MADHYA PRADESH STATE JUDICIAL ACADEMY,
HIGH COURT OF M.P., JABALPUR

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HINDU MINORITY AND GUARDIANSHIP ACT, 1956

1. POINT INVOLVED

Section 6 of the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardians and Wards Act, 1890 – Mother can be guardian during the life time of the father.

Parties – ***Kamal Kishore v. Ramswarup***

Reported in – 2001 (1) MPHT 349

Joint family property does not belong to minor alone, therefore, permission of the Court is not necessary.

In all situations where the father is not in actual charge of affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother, can act as natural guardian of the minor and for all her actions husband would be deemed to be 'absent' for the purpose of Section 6 of the Hindu Minority and Guardianship Act and Section 19(b) of the Guardians and Wards Act.

Property in question was joint family property of several persons not the individual property of minor alone. They were having only the undivided share in the property. Thus the provisions of Section 8(2) of the Hindu Minority and Guardianship Act have no application to the instant case.

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2. POINT INVOLVED

Sections 7, 10 and 17 of the Guardians and Wards Act, 1890 – Adoption of Indian children by foreign couple – Right of

biological parents to give child in adoption – Law explained – Effect of guidelines issued by Ministry of Welfare, Govt. of India stated.

Parties – ***Anokha (Smt.) v. State of Rajasthan and others***

Reported in – (2004) 1 SCC 382

The appellant has approached this Court under Article 136 of the Constitution. She has reiterated the stand taken by her before the High Court and the District Judge, namely, that the Guidelines issued by the Ministry of Welfare relating to the adoption of Indian children did not apply in the case of adoption of children living with their biological parents and that the Guidelines only applied to cases where the child was destitute or abandoned or living in social or child welfare centres.

In our view, the High Court and the District Judge erred in not considering the material produced by Respondents 2 and 3 in support of their application and in rejecting the application under the Guardians and Wards Act, 1890 solely on the basis of the Guidelines. The background in which the Guidelines were issued was a number of decisions of this Court, the first of which is ***Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244***. This is borne out from the stated object of the Guidelines as set out in paragraph 1.1 thereof which

> "is to provide a sound basis for adoption within the framework of the norms and principles laid down by the Supreme Court of India in the series of judgments delivered in L.K. Pandey v. Union of India between 1984 and 1991".

The original decision of the Court was taken on the basis of a letter written by one Laxmi Kant Pandey complaining of malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The judgment has considered the problem at great length after affidavits were filed not only by the Indian Council of Social Welfare but also by foreign organisations and Indian organisations which were engaged in offering and placing Indian children for adoption by foreign parents. The decision

has referred to three classes of children: (i) children who are orphaned and destitute or whose biological parents cannot be traced; (ii) children whose biological parents are traceable but have relinquished or surrendered them for adoption; and (iii) children living with their biological parents. The third category has been expressly excluded from consideration as far as the decision was concerned "for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. The reason is obvious. Normally, no parent with whom the child is living would agree to give a child in adoption unless he or she is satisfied that it would be in the best interest of the child. That is the greatest safeguard.

The directions which have been in the decision are limited to the first and second categories of children with more stringent requirements being laid down in respect of children in the first category of cases. As far as adoption of children falling within the second category is concerned, the requirements are not so stringent.

The Guidelines have formulated various directives as given by this Court in the several decisions and do not relate to regulation of the adoption procedure to be followed in respect of the third category of children, namely, children with their biological parents who are sought to be given in adoption to a known couple as is the situation in this case. It is only where there is the impersonalized attention of a placement authority that there is a need to closely monitor the process including obtaining of a no-objection certificate from the Central Adoption Resource Agency (CARA), Ministry of Welfare, the sponsorship of the adoption by a recognised national agency and the scrutiny of the inter-country adoption by a recognised Voluntary Coordinating Agency (VCA). Indeed CARA has been set up under the Guidelines for the purpose of eliminating the malpractices indulged in by some unscrupulous placement agencies, particularly the trafficking in children.

Under the Guidelines, the Home Study Report to be enclosed with an application for adoption must be routed through a foreign and enlisted agency which

must be an enlisted agency in India with a copy to CARA. The Home Study Report is required to contain the following particulars:

(a) Social status and family background.

