25.08.2022 passed by the Ld. Family Court. On 30.05.2023, a plea was raised by the respondent before the Ld. Family Court to grant interim custody of the minor child to her but the same was not entertained as no application for seeking said prayer was available on record and therefore, a request was made by her for moving such application. The appellant contested the application moved by the respondent for grant of interim custody of the minor child by stating that father of the respondent-wife ill-treated the minor child and she used to beat the child. She did not even come to meet the minor child as per the schedule fixed by the Ld. Family Court while granting her visitation rights. However, on 04.09.2023, after hearing both the parties, the Ld. Family Court allowed the application of the respondent and granted her interim custody of the minor child. Against the said order, the appellant herein has approached this Court by way of the instant appeal.

CONTENTIONS

4. Learned counsel appearing for the appellant had vigorously assailed the order under challenge on the ground that the respondent is not interested in the welfare of the child. She was granted visitation rights vide order dated 25.08.2022 passed by the Ld. Family Court but she did not turn up to meet the child on 10.09.2022, 22.10.2022, 28.01.2023, 11.03.2023, 08.04.2023, 22.04.2023, 10.06.2023, 24.06.2023, 08.07.2023 and 22.07.2023 on one pretext

or the other. It was argued that the Ld. Family Court had totally overlooked the settled proposition of law that the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute, while holding that there can be no substitute to the mother's love and affection for a minor child and therefore, it would be against the best interest of the minor child in case his custody is not granted to the respondent. The Ld. Family Court had brushed aside the contention of the appellant that when he visited the respondent after his hip replacement surgery and asked her to return to her matrimonial home, she refused to do so. Rather she sent the minor child along with the appellant as she was not ready and willing to take responsibility of the minor child. It was the appellant who looked after the minor child when he was being treated for his heart ailment and incurred all his medical expenses. In support of his arguments, he relied upon the judgments rendered by the Hon'ble Supreme Court in *Mausami Moitra Ganguli Vs. Jayant Ganguli 2008 (4) RCR (Civil) 551*. Reliance had also been placed on the judgment rendered by a Division Bench of this Court in *Kajal Vs. Rajesh Rana 2015 (3) RCR (Civil) 195* where the order of the trial Court granting custody of the minor child to the father who was taking care of the child since the time of his birth was upheld and the appeal preferred by the mother against the said order was dismissed.

5. It was further argued that date of birth of the minor child is 02.07.2018 and the application for grant of interim custody of the minor child under Section 12 of the 1890 Act was filed on 03.07.2023, as is evident from the order dated 30.05.2023 passed by the Ld. Family Court, which indicates that at the time of filing of the said application, age of the minor child was more than 5 years. As such, the impugned order granting interim custody to the respondent is passed in violation of the provisions of Section 6 of the Hindu Minority and Guardianship

Act, 1956 (hereinafter referred to as the Act of 1956), according to which the natural guardian of a Hindu minor in respect of the minor's person as well as in respect of the minor's property in the case of a boy or an unmarried girl would be the father and after him, the mother. Therefore, the impugned order is liable to be set aside and the present appeal deserves to succeed.

6. Mr. Shivansh Malik, Advocate put in appearance on behalf of the respondent-wife and files his power of attorney, which is taken on record. At the very outset, he raised an objection qua maintainability of the instant appeal. It was argued that the impugned order dated 04.09.2023 passed on the application filed under Section 12 of the 1890 Act is an interlocutory order and therefore, the appeal filed against an interlocutory order is not maintainable.

7. It was also argued that the interim custody of the minor child, who did not complete the age of 5 years shall ordinarily be with the mother and therefore, the order passed by the Ld. Family Court is in consonance with the judgment passed by the Division Bench of this Court in ***Mukul Chauhan Vs. Neha Aggarwal and others 2019 (4) RCR (Civil) 342.***

ANALYSIS AND OBSERVATION

8. We have heard learned counsel for the parties and have gone through the records with their able assistance as well as the case laws cited.

