

Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

GUARDIANSHIP PETITION NO. 1 OF 2024

WITH

INTERIM APPLICATION (L) NO. 10387 OF 2024

IN

GUARDIANSHIP PETITION NO. 1 OF 2024

Mrs. Vincy Cajetan Noronha & Ors.

...Petitioners

Versus

Mrs. Steffi Genovevo Fernandes

...Respondent

WITH

GUARDIANSHIP PETITION NO. 13 OF 2024

WITH

INTERIM APPLICATION (L) NO. 21047 OF 2024

IN

GUARDIANSHIP PETITION NO. 13 OF 2024

Mrs. Vincy Cajetan Noronha & Ors.

...Petitioners

Versus

Mrs. Steffi Genovevo Fernandes

...Respondent

WITH

GUARDIANSHIP PETITION NO. 2 OF 2024

WITH

INTERIM APPLICATION (L) NO. 31480 OF 2023

IN

GUARDIANSHIP PETITION NO. 2 OF 2024

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Steffi Genoveno Fernandes

...Petitioner

Versus

Chidambaram P. Sankaram & Ors.

...Respondents

Ms. Susan Abraham a/w Mr. Narayan Suvarna, Ms. Poojasri Ganesan for the Petitioners in GP/1/2024 and GP/13/2024 and for Respondent Nos. 2 to 4 in GP/2/2024.

Mr. Rajendra Sorankar i/by Ketan Dabke for the Petitioner in GP/2/2024 and for the Respondent in GP/1/2024 and GP/13/2024.

Mr. Abhijit N. Desai for Respondent No. 1 in GP/2/2024.

CORAM : R.I. CHAGLA J.

Reserved on : 23rd January 2025

Pronounced on : 28th April 2025

JUDGMENT :

1. By the Guardianship Petition No. 1 of 2024, the Petitioners had initially sought the relief of permanent custody of the minor Yohan Johnny Sankaram (“**Master Yohan**”) born on 3rd December 2016. The Petitioner Nos. 1 and 2 are the grand-parents of Master Yohan and Petitioner No. 3 is their daughter, i.e. aunt of Master Yohan. Thereafter, by Guardianship Petition No. 13 of 2024 a fresh Guardianship Petition had been filed pursuant to directions of this Court. The Petitioners sought to be declared as Guardians of Master Yohan. This had also been sought by way of amendment to

Guardianship Petition No. 1 of 2013.

2. Guardianship Petition No. 2 of 2024 has been filed by the Petitioner seeking her appointment and declaration as legal Guardian of Master Yohan and to look after the rights and interest in the properties mentioned in the Schedule of properties annexed at Exh.AA to the Guardianship Petition and to manage, administer and hold the same for and on behalf of Master Yohan till he turns major. The Petitioner has also sought for appointment of the Petitioner as competent person to pursue and/or initiate any proceedings as may be required or advised with respect to insurance scheme, all service benefit, PPF, Gratuity and other claims of whatsoever nature of deceased Johnny Sanakarm, i.e. biological father of Master Yohan with Respondent No.5 and/or with any other authorities or Court of law and also to prosecute the claim and receive the same in proceeding pending before the Motor Accident Tribunal Mumbai for and on behalf of Master Yohan.

3. For the sake of convenience, the Petitioner Nos. 1 to 3 in Guardianship Petition No. 1 of 2024 and Guardianship Petition No. 13 of 2024 are referred to as “**the Petitioners**” and the Petitioner in

Guardianship Petition No. 2 of 2024, who is the Respondent in Guardianship Petition No. 1 of 2024 and Guardianship Petition No. 13 of 2024 is referred to as “**the Respondent**”.

4. It is necessary to refer to the material facts as borne out by the pleadings and evidence and which are as under :-

- i. The biological parents of Master Yohan were married by way of civil marriage registered on 25th April 2013 in Dubai.
- ii. The marriage of the biological parents of Master Yohan was solemnized in Goa at the Petitioners’ Parish Church - St. Alex Church, Calangute, Goa.
- iii. Master Yohan was born in Dubai on 3rd December 2016.
- iv. Upon birth of Master Yohan, the Petitioner No. 1 stayed in Dubai for three months between 5th December 2016 and 1st March 2017 with her daughter, Iona - biological mother of Master Yohan; Johnny – biological father of Master

Yohan and Master Yohan for three months to take care of Iona and her grandson so that Johnny could work. Baptism of Master Yohan was arranged by his biological parents on or around 20th January 2017 in Dubai in the presence of Petitioner No. 1.

- v. Master Yohan's parents brought Master Yohan to celebrate his 1st birthday at the house of the Petitioners in Goa on 3rd December 2017, Master Yohan's 2nd birthday too was celebrated on 3rd December 2018 with the Petitioners in Goa.
- vi. Master Yohan's 3rd birthday was celebrated on 3rd December 2019 with the Petitioners at their house in Mumbai.
- vii. The Petitioners claimed to have maintained close relationship with the biological parents of Master Yohan between the years 2017 to 2021 through regular telephonic and video communications, as well as visits to each other in Goa and Dubai till the outbreak of Covid 19 pandemic.

- viii. Iona's health deteriorated during the second wave of the Covid pandemic. She expired on 10th February 2021 in Dubai and Johnny informed the Petitioners of her sudden demise.
- ix. Johnny agreed to bring his wife's body to India to be buried in Goa and the Petitioners as well as Johnny had to manage despite lockdown restrictions.
- x. The Petitioners arranged Iona's funeral on 27th February 2021, when Johnny and Master Yohan reached Goa with Iona's body and which was arranged at the Petitioners' parish church at St. Alex Church at Goa.
- xi. Master Yohan stayed with the Petitioners in Goa between 27th February 2021 and 3rd June 2021 and during which period, Johnny stayed with the Petitioners for a few weeks and left for Mumbai in search of work. The Respondent claims that Johnny left the Petitioners' place along with Master Yohan immediately within two months due to embittered relationship with them.