(b) Description of home.

(c) Standard of living as it appears in the home.

(d) Current relationship between husband and wife.

(e) Current relationship between the parents and children (if any children).

(f) Development of already adopted children (if any).

(g) Current relationship between the couple and the members of each other's family.

(h) Employment status of the couple.

(i) Health details such as clinical test, heart condition, past illness etc. (medical certificate etc.)

(j) Economic status of the couple.

(k) Accommodation for the child.

(l) Schooling facilities.

(m) Amenities in the home.

(n) Reasons for wanting to adopt an Indian child.

(o) Attitude of grandparents and relatives towards adoption.

(p) Anticipated plans for the adoptive child.

(q) Legal status of the prospective adopting parents.

The report is required to be notarised which must in turn be attested either by an officer of the Ministry of External Affairs or in officer of the Justice or Social Welfare Department of the foreign country concerned or by an officer of the Indian Embassy or High Commission or Consulate in that country.

None of these provisions in the several decisions of this Court impinge upon the rights and choice of an individual to give his or her child in adoption to named persons, who way may be of foreign origin. The Court in such cases has to deal with the application under Section 7 of the Guardians and Wards Act, 1890 and dispose of the same after being satisfied that the child is being given in adoption

voluntarily after being aware of the implication of adoption viz. that the child would legally belong to the adoptive parents' family, uninduced by any extraneous reasons such as the receipt of money etc.; that the adoptive parents have produced evidence in support of their suitability and finally that the arrangement would be in the best interest of the child.

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3. POINT INVOLVED

Section 17 of the Guardians and Wards Act, 1890 – Custody of the minor child – Relevant considerations – Welfare of the child paramount consideration – Law explained.

Parties – ***Wazid Ali v. Rehana Anjum***

Reported in – 2005 (3) MPLJ 319

Custody of minor is a sensitive issue. It is also a matter involving the sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between attachment and sentiment of the parities towards the minor child and the welfare of minor which is a paramount importance. [See ***R.V. Srinath Prasad vs. Nandamuri Jayakrishna, (2001) 4 SCC 71***].

Section 17 enumerates the matters which the Court must consider in the matter of appointment of guardians. It is emphasised in both these sections that the welfare of the minor must be the paramount consideration in appointment or declaration of any person as guardian. The cardinal principle is that minors cannot take care of themselves so that the State as *pater patrice* has powers to do all acts and things necessary for their protection. It is, therefore, the primary duty of the Court to be satisfied what would be for the welfare of the minor and to make an order appointing or declaring a guardian accordingly. It is settled law that the word "welfare" must be understood in its widest sense so as to embrace the material and physical well-being; the education and upbringing; happiness and moral welfare. The

Court must consider every circumstance bearing upon these considerations. (See ***Rajkumar Mahant vs. Indrakumari, 1972 MPLJ 775 = 1972 JLJ 1045*****)**.

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4. POINT INVOLVED

Sections 6 & 13 of the Hindu Minority and Guardianship Act, 1956 and Section 17 of the Guardians and Wards Act, 1890 – Custody of minor child – Principles governing grant of custody – Welfare of minor paramount consideration – Law explained.

Parties – ***Ashok Kumar Jatav v. Kumari Roshani and another***

Reported in – 2006 (1) MPLJ 178

Before deciding the appeal I shall have to take into consideration the relevant provisions of the Hindu Minority and Guardianship Act, 1956 and of Guardian and Wards Act, 1890, section 6 of Hindu Minority and Guardianship Act lays down that the natural guardian of minor Hindu unmarried girl in respect of the person as well as the property shall be the father and after him the mother. Since the age of Ku. Roshani is more than 5 years, obviously the appellant being her father is her natural guardian. Proviso to section 6 is in the nature of disqualification for being natural guardian in case if the father ceases to be Hindu or renounces the world completely or finally by becoming a hermit or ascetic. In the present case the appellant is an employee of Railway and has not incurred the disqualification under the said provision.