9. The following questions arise before this Court for consideration:-

(i) Whether the appeal preferred by the appellant against an interlocutory order passed by the Ld. Family Court under Section 12 of the Guardians and Wards Act, 1890 whereby interim custody of the minor child was granted to the respondent, is maintainable or not?

(ii) Whether the Ld. Family Court while passing the impugned order dated 04.09.2023 has adhered to the principle that welfare of the child is of

paramount consideration as enshrined under Section 13 of the Hindu Minor and Guardianship Act, 1956?

10. Admittedly, the respondent-wife had moved a petition under Sections 7, 12 and 25 of the 1890 Act on 27.01.2022 along with the petition filed for seeking divorce under Section 13 (1) (ia) of the Hindu Marriage Act, 1955. It is also not in dispute that as on 27.01.2022 when the aforesaid petition was filed, the minor child had not completed his 5 years. However, when the matter came up for hearing before the Ld. Family Court on 30.05.2023, a request was made on behalf of the counsel appearing for the respondent-wife for grant of interim custody of the child and to move an appropriate application for the said purpose. The matter was adjourned to 03.07.2023 for examination of the petitioner therein and to record her remaining evidence through Local Commissioner as well as for filing application for interim custody. It was in this backdrop, the application for interim custody was filed on 03.07.2023 and by that time, the minor child had completed 5 years of his age.

(i) Whether the appeal preferred by the appellant against an interlocutory order passed by the Ld. Family Court under Section 12 of the Guardians and Wards Act, 1890 whereby interim custody of the minor child was granted to the respondent, is maintainable or not?

11. Before answering the question posed above, it would be apt to reproduce relevant statutory provisions. Section 4 (1) of the 1890 Act defines “minor” as a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority. As per sub-section (2) of Section 4, “guardian” means a person having the care of the person of a minor or of his property, or of both his person and property. Section 7 of the said act talks about

the power of the Court to make order as to guardianship and the same is reproduced as under:-

“7. Power of the Court to make order as to guardianship.—(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian,

the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.”

12. Section 8 of the 1890 Act lays down that no order under Section 7 will be made except on the application of the person desirous of being, or claiming to be, the guardian of the minor; or any relative or friend of the minor; or the Collector of the district in which the minor ordinarily resides or in which he has property; or the Collector having authority with respect to the class to which the minor belongs. Section 12 gives power to the Court to make an interlocutory order for production of a minor and interim protection of his person and property. Section 12 of the 1890 Act is reproduced as under:-

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

custody and protection of the person or property of the minor as it thinks proper.

(2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

(3) Nothing in this section shall authorise—

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

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

Section 25 of the 1890 Act provides for power of the Court to make order qua title of guardian to custody of ward in cases where a ward leaves or is removed from the custody of a guardian and the same reads as under:-

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

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

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

Section 47 of the 1890 Act envisages for orders which are appealable and the same is reproduced as under:-

“47. Orders appealable.— An appeal shall lie to the High Court from an order made by a Court,—

- (a) under section 7, appointing or declaring or refusing to appoint or declare a guardian; or,*
- (b) under section 9, sub-section (3), returning an application ; or,*
- (c) under section 25, making or refusing to make an order for the return of a ward to the custody of his guardian; or,*
- (d) under section 26, refusing leave for, the removal of award from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto; or,*
- (e) under section 28 or section 29, refusing permission to a guardian to do an act referred to in the section; or,*
- (f) under section 32, defining, restricting or extending the powers of a guardian; or,*
- (g) under section 39, removing a guardian; or,*
- (h) under section 40, refusing to discharge a guardian; or,*
- (i) under section 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order; or,*
- (j) under section 44 or section 45, imposing a penalty.”*

13. At this juncture, it is pertinent to mention here that a bare perusal of Section 47 of the 1890 Act would reveal that no appeal is provided for against an order passed under Section 12 of the 1890 Act for production of the minor and interim protection of person and property or grant of visitation rights.