- xii. The Respondent claims that in May 2021 since Johnny had no place to stay, he had requested the Respondent who happened to be the cousin sister of Iona to allow Johnny to stay with her in her mother's flat at Bhayander. Johnny initially stayed with the Respondent at Bhayander and thereafter took a flat on rent on 12th June 2021. The Respondent has relied upon the leave and license agreement where the Respondent is shown as a family member under Clause (12).
- xiii. It is the Petitioners' case that Johnny brought Iona's insurance related paperwork to the Petitioners which was signed by them. It is also their case that Johnny said that he would keep Master Yohan with him in Mumbai and admitted him in a school there. The Petitioners were ready to keep Master Yohan with them, but agreed to the needs of Johnny to have his son with him after the loss of his wife.
- xiv. On 27th March 2022 Johnny booked a flat admeasuring 670 sq.ft. (carpet) in an under construction project for

consideration of Rs.83,20,000/-. The Respondent claimed that this was with a view to start a family with the Respondent.

- xv. The Petitioners have claimed that between June 2021 and June 2023, they would often go to Mumbai to visit Johnny and Master Yohan and that Johnny and Master Yohan also would travel to Goa for family occasions or festivals.
- xvi. The Respondent was granted a decree of divorce from her husband by the Family Court on 26th April 2023. It is the Respondent's case that Johnny and the Petitioner decided to marry each other on possession of the flat and in the meantime, they had got engaged by exchanging rings.
- xvii. Master Yohan travelled to Goa accompanied by the Respondent's mother (sister of Petitioner No. 1) on 6th May 2023 and stayed with the Petitioners for two weeks. It is the Respondent's contention that this period was only one week and thereafter, Master Yohan was at the Respondent's uncle's place at Thivim.

- xviii. Johnny expired in a road accident on 2nd July 2023.
- xix. The Respondent claims that she was solely involved in the process of claiming Johnny's body from police authority, as Johnny had expired in a road accident. The Respondent has further claimed that from the formalities at hospital, till arranging funeral mass of Johnny were handled by her. The Respondent has also claimed that the Petitioners were nowhere in the picture. This is contrasted by the claim of the Petitioners that on 3rd July 2023, the funeral mass of Johnny was arranged by his friends at St. Joseph Church cemetery in Mira Road.
- xx. On 4th July 2023, the Petitioners offered to bring Master Yohan with them to Goa. The Petitioners' claim that when they expressed their desire to do so, the Respondent agreed stating that she was "nobody" to the child.
- xxi. The Petitioners' claim that on the next day i.e. 5th July 2023, the Respondent changed her mind and kept Master Yohan away from the Petitioners.

- xxii. The Petitioners have further claimed that the Respondent under the guise of taking Yohan to school and later taking the Respondent's mother to the hospital kept Yohan and the mother at a friend's residence at an undisclosed location.
- xxiii. The Respondent has claimed that on 6th July 2023 prior to her overcoming the loss of Johnny, i.e. her fiancé, the Petitioners started abusing the Respondent. The Respondent claims that the Petitioners threatened her to handover Johnny and Master Yohan's bank passbook, jewellery and locker keys. The Petitioners also threatened to take Master Yohan to Goa forcefully with them. The Respondent claims that she was constrained to lodge police complaint with Kashmiri Police Station on 6th July 2023. Subsequently, Kashmiri Police station registered NC complaint against the Petitioners. In contrast, the Petitioners' claim that on 6th July 2023, they had left Johnny's residence in the morning since they were told that they could not meet Master Yohan nor were they able to locate their grandson/nephew Master Yohan.

- xxiv. The Petitioners have claimed that they made numerous calls and sent messages during the period 6th July 2023 to 29th July 2023 to the Respondent which went unanswered.
- xxv. The Respondent claims that after the demise of Johnny, the father of late Johnny executed Affidavit on 13th July 2023 giving his unconditional consent as well as no objection to Respondent as guardian and for her keeping the custody of child. The father of Johnny was also sent an e-mail to Master Yohan's school giving his no objection to appoint the Respondent as guardian of Master Yohan. However, the school had refused to do the same.
- xxvi. The Petitioners claimed to have attended the one month memorial service for Johnny held at St. Joseph Church, Mira Road on 30th July 2023. However, during the service, the Respondent did not allow Master Yohan to meet the Petitioners.
- xxvii. The Petitioners claim to have lodged a complaint with the Kashimira Police Station for the custody of Master Yohan as

his natural guardian on 1st August 2023.

- xxviii. The Respondent claims that she along with Master Yohan attended the Police Station, where she learnt that the Petitioners had filed a complaint. However, the copy of complaint was not provided.
- xxix. The Petitioners claim that on 1st August 2023, the senior Inspector of Police mediated discussions between the Petitioners and the Respondent and directed the Respondent to give custody of Master Yohan to the Petitioners. They claim that the Respondent refused stating that she had an Affidavit from Johnny's father.
- xxx. The Respondent claims to have sent Advocate's notice dated 7th August 2023 to Kashmiri Police station asking for a copy of complaint filed by the Petitioners as well as the Petitioners' statement recorded at Police Station. The issue of jurisdiction of the police in deciding the custody matter had been raised by the Respondent as the same was required to be decided under the Guardians and Wards Act,

1890. The Respondent claims that no response was received from the Kashimira Police station. The Respondent's statement was recorded by the Police regarding the custody of Master Yohan. The Respondent has further stated that on that day, the Petitioners were present in the Police Station, and wanted to talk to Master Yohan, but Master Yohan refused to talk to them. The Senior Inspector of Police, Kashimira Police Station told the Petitioners to get an order from the Civil Court.

xxxi. The Petitioners claim to have contacted Child line on 24th August 2023, who asked them to lodge a formal complaint with the Child Welfare Committee (CWC) which they did with the Petitioners' friend Mr. Henrison Lobo.

xxxii. The Respondent claims that the Petitioners in connivance with a local political person one Nitesh approached CWC for custody of Master Yohan, at Ulhasnagar. The CWC did not have any jurisdiction to entertain the complaint for custody.