Section 13 of the said Act prescribes the appointment or declaration of any person as guardian of Hindu minor by Court. The welfare of minor should be the paramount consideration. It further lays down that no person shall be entitled to the guardianship by virtue of provisions of the Act (supra) or of any law relating to guardianship among Hindus, if the Court is of the opinion, the guardianship will not

be for the welfare of the minor. Little more and definitely more exhaustive provisions are made in section 17 of Guardians and Wards Act which is reproduced below :–

> "**17.** *Matters to be considered by the Court in appointing guardian* – (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, 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.
>
> (2) 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 a deceased parent and any existing or previous relations of the proposed guardian with the minor of his property.
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> (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.
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> (4) (Omitted by Act III of 1951, section 3 and Schedule).
>
> (5) The Court shall not appoint or declare any person to be a guardian against his will."

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5. POINT INVOLVED

Sections 7 and 25 of the Guardians and Wards Act, 1890 – Custody of minor – Rival claims of father and mother – Paramount consideration is welfare of child – The choice of minor should also be given due consideration.

Parties – *Sheila B. Das v. P.R. Sugasree*

Reported in – (2006) 3 SCC 62

Having regard to the complexities of the situation in which we have been called upon to balance the emotional confrontation of the parents of the minor child and the welfare of the minor, we have given anxious thought to what would be in the best interest of the minor. We have ourselves spoken to the minor girl, without

either of the parents being present, in order to ascertain her preference in the matter. The child who is a little more than 12 years of age is highly intelligent, having consistently done extremely well in her studies in school, and we were convinced that despite the tussle between her parents, she would be in a position to make an intelligent choice with regard to her custody. From our discussion with the minor, we have been able to gather that though she has no animosity as such towards her mother, she would prefer to be with the father with whom she felt more comfortable. The minor child also informed us that she had established a very good relationship with her paternal aunt who was now staying in her father's house and she was able to relate to her aunt in matters which would concern a growing girl during her period of adolescence.

We have also considered the various decisions cited by the appellant which were all rendered in the special facts of each case. In the said cases the father on account of specific considerations was not considered to be suitable to act as the guardian of the minor. The said decisions were rendered by the courts keeping in view the fact that the paramount consideration in such cases was the interest and well-being of the minor. In this case, we see no reason to consider the respondent ineligible to look after the minor. In fact, after having obtained custody of the minor child the respondent does not appear to have neglected the minor or to look after all her needs. The child appears to be happy in the respondent's company and has also been doing consistently well in school. The respondent appears to be financially stable and is also not disqualified in any was from being the guardian of the minor child. No allegation, other than his purported apathy towards the minor, has been levelled against the respondent by the appellant. Such an allegation is not borne out from the materials before us and is not sufficient to make the respondent ineligible to act as the guardian of the minor.

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6. POINT INVOLVED

Section 25 of the Guardians and Wards Act, 1890 – Custody of minor – Relevant

factors for deciding the issue of minor's custody.

Parties – *Ram Kishore Singh v. Nirmala Devi Kushwaha and another*

Reported in – 2006 (3) MPHT 156 (DB)

It is well settled that in matters concerning custody of minor children, welfare of the minor and not the legal right of this or that particular party is paramount consideration. Regarding custody of minor the following genuine facts are to be kept in mind:–

(a) Ascertainable wishes and feelings of the child concerned, considered in the light of his age and understanding.

(b) His physical, emotional and educational needs.

(c) The likely effect on him on any change in the circumstances.

(d) His age, sex, ground and any characteristics, which the Court considered relevant and lastly.

(e) Any harm which he has suffered or is at risk of suffering.

Therefore, the Court should take into consideration duly weightage to the relevant considerations and facts which appears to be just in the custody of the child welfare.

On the same guidelines about welfare of the child in ***Jayant Barar Vs. Deepak Barar, AIR 1994 NOC 269 MP***, the Court has expressed their opinion.

In this case, in the statement before the Court, the minor expressed his desire to live with his grand father. During the course of proceedings in appeal, by order of the Court, he was kept in hostel and both the parties were kept away so that he should not be influenced by either side. He has appeared before this Court on the date of final hearing of this appeal and in the Court he has again expressed that he wants to reside with his grand father, who is the present appellant.