14. Section 19 of the Family Courts Act, 1894 deals with provisions of appeal to be filed before the High Court against every judgment or order passed by Family Courts and the same reads as under:-

“19. Appeal.—(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an

appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and as to the regularity of such proceeding.

(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges.”

15. A conjoint reading Section 47 of the 1890 Act and Section 19 of the Family Courts Act, 1984 makes it crystal clear that no appeal shall lie to the High Court against an interlocutory order passed under Section 12 of the 1890 Act by the Family Court.

16. The terms ‘judgment’ and ‘interlocutory order’ have been distinguished by a three Judge Bench of the Hon’ble Supreme Court in ***Shah Babulal Khimji Vs. Jayaben D. Kania and another (1981) 4 SCC 8*** as under:-

“113. Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the reasons for the decree it follows as a matter of course that

the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by subsection (2) of Section 2 cannot be physically imported into the definition of the word “judgment” as used in clause 15 of the letters patent because the letters patent has advisedly not used the terms “order” or “decree” anywhere. The intention, therefore, of the givers of the letters patent was that the word “judgment” should receive a much wider and more liberal interpretation than the word “judgment” used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the letters patent. It seems to us that the word “judgment” has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds:

(1) A final judgment.— A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial Judge indisputably and unquestionably is a judgment within the meaning of the letters patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) A preliminary judgment.—This kind of a judgment may take two forms—(a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and therefore appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to

maintainability of the suit, e.g., bar of jurisdiction, res judicata, a manifest defect in the suit, absence of notice under Section 80 and the like, and these objections are decided by the trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger Bench.

(3) Intermediary or interlocutory judgment.— Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the letters patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the trial Judge in a suit under Order 37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the letters patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an order passed by the trial Judge would not amount to a judgment

within the meaning of clause 15 of the letters patent but will be purely an interlocutory order. Similarly, suppose the trial Judge passes an order setting aside an ex parte decree against the defendant, which is not appealable under any of the clauses of Order 43 Rule 1 though an order rejecting an application to set aside the decree passed ex parte falls within Order 43 Rule 1 clause (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of letters patent. The fact, however, remains that the order setting aside the ex parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench.

114. In the course of the trial, the trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the trial Judge.

115. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on

this score can be corrected by the appellate court in appeal against the final judgment.”

17. The status of orders relating to custody as to whether they are final or interlocutory orders was considered in a two Judge Bench judgment of the Hon’ble Supreme Court in ***Dhanwanti Joshi Vs. Madhav Unde (1998) 1 SCC 112*** and speaking through Justice M. Jagannadha Rao, the Hon’ble Supreme Court has held as under:-

“21. It is no doubt true that orders relating to custody of children are by their very nature not final, but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interests of the child (Rosy Jacob v. Jacob A. Chakramakkal [(1973) 1 SCC 840]). However, we may state that in respect of orders as to custody already passed in favour of the appellant the doctrine of res judicata applies and the Family Court in the present proceedings cannot re-examine the facts which were formerly adjudicated between the parties on the issue of custody or are deemed to have been adjudicated. There must be proof of substantial change in the circumstances presenting a new case before the court. It must be established that the previous arrangement was not conducive to the child's welfare or that it has produced unsatisfactory results. Ormerod, L.J. pointed out in S v. W [(1981) 11 Fam Law 81] [Fam Law at p. 82 (CA)] that “the status quo argument depends for its strength wholly and entirely on whether the status quo is satisfactory or not. The more satisfactory the status quo, the stronger the argument for not interfering. The less satisfactory the status quo, the less one requires before deciding to change”.

A two judge Bench of the Hon’ble Supreme Court in ***Vikram Vir Vohra Vs. Shalini Bhalla (2010) 4 SCC 409*** speaking through Justice A.K. Ganguli has held as under:-

“11. The argument of the learned counsel for the appellant, that in view of the provisions of Section 26 of the Act, the order of custody of the child and the visitation rights of the appellant cannot be changed as they are not reflected in the decree of mutual divorce, is far too hyper technical an objection to be considered seriously in a custody proceeding. A child is not a chattel nor is he/she an article of personal property to be shared in equal halves.