- xxxiii. The Respondent has claimed that the CWC not only entertained the Petitioners' complaint without jurisdiction, but also started harassing and pressuring the Respondent in connivance with local police and political person to handover the custody of Master Yohan.
- xxxiv. According to the Respondent, she received a call from PSI, Ms. Archana Jadhav on 28th August 2023 asking the Respondent to attend the CWC at Ulhasnagar on 29th August 2023. In the summons issued by the Kashimira Police Station on 28th August 2023, it has been mentioned that the matter is with respect to the custody of Master Yohan.
- xxxv. There are different versions of events from 29th August 2023 till 5th September 2023, as claimed by the Petitioners on the one hand and the Respondent on the other. According to the Petitioners, the Respondent along with Master Yohan were summoned by CWC for hearing on 29th August 2023. The Petitioners No. 1 and 2 accompanied by a social worker friend, attended the

hearing along with the Respondent. However, Master Yohan was not produced and the matter had been adjourned to 4th September 2023, which was later changed to 5th September 2023, as the Respondent was not present on 4th September 2023.

xxxvi. Whereas the Respondent claims that on 29th August 2023, she attended the office of CWC, where the member of the CWC warned the Respondent that if the issue is not “settled”, they will take the custody of the said child. The Respondent claims to have thereafter, on 31st August 2023, addressed a letter through her Advocates to Kashmirira Police Station once again requesting copy of the complaint of the Petitioners and it was recorded therein that the powers to grant guardianship or custody are assigned to the District Court or this Court under the provisions of Guardians and Wards Act, 1890. Further, on 2nd September 2023 the Respondent claims to have sent representation to CWC through her Advocate where the point of jurisdiction and powers of CWC were disputed. On 4th September 2024, the Kashmirira Police Station harassed

and threatened the Respondent to handover custody of Master Yohan by sending summons on the Respondent's whatsapp at 00:19 hours on that day and by asking personal details like bank account, property details, IT returns etc. at the behest of the Petitioners.

xxxvii. The Petitioners claim that on 5th September 2023, the CWC summoned the Petitioners to the CWC office at Ulhasnagar saying that the Respondent and Master Yohan were at Kashimira Police Station. The Petitioners claimed to have rushed to the CWC office to seek custody of Master Yohan. Since the Respondent had no means of transport on the Inspector's request, and the Respondent's consent, the Petitioner No. 3's social worker friend Nikesh drove the Respondent, Master Yohan and PSI Archana Jadhav in his car to the CWC office at Ulhasnagar. The Petitioners further claim that when they reached the CWC office, the CWC, Chairperson had already left the office, leaving instruction for the PSI to take Master Yohan to Janani Ashish Charitable Trust, a Children's Home in Dombivali. Thereafter, the Respondent with her friend, Master Yohan

and PSI Archana Jadhav went to Dombivali Children's home in Nikesh's car and left Master Yohan at home. The Petitioners were not allowed to go with them so that they returned to their home at Andheri.

xxxviii. The Respondent filed Criminal Writ Petition No. 3057 of 2023 before this court on 5th September 2023 challenging the jurisdiction and power of CWC and Police Authorities.

xxxix. The Petitioners claim that the Respondent suppressed information from the CWC and Kashimira Police Station that they had filed Criminal Writ Petition, although both having been arraigned as the Respondents. They claim that in the event, notice had been given by the Respondent to CWC and Kashimira Police Station, it could have averted any action by CWC vis-à-vis Master Yohan. They have claimed that this was with the malafide intentions to snatch orders from this Court. This is disputed by the Respondent as according to the Respondent, on 4th September 2023 the CWC was intimated about filing of the Writ Petition with request to defer the proceeding. This

was by a letter dated 4th September 2023, addressed by the Respondent and which was returned by the CWC. The Respondent claims that she sent letter and copy of the Criminal Writ Petition by hand delivery which was accepted by the CWC at the same address on 6th September 2023.

- xl. The Respondent claims that on 5th September 2023, the Police had came to the Respondent's office at Mira Road and told her that they need to take custody of Master Yohan. The Respondent was forced to call Master Yohan to the office from the Respondent's home. The Respondent and Master Yohan were forced into a police vehicle and then taken to Kashimira Police Station. They were presented before Senior Inspector of Police, who directed to take the Respondent and Master Yohan to CWC at Ullahasnagar. They were all placed in one "private car" which the Respondent learnt belonged to one Nitesh who is a political party worker, and who was doing liasoning for custody of Master Yohan on behalf of the Petitioners. That upon reaching CWC's office at about 6:40 pm, the CWC's

staff prepared one letter and handed over the same to PSI Archana Jadhav to place Master Yohan in “Jankalyan Balgriha” at Dombivali West, Thane.