The Apex Court has laid down some guidelines in similar circumstances in the case of ***Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi, AIR 1992 SC 1447***, in which it is laid down that,–

"Pursuant to our order dated March 27, 1992 the children namely, Vishal and Rikta are present before us in these chamber proceedings. Their Maternal uncle Kirtikumar and their father Pradipkumar are also present. Vishal and Rikta both are intelligent children. They are more matured than their age. We talked to the children exclusively for about 20/25 minutes in the chamber. Both of them are bitter about their father and narrated various episodes showing ill-treatment of their mother at the hands of their father. They categorically stated that they are not willing to live with their father. They further stated that they are very happy with their maternal uncle Kirtikumar who is looking after them very well. We tried to persuade the children to go and live with their father for some time but they refused to do so at present. After talking to the children, and assessing their state of mind, we are of the view that it would not be in the interest and welfare of the children to hand over their custody to their father Pradipkumar. We are conscious that the father, being a natural guardian, has a preferential right to the custody of his minor children but keeping in view the facts and circumstances of this case and the wishes of the children, who according to us are intelligent enough to understand their well-being, we are not inclined to hand over the custody of Vishal and Rikta to their father at this stage".

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7. POINT INVOLVED

Sections 7 and 17 of the Guardians and Wards Act, 1890, Sections 4, 6 & 13 of the Hindu Minority and Guardianship Act, 1956 and Section 26 of the Hindu Marriage Act, 1955 – Custody of minor – Selection of guardian – Paramount consideration is the welfare of the child and not statutory rights of parents – Court exercising 'parens patriae' jurisdiction – Principles governing custody of minor children reiterated.

Parties – ***Nil Ratan Kundu and another v. Abhijit Kundu***

Reported in – (2008) 9 SCC 413

English Law:

In *Halsbury's Laws of England,* 4th Edn., Vol. 24, Para 511 at p. 217, it has been stated:

> "511. …. Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."

It has also been stated that if the minor is of any age to exercise a choice, the court will take his wishes into consideration. (para 534, p. 229)

In ***McGrath (infants) Re, (1893) 1 Ch 143***, Lindley, L.J. observed: (Ch p. 148)

> "…The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

American Law:

The law in the United States is also not different. In *American Jurisprudence*, 2nd Edn., Vol. 39, Para 31, p. 34, it is stated:

> "As a rule, in the selection of a guardian of a minor, the best interest of the child is the paramount consideration, to which even the rights of parents must sometimes yield."

The child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.

In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

The primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child and the decision is reached by a consideration of the equities involved in the

welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate.

Indian Law :

The provisions of custody and guardianship of a child are in Sections 7 and 17 of the Guardians and Wards Act, 1890, in Sections 4 and 6 of the Hindu Minority and Guardians Act, 1956 and in Section 26 of Hindu Marriage Act of 1955. Going through these provisions and the previous pronouncements of the Apex Court in ***Saraswatibai Shripad Ved v, Shripad Vasanji Ved, AIR 1941 Bom 103, Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840, Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544, Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 69*** and ***Mausami Moitra Ganguli v. Jayant Ganguli, Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi, (1992) 3 SCC 573*** and of various High Courts in determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force.

It is not the 'negative test' that the father is not 'unfit' or disqualified to have custody of his son/daughter that is relevant, but the 'positive test' that such custody would be in the welfare of the minor which is material and it is on that basis that the court should exercise the power to grant or refuse custody of a minor in favour of the father, the mother or any other guardian.

A child is not property or commodity. Issues relating to custody of minors and tender aged children have to be handled with love, affection, sentiments and by applying human touch to the problem.

The final decision rests with the court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. *Normally,* therefore, in custody cases, wishes of the minor should be ascertained by the court before deciding as to whom the custody should be given.

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*8. POINT INVOLVED

Sections 6 (b) & 13 of the Hindu Minority and Guardianship Act, 1956 and Sections 7 and 17 of the Guardians and Wards Act, 1890 – In a case of illegitimate minor child or illegitimate unmarried girl, the mother is the natural guardian and thereafter the father – While in the aforesaid circumstances, guardianship is required to be decided, paramount consideration is welfare of the child.