12. In a matter relating to the custody of a child, this Court must remember that it is 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.”

18. Similarly, the Hon’ble Supreme Court in ***ABC Vs. State (NCT of Delhi) (2015) 10 SCC 1*** has held that guardianship or custody orders never attain permanence or finality and can be questioned at any time, by any person genuinely concerned for the minor child, if the child's welfare is in peril. The uninvolved parent is, therefore, not precluded from approaching the Guardian Court to quash, vary or modify its orders if the best interests of the child so indicate. In ***Rosy Jacob Vs. Jacob A. Chakramakkal (1973) 1 SCC 840***, the Hon’ble Supreme Court has held that all orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based on consent decrees cited at the bar. Orders relating to custody of wards

even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation.

19. In view of the aforesaid, this Court answers the first question by holding that in view of the specific bar contained under Section 19 of the Family Courts Act, 1984 no appeal shall lie against the interlocutory order passed under Section 12 of the 1890 Act and therefore, the instant appeal is not maintainable.

(ii) Whether the Ld. Family Court while passing the impugned order dated 04.09.2023 has adhered to the principle that welfare of the child is of paramount consideration, as enshrined under Section 13 of the Hindu Minor and Guardianship Act, 1956?

20. Before advertng to the question as formulated above, it would also be apt to reproduce Section 13 of the Act of 1956 and the same is as under:-

“13. Welfare of minor to be paramount consideration.—(1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.
(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

21. The provisions of the Act of 1956 are in addition to, and not, save as hereinafter expressly provided, in derogation of the 1890 Act, meaning thereby, the 1890 Act regulates questions of guardianship and custody of all children within the territory of India, irrespective of their religion; whereas the Act of 1956 specifically deals with matters of guardianship and custody of minor Hindu children. Further, Section 26 of the Hindu Marriage Act, 1955 authorizes Courts to pass interim orders and make such provisions in the decree as it may deem just

and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

22. The issue of custody of a minor in a custody petition filed under the Guardians and Wards Act, 1890, Hindu Minority and Guardianship Act, 1956 or Hindu Marriage Act, 1955 has to be decided on the touchstone of the principle that the welfare of a minor is of paramount consideration. It is not the right of the father or the mother that would require adjudication while deciding the custody petition but it is the welfare of the minor alone which is the paramount consideration. A two Judge Bench of the Hon'ble Supreme Court while discussing the rights of the parties in the matters relating to custody of minor under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 in ***Rajeswari Chandrasekar Ganesh Vs. State of Tamil Nadu and others***, 2022 SCC OnLine SC 885 (Writ Petition (Criminal) No. 402 of 2021 decided on 14.07.2022), speaking through Justice J.B. Pardiwala, has observed as under:-

“PRINCIPLES OF LAW GOVERNING THE RIGHTS OF THE PARTIES:

71. The Guardians and Wards Act, 1890, was primarily enacted to consolidate the various Acts then in force keeping in view the personal law of diverse communities in India. It, however, did not encroach upon the jurisdiction of the Courts of Wards and did not take away any powers vested in the High Courts or the Supreme Court. A ‘minor’ under the Act has been defined as a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority. A ‘guardian’ has been defined as a person having the care of the person of a minor or of his property or of both his person and property. Section 6 of the Act provides that no provision in the Act shall be construed to take away or derogate from any power to appoint a

guardian of a minor's person or property, or both, which is valid by the law to which the minor is subject. Section 7 gives power to the Court that if it is satisfied that it is for the welfare of a minor that an order should be made, it may make an order appointing a guardian of his person or property, or both, or declaring a person to be such a guardian. Section 8 lays down that no order under Section 7 will be made except on the application of the person desirous of being, or claiming to be, the guardian of the minor or any relative or friend of the minor or the Collector of the district in which the minor ordinarily resides or in which he has property or the Collector having authority with respect to the class to which the minor belongs. Section 9 deals with the territorial jurisdiction of the court. Section 10 lays down the manner in which an application is to be made and what is to be stated in the application. Section 11 provides for the procedure on admission of such an application. Section 12 gives power to the court to make interlocutory order for production of a minor and interim protection of his person and property. Section 17 enjoins upon the court to have due regard to the personal law of the minor and specially take note of the circumstances which point towards the welfare of the minor in either appointing a guardian or declaring a guardian. If the minor is old enough to form an intelligent preference, the court may be justified to consider that preference also in coming to the final conclusion. Further, no person can be appointed as a guardian against his own will.