- xli. The Petitioners have claimed that on 7th September 2023 they received a call from the Chairperson of CWC to go to Kashimira Police Station at Mira Road with regard to mediation for custody of Master Yohan. Since the Respondent had declined to come, the Petitioners were asked to accompany the police personnel to bring Master Yohan from the Children’s Home to the CWC Office at Ulhasnagar. The Petitioners claim that Master Yohan had willingly and happily accompanied the Petitioners. The Petitioners further claim that when they along with PSI Archana Jadhav reached the CWC office at Ulhasnagar, they were accosted by a crowd of around 10 friends of the Respondent, who created chaos and disruption totally traumatising Master Yohan. The Respondent’s associates did not allow any mediation to take place resulting in Master Yohan being escorted back to the Children’s Home by the police personnel in the vehicle, which had been

booked by the Petitioners.

xlii. The Respondent claims that from 5th September 2023 till 12th September 2023, Master Yohan was kept in children's home which affected his mental and physical health. There were bite mark and rashes on Master Yohan's body during his illegal confinement in children's home which has affected his mental and physical health severely. The Respondent claims that during the stay of Master Yohan in the Children's home, he was seen in the company/custody of the Petitioners outside the Children's / shelter home.

xliii. An order came to be passed on 11th November 2023 by this Court in Writ Petition No. 3057 of 2023 by which it was recorded that though the Respondent is not the biological mother of Master Yohan, she had taken care of him since 2021. Accordingly, the custody of Master Yohan was restored to the Respondent.

xliv. Interim Application No. 3453 of 2023 was taken out by Petitioners in Criminal Writ Petition No. 3057 of 2023 for

custody of Master Yohan. This was disposed of on 1st November 2023 by this Court with direction to approach the appropriate Court deciding the custody matters.

- xlvi. The Petitioners filed Civil Miscellaneous Application No. 301 of 2023 on 25th September 2023 at Thane District and Sessions Court under Section 25 of the Guardians and Wards Act, 1890 for custody of Master Yohan. The Petition was thereafter, transferred to this Court and re-numbered as present Guardianship Petition No. 1 of 2024.
- xlvi. The Respondent filed Guardianship Petition No. 2 of 2024 on 20th October 2023 against the Petitioners.
- xlvi. This Court by an order dated 29th April 2024 allowed the Petitioners to file fresh Guardianship Petition under Section 7 of the Guardians and Wards Act, 1890. Accordingly, Guardianship Petition No. 13 of 2024 was filed on 3rd May 2024.
- xlvi. In Criminal Writ Petition No. 3057 of 2023 an Interim

Application No. 3453 of 2023 had been filed by Petitioner No. 2 to be impleaded as necessary party and which was allowed by this Court and the Petitioner No. 2 herein was joined as Respondent No. 4 therein.

5. Ms. Susan Abraham, the learned Counsel for the Petitioners has submitted that it is well settled that only under substantive proceedings under the Guardians and Wards Act, 1890 that the appropriate Court decides the issue of child custody and guardianship. She has placed reliance upon the decision of the Supreme Court in **Somprabha Rana Vs. State of Madhya Pradesh**¹.

6. Ms. Abraham has submitted that the Respondent has suppressed material fact of filing of the Criminal Writ Petition No. 3057 of 2023 from the Kashimira Police Station and CWC was not in the best interest of Master Yohan and done with the sole motive of snatching orders from this Court. This also goes to show the malafide and unconsciousable conduct on the part of a caregiver of an orphaned child, which in this case is Master Yohan i.e. after the death of his parents and thus, the Respondent has wreaked havoc on

¹ **Criminal Appeal No. 3821 of 2023**

Master Yohan's emotional and psychological well being by leaving him at the children's home in Dombivali. She has submitted that this raises doubts about the Respondent's suitability as a caregiver.

7. Ms. Abraham has relied upon the decision of the Supreme Court in **S.P. Chengalvaraya Naidu Vs. Jagannath**² in support of her contention that the Respondent by suppressing the material fact has sought to take unfair advantage and this deception is in order to gain by another's loss. She has submitted that in the said decision, it has been held that fraud is an act of deliberate deception with a design of securing something by taking unfair advantage of another.

8. Ms. Abraham has further relied upon **Gautam Kumar Das Vs. NCT Of Delhi & Ors.**³ at paragraphs 13 and 16, wherein it has been held that merely because of the unfortunate circumstances faced by the Appellant therein as a result of which, Respondent Nos. 5 and 6 were given the temporary custody of the minor child and only because they looked after her for few years, the same cannot be

² 1994 SCC (1)1

³ SLP Criminal 5171 of 2024 judgment dated 20.08.2024

a ground to deny the custody of the minor child to the appellant, who is her only natural guardian. Further, the minor child being of a tender age, she will get adapted to the natural family very well in a short period. She has submitted that this decision is applicable in the present case, as due to the circumstances which arose from Master Yohan's parents' demise, the Respondent looked after Master Yohan for a few years and merely because of this fact, the Petitioners cannot be denied the custody of Master Yohan as they are his natural guardians.

9. Ms. Abraham has also placed reliance upon the decision in **Tejaswini Gaud & Ors. Vs. Shekhar Jagdish Prasad Tewari & Ors.**, paragraph 34, wherein it is held that merely because of Appellants therein being the relatives took care of the child, they cannot retain the custody of the Child.

10. Ms. Abraham has referred to Section 17 of the Guardians and Wards Act, 1890 and in particular, Section 17(2), which provides that in considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his

nearness of kin to the minor, the wishes if any of the deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. She has submitted that the Respondent's behavioural control over Master Yohan to the exclusion of his entire family which raised Master Yohan from the time of his birth till the death of his father is not only unhealthy but also can cause permanent damage to the tender and impressionable psyche of the 7-8 year old Master Yohan. She has submitted that the Respondent having been previously married while claiming to be in a relationship with the father of Master Yohan will not be conducive for the upbringing and welfare of Master Yohan. She has submitted that there was never any such intention of Master Yohan's father to marry the Respondent and/or this was neither made public nor put in writing. The relationship of the Respondent with Master Yohan's father is an adulterous relationship and not a "Live-in Relationship" since she was at that time a married woman. The divorce obtained from her legally wedded husband was only on 26th April 2023.