Parties – ***Saudarabai v. Ram Ratan***

Reported in – 2008 (2) MPLJ 186

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*9. POINT INVOLVED

Sections 4, 6 & 13 of the Hindu Minority And Guardianship Act, 1956 and Sections 7 & 17 of the Guardians And Wards Act, 1890

Custody of minor child – Paramount consideration is the welfare of the child and not the statutory rights of the parties (parents) – Mature and human approach of the Court is required – The Court has to give due weightage to the child – Ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted – Proper balance between rights of the respective parents and the welfare of the child including choice of minor is important consideration – Court can exercise its *parens patriae* jurisdiction in such cases.

Parties – ***Gaurav Nagpal v. Sumedha Nagpal***

Reported in – (2009) 1 SCC 42

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*10. POINT INVOLVED

Sections 7 & 8 of the Guardians And Wards Act, 1890 – Minor child, custody of – Minor girl child was living with her grandmother – Father of the child was no more due to incurable ailment – Before his death he had executed a Will in favour of his mother and bequeathed all movable and immovable properties as he had no faith in his wife who was residing with her parents – It was also alleged that she is habituated to lead an independent life and had no concern and attachment for the minor child – She was also desirous to enter into a second wedlock – He also expressed his desire in the Will that his mother would look after and take care of his daughter – Held, although mother is the natural guardian but the welfare of child is paramount consideration – Child was ordered to be given to her grandmother and not to her mother.

Parties – ***Chhotibai (Smt.) v. Smt. Sunita Kushwah***

Reported in – 2009 (II) MPJR 412 (DB)

11. POINT INVOLVED

Sections 7, 9, 14 and 17 of the Guardians And Wards Act, 1890 and Private International Law – Child custody – In regards custody of a minor child, New York (USA) Court has, upon the consent of the disputing parents, passed the order – The mother of the child removed the child to India in contravention of the order, thereafter, the father of the child filed habeas corpus petition under Article 32 of the Constitution in the Supreme Court for production and handing over the custody of the child – The parents of child directed to seek order from the New York Court; having considered the interest of child and conformity with comity principle.

Parties – ***V. Ravi Chandran (Dr.) (2) v. Union of India and others***

Reported in – (2010) 1 SCC 174 (3-Judge Bench)

Admittedly, Adithya is an American citizen, born and brought up in United States of America. He has spent his initial years there. The natural habitat of Adithya is in United States of America. As a matter of fact, keeping in view the welfare and happiness of the child and in his best interest, the parties have obtained series of consent orders concerning his custody/parenting rights, maintenance etc. from the competent courts of jurisdiction in America. Initially, on 18.04.2005, a consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court whereunder the court granted joint custody of the child to the petitioner and respondent No. 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. In a

separation agreement entered into between the parties on 28.07.2005, the consent order dated 18.04.2005 regarding custody of minor son Adithya continued.

On 28.06.2007 respondent No. 6 brought minor Adithya to India informing the petitioner that she would be residing with her parents in Chennai.

On 08.08 2007, the petitioner filed the petition for modification (Custody) and Violation Petition (Custody) before the Family Court of the State of New York on which a show cause notice came to be issued to respondent No. 6. On that very day, the petitioner was granted temporary sole legal and physical custody of Adithya and respondent No. 6 was directed to immediately turn over the minor child and his passport to the petitioner and further her custodial time with the minor child was suspended and it was ordered that the issue of custody of Adithya shall be heard in the jurisdiction of the United States Courts, specifically, the Albany County Family Court. It transpires that the Family Court of the State of New York has issued child abuse non-bailable warrants against respondent No. 6.

In the backdrop of the aforenoticed facts, we have to consider—now since the child has been produced – what should be the appropriate order in the facts and circumstances keeping in mind the interest of the child and the orders of the courts of the country of which the child is a national.

While dealing with a case of custody of a child removed by a parent from one country to another in contravention to the orders of the court where the parties had set up their matrimonial home, the court in the country to which child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the

order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the Court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interest of the child. The indication given in ***McKee v. McKee, (1951) 1 All ER 942 (PC)*** that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interest of the child has been explained in ***L (Minors) In re., (1974) 1 ALL ER 913 (CA)*** and the said view has been approved by this Court in ***Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112***. Similar view taken by the Court of Appeal in ***H (Infants), In re. (1966) 1 AII ER 886 (CA)*** has been approved by this Court in ***Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42***.

