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

Date of decision: December 12, 2023

+ MAT.APP.(F.C.) 367/2023, CM APPLs.64274/2023 & 64275/2023
PANKAJ JAIN Appellant
Through: Mr.Prashant Mendiratta, Mr.Rishabh
Bansal, Ms.Himanshi Malhotra &
Ms.Aditi Chaudhary, Advs. with
appellant in person.
versus
PARUL JAIN Respondent
Through: Ms.Malavika Rajkotia, Mr.Ramakant
Sharma & Mr.Prateek Avasthi, Advs.
with respondent in person.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

J U D G M E N T

ANOOP KUMAR MENDIRATTA, J. (ORAL)

CM APPL.64275/2023 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

MAT APP.(F.C.) 367/2023, CM APPL.64274/2023 (stay)

Issue notice. Ms.Malavika Rajkotia, Advocate appears on advance notice and accepts notice.

Submissions have been made by Mr.Prashant Mendiratta, Advocate on behalf of the appellant and Ms.Malavika Rajkotia, Advocate on behalf of the respondent.



1. An appeal under Section 19 of the Family Courts Act, 1984 has been preferred by the appellant challenging the order dated November 21, 2023 passed by the learned Judge, Family Court (West), Tis Hazari Courts, Delhi in Guardianship Petition No.54/2018, whereby the memo of withdrawal filed by the appellant was dismissed and the respondent was transposed as petitioner, in pending guardianship proceedings.

2. **Factual Matrix**

- (i) Shorn of unnecessary details as noticed in the impugned order, the marriage between the parties was solemnized on April 22, 2006 in accordance with Hindu rites and ceremonies. A girl child was born out of the wedlock on February 11, 2013 and is presently aged about 10 years and 10 months. The respondent allegedly left the matrimonial home on March 10, 2018 along with the child and preferred a petition under section 13(1)(ia) of Hindu Marriage Act, 1955 seeking dissolution of marriage on March 23, 2018.
- (ii) Thereafter in May 2018, appellant filed a guardianship petition under Sections 7 & 25 of the Guardians and Wards Act, 1890 (GP No.54/2018) for restoration of custody of child back to him. Also, an application was preferred by the appellant under Section 12 of the Guardians and Wards Act, for interim custody of the child.
- (iii) Vide order dated March 26, 2019 passed by the learned Family Court, appellant father was given overnight custody of the child for first and third Friday of every month till evening of following Sunday, which was further modified vide order dated April 19, 2021.



- (iv) The respondent mother was permitted to change the school of the child in her best interest vide order dated March 22, 2023. It is pertinent to note that at the stage of passing of order dated March 22, 2023 by the learned Family Court, the temporary custody of the child was with the appellant father which was directed to be handed over to the respondent mother on March 22, 2023.
- (v) Appellant challenged the order dated March 22, 2023 before the Delhi High Court. Vide order dated March 24, 2023, he was directed to handover the custody of the child. The matter was further taken by the appellant to the Hon'ble Apex Court wherein the directions were issued for handing over of the child to the respondent mother but the same has not been complied with by the appellant. As such, the custody of child is still stated to be with the appellant father. Further, it is pointed out that the child does not appear to be going to school since March, 2023, impacting her studies.
- (vi) At the fag end of the trial as the respondent's cross-examination was almost over, an application was preferred by the appellant for withdrawing the guardianship petition. The application was opposed on behalf of the respondent taking a stand that the appellant is trying to take advantage of his own wrong after unauthorizedly keeping the child and in order to defeat the rights of the respondent. Also, an application was preferred on behalf of the respondent for transposing her as petitioner since she stood deprived of the custody of the child.



(vii) In response to the service of transposition application upon the appellant, he appeared in the court on October 26, 2023 and claimed that he is not appearing in the guardianship petition but only in connected HMA divorce petition filed by the respondent on the grounds of cruelty. The appellant also filed an e-mail dated November 03, 2023 stated to have been sent by him on official e-mail ID of the Court on November 18, 2023 and also stated that he did not wish to file the reply to respondent's application as the same is not maintainable in law. It was further noticed by the learned Trial Court that the appellant extensively argued on the withdrawal application time and again and also filed an affidavit dated October 03, 2023 stating that his appearance is not required in guardianship petition in view of filing of withdrawal application and the Family Court became *functus officio* to further deal with the matter. Reliance was also placed upon various judgments as referred in the impugned order, including ***Aman Lohia v. Kiran Lohia, (2021) 5 SCC 489*** passed by the Hon'ble Apex Court to contend that the transposition of respondent is not permissible in the guardianship petition.

3. Learned Family Court vide impugned order held that ***Aman Lohia*** (supra), is distinguishable since the order of transposition passed in the said case was set aside by the Hon'ble Apex Court, as the notice of transposition application was not issued to the non-applicant therein but in the present case the appellant is duly served but chose not to file a reply. Further observing that since the court exercises '*parens patriae jurisdiction*' under



guardianship matters the judgments relied upon by the appellant did not further his case. On merits, it was observed that the appellant had moved the application with the sole *malafide* intention to retain custody of minor daughter of the parties as long as he can, to which he is not entitled under the law, in view of the interim orders relating to interim custody/visitation rights passed by various Courts at different stages. The learned Trial Court was also of the view that the appellant through the application for withdrawal of petition sought to nullify the rights of the opposite party for such adjudication. Accordingly, in the peculiar facts and circumstances of the case, the appellant's application for withdrawal of guardianship petition was rejected and it was directed that the appellant shall continue to be one of the parties in the present petition. Further, relying upon ***Someshwar Dayal v. Anupama Dayal*, 2016 SCC OnLine Del 4585**, the application filed by the respondent was allowed and she was permitted to be transposed as petitioner.