11. Ms. Abraham has relied upon the judgment of the Supreme Court in **Indra Sarma Vs. K.V. Sarma**⁴, which held that a

⁴ AIR 2014 SC 309

Live-in Relationship with a married person is not a relationship in nature of marriage. She has further relied upon the decision of the Supreme Court in **U. Suvetha Vs. State**⁵, where the Supreme Court held that a girl friend or even a concubine in an etymological sense would be a “relative”. Such status must be conferred either by blood or marriage or adoption. If no marriage has taken place, then the question of one being relative of another would not arise.

12. Ms. Abraham has further placed reliance upon **Gaurav Nagpal Vs. Sumedha Nagpal**⁶, wherein it is held that the moral and ethical welfare of the child must also weigh with the Court as well as its physical well being.

13. Ms. Abraham has submitted that the Respondent’s admitted income in her Guardianship Petition No. 2 of 2024 is INR 34,491/-, which is insufficient to cover all the necessities for Master Yohan, the Respondent herself, and her ailing mother who is a cancer patient/survivor and is affected by polio. She has submitted that with a monthly rent of INR 22,500/-, the Respondent is left with only INR

⁵ (2009) 6 SCC 757

⁶ Civil Appeal No. 5899 of 2007 Judgment dtd 19.11.2008

12,000/- to cover all other expenses, including food, household costs, mother's medication, and school fees. She does not own a house in her or her mother's name.

14. Ms. Abraham has submitted that the Petitioners have sufficient means to provide for Master Yohan's needs without access to any of his inheritance. The Petitioner Nos. 1 and 2 own two houses (in Goa & Mumbai) and have accumulated substantial savings, since they are both retired from well paying and permanent jobs. Similarly, Petitioner No. 3, is financially stable, since she runs a company and her husband too is in a well-placed position in the hospitality industry and is earning a good income. They too, own a house in Goa. She has submitted that the Petitioners therefore are well endowed to provide for Master Yohan, without touching the funds in his name which can then be saved for his exclusive use when he turns major.

15. Ms. Abraham has submitted that the Respondent does not have the capacity to bring up Master Yohan in a wholesome environment, whereas the Petitioners are a well-knit family with one granddaughter / daughter Rain, who will be an elder sister for

Master Yohan. The Petitioners have a large extended family (in Goa and Mumbai). Master Yohan will be loved and cared for by the Petitioners and their extended family.

16. Ms. Abraham has submitted that the Petitioners have had a natural, homely and wholesome relationship with Master Yohan from the time of his birth till the demise of his father, the late Johnny. She has placed reliance upon the decision of the Supreme Court in **Lahari Sakhamuri Vs. Sobhan Kodali**⁷, wherein the Supreme Court has considered the crucial factors which are to be kept in mind by the Courts for gauging the welfare of the children equally for the parent's can be *inter alia*, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.

17. Ms. Abraham has referred to Section 17(3) of the Guardians and Wards Act, 1890, which provides that "*If the minor is*

⁷ (2019) 7 SCC

old enough to form an intelligent preference, the Court may consider that preference.”. She has submitted that Master Yohan, between ages of 7 & 8 is not an age to make “*an intelligent preference*” about who he wishes to be with as his natural guardian. She has submitted that Master Yohan has lost both his parents in a matter of two years. Further, Master Yohan was in close contact with the Petitioners till May 2023, to be suddenly alienated from them from July onwards, which can be the most traumatising experience for any child of that age. She has submitted that Master Yohan being a child of such tender years can be easily tutored to say as per the diktat of the person who has custody, as so frequently witnessed between warring biological parents in child custody battles.

18. Ms. Abraham has referred to the Court appointed Counsellor’s Report dated 20th September 2024. The said Counsellor’s Report clearly points to the extremely vulnerable and indecisive behaviour of the child vis-à-vis his biological family and an unhealthy attachment to the caregiver. She has submitted that there are a catena of judgments, which have held that it is necessary for the child to be given overnight custody, vacations and shared custody between contesting parents and which may be applied in the present

case between the Petitioners and the Respondent who has interim custody of the child.

19. Ms. Abraham has submitted that the said Counsellor's Report highlights the remarkable bonds Master Yohan displayed in just two sittings with the Counsellor with both the Respondent as Custodian and Caretaker on the one hand, and with his biological grand-parents, aunt Ingrid, and cousin Rain on the other and their involvement and requirement in Master Yohan's upbringing and emotional welfare.

20. Ms. Abraham has submitted that this Court in deciding Guardianship of properties of Iona and Johnny, the deceased parents of Master Yohan, under Section 7 of the Guardians and Wards Act, 1890, requires to consider that only a Legal Heir can claim the funds arising out of employment of any deceased person. In the present case, there is only Master Yohan who is the sole legal heir to the properties of his late parents. She has submitted that this Court ought to keep interim custody of the said properties, till all the contentions and claims of the parties are finally heard and decided or till the minor child attains age of majority, whichever is earlier. She

has relied upon the decision of the Madras High Court in **R. Poonkothai Vs. K.S. Karupaiah**⁸ in this context.

21. Ms. Abraham has submitted that this Court be pleased to decide interim guardianship under Section 12 of the Guardians and Wards Act, 1890 granting Petitioners interim guardianship and custody of Master Yohan. This will not only serve, but will enhance Yohan's welfare by ensuring a continuity of his bonds with his biological family, i.e. the Petitioners, by the present caregiver who holds his interim custody, i.e. the Respondent. She has placed reliance on the decision of the Supreme Court in **Smriti Madan Kansagra Vs. Perry Kansagra**⁹ and **Nil Ratan Kundu and Anr. Vs. Abhijit Kundu**¹⁰.

22. Ms. Abraham has submitted that in view of this Court having finally heard the Guardianship Petition, the relief sought for in the Guardianship Petition No. 1 of 2024 and Guardianship Petition No. 13 of 2024 filed by the Petitioners be made absolute and the Petitioners be declared as Guardians of Master

⁸ 2012 2 SCC OnLine Mad 4599

⁹ CA 3559 of 2020: SC

¹⁰ (2008) 11 S.C.R. 1111

Yohan.