Do the facts and circumstances of the present case warrant an elaborate enquiry into the question of custody of minor Adithya and should the parties be relegated to the said procedure before appropriate forum in this country in this regard? In our judgment, this is not required.

In the result and for the reasons stated, we pass the following order inter alia :

(i) The respondent No. 6 shall act as per the consent order dated 18.06.2007 passed by the Family Court of the State of New York till such time any further order is passed on the petition that may be moved by the parties henceforth and, accordingly, she will take the child Adithya of her own to the United States of America within fifteen days from today and report to that court.

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12. POINT INVOLVED

Sections 12 and 19 of the Guardians And Wards Act, 1890 – Guardianship and custody of minor child – Considerations are different – A person who is fit to be appointed as a guardian, may not be fit to get custody of the same child.

Parties – ***Athar Hussain v. Syed Siraj Ahmed & Ors.***

Reported in – AIR 2010 SC 1417

We are mindful of the fact that, as far as the matter of guardianship is concerned, the prima facie case lies in favour of the father as under Section 19 of the Guardians and wards Act, unless the father is not fit to be a guardian, the Court has no jurisdiction to appoint another guardian. It is also true that the respondents, despite the voluminous allegations leveled against the appellant have not been able to prove that he is not fit to take care of the minor children, nor has the Family Court or the High Court found him so. However, the question of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better. In the case of ***Rosy Jacob v. Jacob A. Chakramakkal, AIR 1973 SC 2090***, keeping in mind the distinction between right to be appointed as a Guardian and the right to claim custody of the minor child, this Court held so in the following oft-quoted words:

> "Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them."

In the case of Mt. ***Siddiqunnisa Bibi v. Nizamuddin Khan and Ors., AIR 1932 All 215***, which was a case concerning the right to custody under Mohammaden Law, the Court held:

> "A question has been raised before us whether the right under the Mahomedan law of the female relation of a minor girl under the age of puberty to the custody of the person of the girl is identical with the guardianship of the person of the minor or whether it is something different and distinct. The right to the custody of such a minor vested in her female relations, is absolute and is subject to several conditions including the absence of residing at a distance from the father's place of residence and want of taking proper care of the child. It is also clear that the supervision of the child by the father continues in spite of the fact that she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father."

Section 12 of the Act empowers courts to "make such order for the temporary custody and protection of the person or property of the minor as it thinks proper." In matters of custody, as well settled by judicial precedents, welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the Court to make any order as it deems proper.

Thus the question of guardianship can be independent of and distinct from that of custody in facts and circumstances of each case.

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13. POINT INVOLVED

> Sections 6 and 13 of the Hindu Minority And Guardianship Act, 1956 – Custody of minor – Considerations thereto – The interest of the minor is of paramount importance to the Court which stands in *loco parentis* to the minor – The wishes of

the minor are also to be given due weightage – Legal position reiterated.

Parties – ***Mohan Kumar Rayana v. Komal Mohan Rayana***

Reported in – (2010) 5 SCC 657

Having the interest of the minor in mind, we decided to meet her separately in order to make an assessment of her behavioural pattern towards both the petitioner as well as the respondent. Much against the submissions which have been made during the course of hearing of the matter, Anisha appeared to have no inhibitions in meeting the petitioner-father with whom she appeared to have an excellent understanding. There was no evidence of Anisha being hostile to her father when they met each other in our presence. From the various questions which we put to Anisha, who, in our view, is an extremely intelligent and precocious child, she wanted to enjoy the love and affection both of her father as well as her mother and even in our presence expressed the desire that what she wanted most was that they should come together again. However, Anisha seems to prefer her mother's company as the bonding between them is greater than the bonding with her father. Anisha is a happy child, the way she is now and having regard to her age and the fact that she is a girl child, we are of the view that she requires her mother's company more at this stage of her life.

There is no doubt that the petitioner is very fond of Anisha and is very concerned about her welfare and future, but in view of his business commitments it would not be right or even practicable to disturb the status quo prevailing with regard to Anisha's custody. The conditions laid down by the High Court regarding visitation rights to the petitioner are, in our view, sufficient for Anisha to experience the love and affection both of her father and mother. There is no reason why the petitioner, who will have access to Anisha on holidays and weekends, cannot look after her welfare without having continuous custody of her person.

