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

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1. POINT INVOLVED

Section 8 of the Hindu Minority and Guardianship Act, 1956 – Joint Hindu Family Property.

Parties – ***Hazarilal v. Jugal Kishore***

Reported in – 1998 (2) JLJ 177

Section 8 will not apply where minor possessing joint interest in the family property. ***Suggabai v. Heeralal, 1969 JLJ 227*** and ***Gullu v. Bhag Chand, 1928 WN 68*** were relied on. If major son is in existence mother alone cannot execute agreement for sale and bind the whole property and shares. ***Balamukund v. Komalwati, AIR 1964 SC 1385*** was relied on. Reference was made to Section 243-A of "*The Principles of Hindu Law*" by Mulla. If the property is alienated and if it is joint property the recital of legal necessity is not individual. It provides only corroborative evidence such recitals should be proved as a fact. ***Smt. Rani and Others v. Smt. Shanta Bala, AIR 1971 SC 1028*** and ***Ram Krishna v. Vittal Rao, 1978 JLJ 450***.

TRANSFER OF HINDU JOINT FAMILY PROPERTY:- Transferee has to prove that the transfer is for actual legal necessity or for the benefit of the estate. Transferee has also to prove that he made bonafide enquiry to the above need etc. ***Teja Singh Vs. Sodan Singh, 1978 part II MPWN 180***.

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2. POINT INVOLVED

Section 4 & 8 of the Hindu Minority and Guardianship Act, 1956 – Guardian not appointed as such under Section 4 is not a natural guardian and he cannot act as guardian. No guardian can transfer property of minor without permission of Court.

Parties – ***Rajaram v. Mahila Batto Devi***

Reported in – 1999 R.N. 208 (HC)

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3. POINT INVOLVED

Section 6 (A) of the Hindu Minority and Guardianship Act, 1956 – Mother can act as natural guardian of minor even when father is alive. Word 'after' in S. 6 (a) has to be read as meaning "in the absence of father" to make the section consistent with constitutional safeguard of gender equality. Section 19 (b) of Guardians and words Act has to be construed similarly. The Supreme Court held the decision to operate prospectively.

Parties – ***Ms. Githa Hariharan v. Reserve Bank of India***

Reported in – AIR 1999 SC 1149

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4. POINT INVOLVED

Section 8 & 8(3) of the Hindu Minority and Guardianship Act, 1956 – Alienation by *Karta*: question of validity.

Parties – ***Prakash Chandra v. Nanda Kishore***

Reported in – 2000 (2) Vidhi Bhasvar 162

This section applies only to exclusive property of minor. Alienation by his natural guardian without permission can be challenged only by such minor and none else is competent to challenge.

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5. POINT INVOLVED

Section 6 of the Hindu Minority and Guardianship Act, 1956 – Mother can be guardian during the lifetime of the father.

Parties – *Prakash Chandra v. Nanda Kishore*

Reported in – 2000 (2) Vidhi Bhasvar 162

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 provision of Section 8(2) of the Hindu Minority and Guardianship Act has no application to the instant case.

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6. POINT INVOLVED

Section 8 (2) of the Hindu Minority and Guardianship Act, 1956 – Joint family property in which minor had interest – Sale by father – Provisions not applicable.

Parties – *Kamal Kishore v. Ramswarup*

Reported in – 2001 (1) M.P.H.T. 349

In order to attract Section 8(2) of the Hindu Minority and Guardianship Act, the property should be the property of minor and not the property of the family. When the land sold by father of the minor was joint family property of several persons and not the individual property of the minor alone, the provisions of section 8(2) did not apply to the case. ***Gullu v. Bhagchand, MPWN 1982 SN 68*** relied on.

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7. 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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8. POINT INVOLVED

Sections 6 & 13 of the Hindu Minority and Guardianship Act, 1956 – 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.
> (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.
> (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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9. POINT INVOLVED

Section 6 & 13 of The Hindu Minority and Guardianship Act, 1956 – 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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10. POINT INVOLVED

Sections 4, 6 & 13 of The Hindu Minority and Guardianship Act, 1956 – 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 698, Mausami Moitra Ganguli v. Jayant Ganguli*** and ***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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11. POINT INVOLVED

Section 4, 6 & 13 of The Hindu Minority and Guardianship Act, 1956 – 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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12. POINT INVOLVED

Section 6 & 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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13. POINT INVOLVED

Section 8 of the Hindu Minority and Guardianship Act,1956 – Natural guardian, powers of – Whether natural guardian can alienate properties of minor without previous permission of the Court? Held, No – Law explained – Further held, such property can be sold by the natural guardian for the proper benefit, protection, education etc. of the minor with the leave of the Court.

Parties – ***Saroj v. Sunder Singh & ors.***

Reported in – 2014 (II) MPJR (SC) 80

Section 8 of the Hindu Minority and Guardianship Act, 1956 deals with the powers of natural guardian of a Hindu minor and the said section mandates that the natural guardian has power to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate, etc. The provision reads as follows:

> "***8. Powers of natural guardian***. (1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the

minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor; or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

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

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in subsection (2) except in case of necessity or for an evident advantage to the minor.