23. Mr. Sorankar, the learned Counsel for the Respondent in Guardianship Petition No. 1 of 2024 and Guardianship Petition No. 13 of 2024 and the Petitioner in Guardianship Petition No. 2 of 2024 has submitted that Master Yohan has been looked after by the Petitioner since May 2021 till today. There is a close bonding between the Petitioner and Master Yohan. He has submitted that Master Yohan was in the Respondent's care from the age of 4 years and that there is no material to show that the Petitioners have ever participated in the upbringing and care of master Yohan. He had submitted that the Petitioners were present only on the first birthday of Master Yohan, as the same was in Goa. However, on subsequent birthdays they were never present as alleged.

24. Mr. Sorankar has submitted that Master Yohan's father Johnny and the Respondent having been living together since May 2021. Johnny had upon the Respondent having been granted the Decree of Divorce from her erstwhile husband, decided to marry the Respondent on possession of the flat, which Johnny had booked in an under construction project and in the meantime, they had got

engaged by exchanging rings.

25. Mr. Sorankar has submitted that Master Yohan though in the custody of the Respondent, had been snatched away from the Respondent due to the complaints of the Petitioners i.e. the police complaint and the complaint made to the CWC. He has submitted that Master Yohan was made to suffer in a children's home from 5th September 2023 till 12th September 2023, which affected his mental and physical health. The Petitioners, if they were so concerned about the welfare of Master Yohan, would have not acted in such a manner which would cause immense injury to child's mind and body. He has placed reliance on the Criminal Writ Petition No. 3057 of 2023 as well as order dated 11th September 2023 passed therein by which this Court had restored the custody of Master Yohan to the Respondent / Petitioner therein. He has submitted that this order has not been challenged by the Petitioners till date and thus, has attained finality.

26. Mr. Sorankar has further submitted that the Respondent has been taking care of Master Yohan's welfare including his educational fees, upbringing and all his basic needs. Further, after

the demise of Johnny, his father, Chidambaram P. Sankaram executed an Affidavit at Kerala authorising the Respondent to take care of Master Yohan by giving his no objection. Master Yohan has developed a good bonding with the Respondent and the Respondent undertakes to take all responsibility and care of Master Yohan even in future.

27. Mr. Sorankar has submitted that Master Yohan is entitled to the properties i.e. movable, immovable, bank account balance, fixed deposits, flat (under construction) left behind by his deceased father Johnny.

28. Mr. Sorankar has submitted that the Respondent's income is adequate enough to fulfill all the necessities of Master Yohan, the Respondent and her mother. He has submitted that the Petitioners have falsely submitted that Respondent's mother is suffering from Polio. The said disease has already been cured. With respect to breast cancer of the Respondent's mother, she has recovered in the year 2017.

29. Mr. Sorankar has submitted that Master Yohan is

extremely attached to the Respondent, as has been noticed by this Court during the interactions with Master Yohan. Further, the Counsellor appointed by this Court, in her Report has opined that Master Yohan can stay with the Respondent and in return, the Respondent should bridge the gap and allow Master Yohan to be with his grand-parents, his aunt Ingrid and her family including daughter Rain by visiting each other's house, respectively, as well as through video, audio calls, etc. He has submitted that it is imperative that Master Yohan stays with the Respondent as Master Yohan addresses the Respondent as his mother.

30. Mr. Sorankar has relied upon the decision of the Supreme Court in **Mausami Moitra Ganguli Vs. Jayant Ganguli**¹¹, wherein the Supreme Court has considered that the welfare of the child is of paramount consideration. The Court is required to consider whether one of the parents i.e. the father has sufficient time or resources to look after the welfare of the child and since the dislocation of the minor from Allahabad, where he has grown up with his father in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and

¹¹ (2008) 7 SCC 673

depression on him.

31. Mr. Sorankar has further relied upon the decision of the Supreme Court in **Gaytri Bajaj Vs. Jiten Bhalla**¹², wherein the Supreme Court has considered the issue of custody of minor children under either the provisions of the Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor of paramount importance. An attempt was made by the Court, even by means of a personal interaction with the children, to bring the issue with regard to custody and visitation rights to a satisfactory conclusion.

32. Mr. Sorankar has further relied upon the decision of the Supreme Court in **Anjali Kapoor (Smt) Vs. Rajiv Baijal**¹³, wherein the Supreme Court has in deciding the question of guardianship of the minor, held that the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law.

¹² (2012) 12 SCC 471

¹³ (2009) 7 SCC 322

33. Mr. Sorankar has also relied upon the decision of the Supreme Court in **R.V. Srinath Prasad Vs. Nandmuri Jayakrishna & Ors.**¹⁴, wherein the Supreme Court has held that the custody of the minor children is a sensitive matter. It is also a matter involving sentimental attachment. Neither affluence nor capacity to provide comfortable living should cloud the consideration by the Court. A balance has to be struck between the attachment and sentiments of the parties towards the minor children and the welfare of the minors which is of paramount importance.

34. Mr. Sorankar has accordingly, submitted that the Respondent is best suited to be appointed as Guardian of Master Yohan. Accordingly, the Guardianship Petition No. 1 of 2024 and Guardianship Petition No. 13 of 2024 is required to be dismissed and the Guardianship Petition No. 2 of 2023 filed by the Respondent be made absolute.

35. Having considered the submissions, this Court is exercising powers under Section 7 of the Guardians and Wards Act, 1890 in determining whether the Petitioners or the Respondent is to

¹⁴ (2001) 4 SCC 71

be appointed as Guardian of Master Yohan. In doing so the Court is exercising its *parens patriae* jurisdiction. The Supreme Court in **Gaurav Nagpal Vs. Sumedha Nagpal** (supra), whilst considering the provisions of the Hindu Minority Act, 1956 held that 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 his / her physical well being.