72. The Hindu Minority and Guardianship Act, 1956 was enacted as a law complementary to the Guardians and Wards Act, 1890. This defines a 'minor' to be a person who has not completed the age of eighteen years. 'Guardian' has been defined as a person having the care of the person of a minor or of his property or of both his person and property and includes - (i) a natural guardian, (ii) a guardian appointed by the will of the minor's father or mother, (iii) a guardian appointed or declared by a Court, and (vi) a person empowered to act as such by or under any enactment relating to any court of wards. 'Natural guardian', according to this Act, means any of the guardians mentioned in Section 6. Section 6 says that the natural guardians of a Hindu minor, in respect of the minor's

person as well as in respect of the minor's property (excluding his or her undivided interest in the joint family property) are - (a) in the case of a boy or an unmarried girl, the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Section 8 lays down that the natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate but the guardian can, in no case, bind the minor by a personal covenant. Sub-section (5) of Section 8 lays down that the Guardians and Wards Act, 1890, shall apply in certain circumstances. Section 13 of the Act lays down that in the appointment or declaration of any person as guardian of Hindu minor by a Court, the welfare of the minor shall be the paramount consideration. Indeed sub-section (2) of Section 13 lays down that no person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor. This section is complementary to Section 17 of the Guardians and Wards Act, 1890 which lays down that in appointing or declaring the guardian of a minor the Court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

73. A mere reading of the provisions of the two Acts referred to above makes it obvious that the welfare of the minor predominates to such an extent that the legal rights of the persons claiming to be the guardians or claiming to be entitled to the custody will play a very insignificant role in the determination by the court.”

A two Judge Bench of the Hon’ble Supreme Court in ***Gaurav Nagpal Vs. Sumedha Nagpal (2009) 1 SCC 42*** speaking through Justice Dr. Arijit Pasayat has held as under:-

“48. Merely because there is no defect in his personal care and his attachment for his children—which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

xxxx

xxxxx

51. The word “welfare” used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.”

23. A two judge Bench of the Hon’ble Supreme Court ***Nil Ratan Kundu and another Vs. Abhijit Kundu (2008) 9 SCC 413*** speaking through Justice C.K. Thakker has held as under:-

“52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence

or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.”

24. Now adverting to the question whether the Ld. Family Court while passing the impugned order dated 04.09.2023 has adhered to the principle that welfare of the child is of paramount consideration, it is pertinent to reproduce relevant paragraphs of the order passed by the Ld. Family Court, which are as under:-

“7. Apart from that, the applicant is a well education working lady who is capable of providing a better upbringing and education to the minor child. She is financially independent and has the resources for securing a better future of the minor child. The fact that she is working or living alone cannot be a ground to discard her claim for interim custody of the child as a single working mother is still capable of raising the child in a proper manner. In fact, a working woman would be in a better position to educate the minor child and to groom his overall personality. The case of the applicant is at a better footing as she is having the assistance of her parents as well, who are residing in the same city.

8. The primary consideration in the matters of child custody is the welfare of child. According to Section 13 of the Hindu Minority and Guardianship Act, 1956 in determining the welfare and interest of the child, certain factors are to be kept in mind, including the child's ordinary comfort, contentment, intellect, moral and physical development, his health, education and general surroundings, the court is of the view that

overall development of the minor child cannot take place effectively in the absence of mother, particularly in such tender age. There can be no substitute to the mother's love and affection for minor child and therefore, it would be against the best interest of the minor child, in case his custody is not granted to the applicant-mother.