4. Learned counsel for the appellant relying upon ***Aman Lohia*** (supra) reiterates the contentions raised before the learned Family Court and submits that the Family Court is bound to follow the procedure provided under the Code of Civil Procedure, 1908 while adjudicating a Guardianship Court despite powers under sub-section 3 of Section 10 of the Family Courts Act, 1984 permitting the Family Court to lay down its own procedure. The power of the Family Court to adjudicate the memo of withdrawal under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 is also challenged. It is also contended that the Court ceases to have jurisdiction the moment the withdrawal application/memo is filed. A contention has also been raised that



a proper notice as outlined under Order V Code of Civil Procedure, 1908 was not served. The matter is further stated to have been wrongly posted by learned Family Court for arguments without asking for substantive amended petition, written statement, framing of issues and recording of evidence by the learned Family Court. It is also pointed out that the child did not want to return with the respondent and only wishes to stay with the appellant, which fact has also been revealed to the Presiding Officers on interaction with the child.

5. On the other hand, learned counsel for the respondent supports the order passed by the learned Family Court and submits that **Aman Lohia** (supra) relied by the appellant was duly considered and is distinguishable on facts. She further emphasizes that appellant cannot be permitted to take advantage of his own wrong after unauthorizedly keeping the child, in order to defeat the rights of the respondent. It is also pointed out that that appellant had sufficient opportunity to file reply and detailed submissions were made on the application under consideration.

6. We have given considered thought to the contentions raised.

There is no dispute as to the proposition that the nature of inquiry before the Family Court is adjudicatory and while adopting the procedure under sub-section 3 of Section 10 of the Family Courts Act, 1984, the Court is bound to follow the foundational principles of fairness of procedure and natural justice along with the norms prescribed in the relevant statutes.

On the face of record, the learned Family Court appears to have adhered and followed the practice and procedure for the purpose of adjudicating the guardianship petition which was under consideration before



it under the Family Courts Act, 1984. Merely because the appellant filed an application for withdrawal of the guardianship petition, it cannot be presumed that the Court became *functus officio* to further deal with the matter. The narration of facts as observed above and also noticed in the impugned order clearly reflect that sufficient time and opportunity was granted to the appellant to make submissions. In fact, detailed submissions were made by the appellant before the Family Court though the proceedings were also challenged for want of proper service of application for transposition. Apparently, nothing restrained the appellant from filing a reply to the said application, if he so desired. Perusal of record reflects that the appellant sought to withdraw the guardianship petition at the fag end, only to ensure that the orders for handing back of the custody of the child remain non-complied. It cannot be ignored that the pleadings had been duly completed and evidence had been almost led by the parties in respect of their respective stand before the Family Court. It does not appear to be logical that when the parties had almost concluded their evidence before the Court and the matter reached at the final stage after following the due procedure of law, rights of respondent for adjudication of her rights for custody of the child could be defeated by merely permitting the appellant to withdraw the petition and burden her to file a fresh guardianship petition.

7. It is well settled that in the guardianship and custody matters, the Court exercises the '*parens patriae jurisdiction*' keeping in perspective the welfare of the minor child. The child would continue to remain the sufferer on account of discord between the parents, in case the rights of the parties are not expeditiously determined as per law. The procedural law is always



subservient to the substantive justice and hyper-technical procedure cannot be insisted upon in view of clear mandate under sub-section 3 of Section 10 of the Family Courts Act, 1984, which permits the Family Court to lay down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts.

8. In the facts and circumstances of the case, we are of the considered view that if the application for withdrawal of the guardianship petition preferred by the appellant is permitted, the same would result in mere abuse of judicial process, defeating the rights of the respondent mother for adjudication of her guardianship rights and return of the custody of the child to the respondent.

It is also pertinent to observe that the very purpose of transposition is to enable the effective and comprehensive adjudication of the matter in controversy between the parties and the Court has wide powers to grant such a prayer for transposition, if the appellant seeks to withdraw or abandon his claim only in order to defeat the rights of the respondent for custody of the child. Such transposition, if denied, would also lead to unnecessary multiplicity of the proceedings and delay the adjudication of the rights of the respondent *qua* custody of child, as already observed above.

9. The factual position in *Aman Lohia* (supra) relied by the learned counsel for the appellant appears to be clearly distinguishable since in the aforesaid case, there appears to be non-compliance with the prescribed procedure and infraction of principles of natural justice as also noticed by the learned Trial Court. There is no dispute as to the proposition of law and



the observations made by the Hon'ble Apex Court in para 48 as referred to by learned counsel for the appellant.

10. In the facts and circumstances of the case, for the reasons stated herein, the order passed by the learned Trial Court declining to accept the withdrawal of the guardianship petition and transposing the respondent as petitioner appears to be fully justified. The appeal is accordingly dismissed. Nothing stated herein shall tantamount to an opinion on the merits of the case. No order as to costs.

**(ANOOP KUMAR MENDIRATTA)
JUDGE**

**(V. KAMESWAR RAO)
JUDGE**

DECEMBER 12, 2023/sd