36. In **Mausami Moitra Ganguli Vs. Jayant Ganguli**, the Supreme Court considered the provisions of the Guardians and Wards Act, 1890 and in particular Section 17 thereof which relates to the custody of the minor child. The Supreme Court in paragraphs 19 and 20 held as under:-

“19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in

either the Guardianship and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

- 20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.”*

37. In the above decisions the principles governing Guardianship as well as custody of a minor child has been considered and the Court in exercising its *parens patriae* jurisdiction shall take into consideration the welfare of the minor child, which is the paramount consideration.

38. In the present case, Master Yohan lost both his parents at a tender age, in a matter of two years apart, i.e. loosing his mother in the year 2021 and his father in the year 2023. Master Yohan has been looked after by the Respondent - Mrs. Steffi Genoveno Fernandes since May 2021 i.e. few months after his mother expired. This is when his father Johnny started residing with the Respondent and her mother in Mumbai. Johnny and the Respondent were to marry each other on possession of a flat which Johnny had booked and in the meantime, they had got engaged by exchanging rings.

39. The Petitioners are residents of Goa. The Petitioners were initially very much a part of Master Yohan's life i.e. when Master Yohan and his parents used to spend holidays in Goa with them. However, the Petitioners interactions with Master Yohan

were for limited periods, considering that Master Yohan and his parents were living in Dubai where Master Yohan was born. After the demise of Master Yohan's mother – Iona, Master Yohan and his father Johnny returned to India and stayed with Iona's parents, i.e. the Petitioner Nos. 1 and 2 in Goa for a few months. Thereafter, Master Yohan and his father Johnny, as aforementioned resided with the Respondent in Mumbai.

40. Master Yohan has grown to be extremely attached to the Respondent and there is a tremendous bonding between them. I had an occasion to interact with Master Yohan and during the interaction, I found that Master Yohan referred to the Respondent as his mother and was reluctant to acknowledge or meet his grand-parents, i.e. Petitioner Nos. 1 and 2 and his aunt Petitioner No. 3. This is when I advised Master Yohan that for grand-parents, their grand child is precious and considered an integral part of their life. Further, Master Yohan's aunt i.e. Petitioner No. 3 also has a daughter Rain and for Master Yohan, it would be a healthy environment to interact with Rain and her mother together with the grand-parents.

41. The Petitioners on the one hand has contended

that the Respondent has a control over Master Yohan, by having taken custody of Master Yohan from them and that Master Yohan has been alienated from the Petitioners. Whereas the Respondent on the other hand has contended that the Petitioners have not made an attempt to be a part of Master Yohan's life and/or take care of his basic needs.

42. The Petitioners have also alleged that the Respondent has tutored Master Yohan to keep his distance from his grand-parents, i.e. Petitioner Nos. 1 and 2 and his aunt Petitioner No.3. The Petitioners have placed reliance upon the decision of the Supreme Court in **Indra Sarma Vs. K.V. Sarma** (supra) and of this Court in **Kshitija Vijay Kakade Vs. The State of Maharashtra**¹⁵, wherein it is held that it is necessary for the child to be given overnight custody, vacations and shared custody between contesting parents. These decisions are in matrimonial cases, where the dispute is between the husband and wife as to custody of the minor child. In the present case, the situation is different. The Petitioners are residents of Goa, which is an unfamiliar surrounding for Master Yohan as he has since the age of four years till today lived in

¹⁵ Criminal Writ Petition No.505 of 2020 Order dtd.04.09.2024

Mumbai. The Petitioners have been visiting Mumbai, as this Court has granted access of Master Yohan to the Petitioners. However, this Court is of the view that it would not be in Master Yohan's interest that he is uprooted from his familiar surroundings in Mumbai and made to live in Goa with the Petitioners.

43. The Petitioners have further contended that the Respondent's income is insufficient to take care of Master Yohan as admittedly she is earning INR. 34,491/- as stated by her in her Guardianship Petition. The Respondent has to cover not only Master Yohan's expenses, but that also of her ailing mother and herself. They have contended that there is a monthly rent of INR 22,500/- which the Respondent is required to pay and that leaves her with only INR 12,000/- to cover all other expenses, including food, household costs, Respondent's mother's medication and school fees.

44. The Petitioners have placed reliance upon their sufficient means to provide for Master Yohan's needs without access to any of his funds. The fact that the Petitioner Nos. 1 and 2 own two houses in Goa and Mumbai and have substantial savings since they have both retired from well paying permanent jobs. Similarly,

Petitioner No.3 is financially stable since she runs a company and her husband too is in a well-placed position in the hospitality industry and is earning a good income. They too own a house in Goa.

45. Although the aforementioned factors are relevant, the paramount consideration is the welfare of Master Yohan. It is well settled that custody of a minor child is a sensitive issue and it is a matter involving sentimental attachment. A balance has to be struck between the attachment and sentiments of the parties towards the minor child and the welfare of the minors which is of paramount importance. Further, it has been held by the Supreme Court in **R.V. Srinath Prasad** (supra), which has been relied on behalf of the Respondent that in a sensitive matter involving custody of the minor child, there is no single factor that can be decisive. Neither affluence nor capacity to provide comfortable living should cloud the consideration by the Court. It is a settled principle that custody orders by their nature can never be final, however, before a change is made it must be proved to be in the paramount interest of the children.

46. It has been held by the Supreme Court in **Gaytri**

Bajaj Vs. Jiten Bhalla (supra) which has been relied upon by the Respondent that the Court is required by means of a personal interaction with the children, to bring the issue with regard to custody and visitation rights to a satisfactory conclusion. Having interacted with Master Yohan, I had occasion to consider that he has a great bonding with the Respondent and refers to her as his mother. There is no dispute that the Respondent has been taking care of the basic needs of Master Yohan including his education since year 2021, initially with Johnny's assistance and thereafter, after his demise in 2023 on her own. Thus, in my view, the fact that the Respondent does not have the affluence which the Petitioners have, is not an issue that can cloud the consideration of this Court.