As has repeatedly been said, in these matters the interest of the minor is of paramount importance to the Court which stands in loco parentis to the minor. Of

course, the wishes of the minor are to be given due weightage, and, in the instant case, the same has been done. We, therefore, see no reason to interfere with the order passed by the learned Principal Judge, Family Court, Mumbai at Bandra, as affirmed by the Bombay High Court.

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14. POINT INVOLVED

Section 9 (i) of the Guardians and Wards Act, 1890 and Order 7 Rule 11 of the Civil Procedure Code, 1908 – Expression "where the minor ordinarily resides", scope of – The question vested in the expression is a mixed question of fact and law and cannot be answered without holding enquiry into the factual aspects of controversy – As the applicability of provision of Order 7 Rule 11 of CPC is confined only to the averments made in petition, the mixed question regarding jurisdiction cannot be decided by way of an application under this provision.

Parties – ***Adesh Gupta and others v. Sadhna Gupta***

Reported in – 2012 (1) MPLJ 406

Section 9 (1) of the Act provides that application with regard to guardianship of the person of the minor shall be made to the District Court having jurisdiction in the place where the minor "ordinarily resides". The residence is a mere physical fact. It means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. When this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material See : ***Kedar Pandey v. Narain Bikram Sah, AIR 1966 SC 160.*** In

Yogesh Bhardwaj v. State of U.P. and others, (1990) 3 SCC 355, it has been held that residence is a physical fact and no volition is needed to establish it. Any period of physical presence, however short, may constitute residence provided it is not transitory, fleeting or casual. It has further been held that residence must be voluntary.

It is well settled in law that while dealing with the application under Order 7, Rule 11 of the Civil Procedure Code, only the averments made in the plaint alone are to be seen See : ***Saleem Bhai and others v. State of Maharashtra and others, 2003 (2) MPLJ (S.C.) 320 = (2003) 1 SCC 557.*** In the case of ***Ruchi Majoo v. Sanjee Majoo, 2011 (3) MPLJ (SC) 642 = (2011) 6 SCC 479,*** the Supreme Court while considering section 9(1) of the Act has held that solitary test for determining the jurisdiction of the Court under section 9 is ordinary residence of the minor. The expression used in section 9(1) of the Act is "where the minor ordinarily resides". Whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be mixed question of law and fact. It has further been held that unless jurisdictional facts are admitted, it can never be pure question of law capable of being answered without an enquiry into the factual aspects of the controversy.

Thus, from the aforesaid enunciation of law by the Supreme Court, it is apparent that the question whether the minor is ordinarily residing at a given place is primarily a question of fact which cannot be decided without an enquiry into the factual aspects. Besides that it is relevant to mention here that residence by volition or by compulsion within territorial jurisdiction of the Court cannot be treated as place of ordinary residence. Similarly, the words "ordinarily resides" are not identical and cannot have the same meaning as residence at the time of filing of the application for grant of custody. The purpose of using the expressions "where the minor ordinarily resides" is probably to avoid the

mischief that minor may be forcibly removed to a distant place, but still the application for minor's custody could be filed within the jurisdiction of the Court from whose jurisdiction he had been removed or in other words where the minor would have continued to remain but for his removal. Similar view has been taken in ***Konduparthi Venkateshwarlu and others v. Ramavarapu Viroja Nandan and others, AIR 1989 Orissa 151.*** If the averments made by the respondent in paragraphs 4, 11, 15 and 16 of the petition filed by her are seen, it is apparent, that the children have been removed from Chhattarpur without her consent. The jurisdictional facts are not admitted and the petition, contains the averment that the Court at Chhattarpur has the territorial jurisdiction to try the petition. The question whether the Court at Chhattarpur has territorial jurisdiction to try the petition is a mixed question of law and fact, as the same is dependent on the question whether the minors are residing within the territorial jurisdiction of the Court. The aforesaid question cannot be determined without holding enquiry into the factual aspects of the controversy. The scope of scrutiny at the stage of consideration of an application under Order 7, Rule 11 of Civil Procedure Code is confined only to the averments made in the petition. Thus, the question whether the Court has territorial jurisdiction being mixed question of law and fact cannot be decided by way of an application under Order 7, Rule 11 of Civil Procedure Code.