9. On the other hand, the respondent-father is alleged to have an aggressive behaviour and in the petition, there are certain instances of him having physically assaulted the petitioner/applicant. Though the allegations are yet to be proved but the copy of FIRs are also placed on record by the applicant/petitioner to substantiate her allegations prima facie. On the other hand, the respondent has wrongly refuted the allegations and has tried to put up a case that the applicant is putting pressure upon her in order to obtain child custody and divorce. However, the Court has also observed during reconciliation efforts that the behaviour of respondent is quite aggressive and he appears to be a bit hyper. In the circumstances, it may not be in the best interest of the minor in case respondent is allowed to retain his custody."

25. A perusal of the order passed by the Ld. Family Court indicates that it has taken into consideration all the relevant factors while coming to the conclusion that it would be in the best interest of the minor child if his custody is given to the respondent herein.

26. Learned counsel for the appellant also argued that the minor child was physically abused by the father of the respondent as well as by the respondent and she had even beaten up the appellant mercilessly. A bare perusal of pleadings shows that the appellant has not placed on record any document to show that he made a police complaint or lodged any FIR against the respondent rather FIRs were registered against the appellant at the behest of respondent levelling various allegations against him including beatings sustained by the respondent at the hands of the appellant. The Ld. Family Court while passing the impugned order

has also noted the fact that during the reconciliation efforts, the behaviour of the appellant was quite aggressive and he appeared to be a bit hyper.

27. The argument of learned counsel for the appellant that the minor child had completed the age of 5 years at the time when the impugned order was passed and therefore, as per provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956, the natural guardian of a Hindu minor would be the father, also pales into insignificance, as admittedly when the petition for custody was filed by the respondent-wife along with the divorce petition, the minor child had not completed 5 years of age and on the date when the impugned order was passed i.e. 04.09.2023, the minor child was just two months over 5 years. The Hon'ble Supreme Court in *Surinder Kaur Sandhu Vs. Harbax Singh Sandhu (1984) 3 SCC 698* has held that Section 6 of the Hindu Minority and Guardianship Act, 1956 though constitutes the father as the natural guardian of a minor son but that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. As such, Section 6 of the Act of 1956 cannot be read in isolation rather it is to be read in conjunction with Section 13 of the Act of 1956, which envisages that welfare of the minor child is of paramount consideration, which is the core issue in custody matters.

28. One of the most commonly articulated propositions by the Courts is that no one can substitute the love of mother. A mother's love for her children is selfless, as the lap of a mother is God's own cradle for the children and therefore, children of tender years ought not to be deprived of said love and affection, thus, ordinarily a child of tender age should be committed to the custody of the mother. Keeping in view the aforesaid, this Court answers the second question that the Ld. Family Court has taken care of all the relevant factors, while holding that it would be in the welfare and best interest of the child if custody of minor

child is given to the respondent herein and this Court does not find any ground to interfere with the said finding.

CONCLUSION

29. Keeping in view the aforesaid facts and circumstances, the present appeal stands dismissed. The Ld. Family Court vide the impugned order had directed the appellant herein to produce the minor child before it on 25.09.2023 and handover the custody of the minor child to the respondent-wife. The said period is extended by another two weeks and now the appellant is directed to produce the minor child namely Seyon Sharma before the Ld. Family Court on 09.10.2023 and handover his custody to the respondent. Needless to say, in view of the settled proposition of law that the order passed under Section 12 of the 1890 Act is interlocutory in nature and is liable to be modified/varied keeping in mind the welfare and needs of the child based on fresh circumstances/material, the appellant will be at liberty to take the recourse as available to him in accordance with law.

30. Civil Misc. Application, pending if any, also stands disposed of.

(RAJ MOHAN SINGH)
JUDGE

(HARPREET SINGH BRAR)
JUDGE

September 27, 2023

Pankaj*

Whether speaking/reasoned Yes/No

Whether reportable Yes/No