47. The Petitioners have relied upon Section 17(3) of the Guardians and Wards Act, 1890 which provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference. They have submitted that Master Yohan is between the age 7 – 8 and not of age to make “an intelligent preference” about whom he wishes to be with as his Guardian. They have accordingly, submitted that the preference expressed by Master Yohan cannot be taken into consideration as this has been tutored by

the Respondent. They have relied upon the Counsellor's Report to submit that it clearly points to the extremely vulnerable and indecisive behaviour of the child vis-à-vis his biological family and an unhealthy attachment to the caregiver, i.e. the Respondent.

48. In my considered view though Master Yohan may not be old enough to form an intelligent preference, the interaction with Master Yohan and the Respondent is certainly a factor which this Court is required to take into consideration and from which it is found that there is a great bonding between Master Yohan and the Respondent.

49. The Court appointed Counsellor in the Report has learnt from the sessions that the Respondent has been taking care of Master Yohan since 2021 and that he is extremely attached to her and refused to befriend anybody around him, including the Counsellor as well as the Petitioners initially. The Counsellor has recommended that Master Yohan can stay with the Respondent and in return the Respondent is required to bridge the gap and allow Master Yohan to stay with his grand-parents, his aunt Ingrid and his family by visiting them at each other's house, including through video

calls, audio calls, etc. Further, the Counsellor has highly recommended Master Yohan to continue counselling / therapy from a Court-psychologist / Counsellor to address his everyday conflicts and behavioural challenges. The Counsellor has also recommended that the Respondent along with Master Yohan's grand-parents to be a part of family counselling / therapy with Master Yohan too, with time.

50. Considering the Counsellor's Report as well as the aforementioned facts which had been brought on record by way of Affidavit of Evidence filed by the Petitioners and the Respondent, it appears that Master Yohan would be best suited with the Respondent and for which the Respondent is required to be declared as Guardian of Master Yohan, conditional upon the Respondent providing access of Master Yohan to the Petitioners either at the residence of the Respondent or at the Petitioners' residence in Mumbai. Further, the Respondent is also required to allow Master Yohan to spend at least one vacation in the year with the Petitioners at their residence in Goa and this may be either with the Respondent or a family friend of the Respondent accompanying Master Yohan with whom Master Yohan is comfortable.

51. Although there were submissions and counter-submissions by the Petitioners and Respondent made with regard to the events which took place at the Kashimira Police Station; CWC at Ulhasnagar and the Children's Home which has been referred to above, this Court is not going into this dispute, as it is the subject matter of the Criminal Writ Petition which has been filed by the Respondent and which will be adjudicated separately by the Bench taking up that matter.

52. Hence, the following order is passed.:-

- (i) Steffi Genovevo Fernandes, Petitioner in Guardianship Petition No. 2 of 2024 is declared as Guardian of Master Yohan Johnny Sankaram and to look after Master Yohan's rights and interest in the properties mentioned in Schedule of properties annexed at Exh.AA and to manage, administer and hold the same for and on behalf of Master Yohan till he turns major.

- (ii) The Petitioner is also appointed as Competent Person to pursue and/or initiate any proceedings as may be required or advised with respect to insurance scheme, all service benefit, PPF, Gratuity and other claims of whatsoever nature of deceased Johnny Sanakarm, i.e. biological father of Master Yohan with Respondent No.5 and/or with any other authorities or Court of law and also to prosecute the claim and receive the same in proceeding pending before the Motor Accident Tribunal, Mumbai for and on behalf of Master Yohan.

- (iii) The order in (i) and (ii) above passed is subject to the Petitioner allowing access of Master Yohan to Vincy Cajetan Noronha, Cajetan Gabriel Noronha and Ingrid Godwin Mathias – Respondent Nos. 2 to 4 in Guardianship Petition No. 2 of 2024 at her residence and/or their residence in Mumbai including by allowing the Respondent Nos. 2 to 4 to make frequent visits and also permit them to take Master Yohan for outings, subject to their returning

him to the residence of the Petitioner on the same day in the evening.

- (iv) Further, the Petitioner in Guardianship Petition No. 2 of 2024 shall allow the Respondent Nos. 2 to 4 to spend at least one vacation in the year of the Respondent Nos. 2 to 4's choice with Master Yohan at their home in Goa and during which the Petitioner and/or a close family friend of the Petitioner to whom Master Yohan is comfortable with shall accompany him to the Respondent Nos. 2 to 4's home in Goa.

- (v) The Declaration of the Petitioner in Guardianship Petition No. 2 of 2024 as Guardian shall be subject to Master Yohan continuing counselling for a period of six months and during which sessions the Petitioner and Respondent Nos. 2 to 4 shall remain present. This is as per the advise of the Court appointed Counsellor Dr. Vishakha N. Punjani. The Counsellor Dr. Vishakha N. Punjani is requested to

do the counselling.

- (vi) In the event, Dr. Vishakha N. Punjani is unable to do the counselling, liberty is granted to the parties to apply for appointment of an independent Counsellor, who is agreeable to do the counselling and which this Court finds suitable to be appointed as Counsellor.
- (vii) Guardianship Petition No. 2 of 2024 is accordingly, allowed with the above directions and disposed of.
- (viii) In view of this order, Guardianship Petition No. 1 of 2024 and Guardianship Petition No. 13 of 2024 is dismissed.
- (ix) All pending Interim Applications filed therein do not survive and are disposed of accordingly.
- (x) There shall be no order as to costs.

[R.I. CHAGLA J.]