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15. POINT INVOLVED

Sections 7 and 47 of the Guardians and Wards Act, 1890 – Custody of child – Welfare and wishes of a child are paramount consideration – It is not only the physical but also the mental welfare which has to be taken into consideration – Term 'guardian' has to be measured not

only in terms of money and physical comfort but also in terms of moral and ethical welfare of the child.

Parties – *Sharif Khan v. Muniya Khan*

Reported in – 2013 (4) MPLJ 244 (DB)

In matters relating to the custody of children, the welfare and wishes of the child are of paramount importance. It is not only the physical but also the mental welfare which has to be taken into consideration by the Courts.

The term guardian has to be taken in its widest possible sense. It has to be measured not only interms of money and physical comfort but also should include moral and ethical welfare of the child. The Hon'ble Supreme Court, in the case of ***Elizabeth Dinshaw v. Arvind M. Dinshaw. AIR 1987 SC 3,*** has held that whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.

Admittedly, the father being a natural guardian of a minor has a preferential right to claim custody of his child but the Court has to see the welfare of the child and not the legal right of a particular party. Hence, after considering the arguments and going through the reasonings on record, we see no reason to allow the appeal. Same is accordingly dismissed.

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*16. POINT INVOLVED

Sections 7, 10, 17 and 47 of the Guardians and Wards Act, 1890 – Custody of a child,

determination of – The paramount consideration is the welfare of the child and not right of the father – The father's right to the custody of the minor child is neither absolute nor is it indefeasible in law – It is circumscribed by the consideration of the benefit and welfare of the minor – A balance has to be struck between the attachments and sentiments of the parties and the welfare of the child.

Parties – ***Rajeev Varma v. Santosh Kumar Kushwaha***

Reported in – 2014 (1) MPHT 326 (DB)

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***17. POINT INVOLVED**

Section 7 (1) (g) of the Family Courts Act, 1986 and Section 25 of the Guardians And Wards , 1890 – Application under section 25 of Guardians and Wards Act for return of custody, jurisdiction therefor – Only Family Court can exercise jurisdiction to decide such application and in view of power created by Family Courts Act, 1984, District Court has no jurisdiction to entertain such application.

Parties – ***Deedar Singh Dhillan and another v. Preetpal Singh Chadda***

Reported in – 2014 (2) MPLJ 194

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***18. POINT INVOLVED**

Section 8 of the Hindu Minority And Guardianship Act, 1956 – Sale of immovable property of minor by natural guardian, nature of such transaction – Held, such transaction is voidable and not void.

Parties – ***Nangali Amma Bhavani Amma v. Gopal Krishnan Nair and others***

Reported in – (2004) 8 SCC 785

The learned counsel for the appellant is right in contending that the High Court had misconstrued the provisions of Section 8 of the Act. Section 8 (1) empowers the natural guardian of a Hindu minor to do all acts which are necessary or reasonable and proper for the benefit of a minor or for the realisation, protection or benefit of the minor's estate subject to two exceptions of which we may only note the exception carved out in sub-section (2) of Section 8. Section 8 (2) provides that the natural guardian shall not without the previous permission of the Court, inter alia, transfer by way of a sale any part of the immovable property of a minor. The effect of violation of this provision has been provided for in the section itself under sub-section (3). This sub-section reads:

> "8. (3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him".

In view of the express language used, it is clear that the transaction entered into by the natural guardian in contravention of sub-section (2) was not void but merely voidable at the instance of the minor. To hold that the transaction in violation of Section 8(2) is void would not only be contrary to the plain words of the statute but would also deprive the minor of the right to affirm or ratify the transaction upon attaining majority. This Court in ***Vishvambhar v. Laxminarayan, (2001) 6 SCC 163*** has also held that such transactions are not void but merely voidable. It was

also held that a suit must be filed by a minor in order to avoid the transaction within the period prescribed under Article 60 of the Limitation Act.

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