As per clause (a) of subsection (2) of Section 8 no immovable property of the minor can be mortgaged or charged, or transferred by sale, gift, exchange or otherwise without the previous permission of the Court. Under subsection (3) of Section 8 disposal of such an immovable property by a natural guardian, in contravention of subsection (1) or subsection (2) of Section 8, is voidable at the instance of the minor or any person claiming under him.

In the present case, though it is stated that the property has been sold for the proper benefit of the minors, their protection, education and marriage, there is nothing on record to suggest that previous permission of the Court was obtained by the natural guardian before transfer by sale in question.

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14. POINT INVOLVED

Section 6 of the Hindu Minority and Guardianship Act, 1956 – Custody, determination of – The paramount consideration is the welfare of the child and not the rights of his/her parents – Keeping in view paramount consideration, the order of

Additional District Judge giving custody of the girl aged 4½ years to the mother – Held, proper.

Parties – ***Surendra Patel and another v. Ritu @ Vandana Patel***

Reported in – 2014 (4) MPHT 334 (DB)

The paramount consideration of this case is "the welfare of the child" and not the rights of her parents. On this point, a judgment of this Court in the matter of ***Rajeev v. Santosh Kumar, 2014 (2) MPLJ 408***, may be referred in which it was held that in case of minor girl, paramount consideration is "welfare of child" and not rights of her parents. We may also refer the judgment of Hon'ble Supreme Court in the case of ***Gaurav Nagpal v. SumedhaNagpal, passed in Civil Appeal No.5099/2007 on 19/11/2008***, wherein in para 40 of the judgment, the Hon'ble Supreme Court has observed that

> "Merely because there is no defect in his personal care and his attachment for his children, which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the 25 requirements of welfare of the minor children and the rights of their respective parents over them."

The Hon'ble Court also referred the order passed in ***Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu, (1984) 3 SCC 698***, wherein it was held that Section 6 of the Act constitutes father as a natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. Further in para 43 in its judgment, the Court observed that the moral and

ethical welfare of the child must also weigh with the Court as well as its physical well being.

Returning back to the present case, it was informed by the learned counsel to the Bench during the argument that both the families belong to agricultural class. They have similar financial and social background. The daughter is still 4½ years old and the mother is capable for taking care her properly. Since both the families have similar financial and social background. The child is still below five years of age, we find that the impugned order is according to the principles laid down in the aforementioned cases of Hon'ble the Apex Court and does not call for any interference.

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15. POINT INVOLVED

Section 6 of the Hindu Minority and Guardianship Act, 1956

- Custody of a child, determination of – Best interests and welfare of the child are of paramount importance.
- Custody of child ordinarily residing in foreign country and is brought in India, principles applicable.

Parties – ***Surya Vadanan v. State of Tamil Nadu and others***

Reported in – AIR 2015 SC 2243

In such a case, following two contrasting principles of law are applicable; (a) the principle of Comity of Court and (b) the principles of best interest and welfare of the child.

In cases where child is brought in India, firstly it must be appreciated that the 'most intimate contact' doctrine and 'closest concern' doctrine are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations – It is not appropriate that a domestic Court having much less intimate contact

with a child and having much less close concern with a child and his or her parents as against a foreign Court in a given case should take upon itself the onerous task of determining the best interests and welfare of the child – Even an interim or interlocutory order passed by foreign Courts have to be given respect and due weightage unless there are some special reasons for not doing so – If the jurisdiction of the foreign Court is not in doubt, 'first strike' principle would be applicable i.e. due respect and weightage must be given to a substantive order prior in point of time to a substantive order passed by another Court.

Repatriation as per custodial order of foreign Court, when can be ordered? Law stated.(iv) Defiance of interlocutory or interim order – Must be viewed seriously as it would have deleterious effect on rule of law.

We are concerned with two principles in a case such as (i) The principle of comity of courts and (ii) The principle of the best interests and the welfare of the child. These principles have been referred to "contrasting principles of law"32 but they are not 'contrasting' in the sense of one being the opposite of the other but they are contrasting in the sense of being different principles that need to be applied in the facts of a given case. What then are some of the key circumstances and factors to take into consideration for reaching this final goal or final objective? First, it must be appreciated that the "most intimate contact" doctrine and the "closest concern" doctrine of ***Surinder Kaur Sandhu v. Harbas Singh Sandhu, AIR 1984 SC 1224*** are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. This is a factor that must be kept in mind. Second, there is no reason why the principle of "comity of courts" should be jettisoned,

except for special and compelling reasons. This is more so in a case where only an interim or an interlocutory order has been passed by a foreign court (as in the present case).

In ***McKee v.McKee*** which has been referred to in several decisions of this court, the Judicial Committee of the Privy Council was not dealing with an interim or an interlocutory order but a final adjudication. The applicable principles are entirely different in such cases. In this appeal, we are not concerned with a final adjudication by a foreign court – the principles for dealing with a foreign judgment are laid down in Section 13 of the Code of Civil Procedure. In passing an interim or an interlocutory order, a foreign court is as capable of making a prima facie fair adjudication as any domestic court and there is no reason to undermine its competence or capability. If the principle of comity of courts is accepted, and it has been so accepted by this court, we must give due respect even to such orders passed by a foreign court. The High Court misdirected itself by looking at the issue as a matter of legal rights of the parties. Actually, the issue is of the legal obligations of the parties, in the context of the order passed by the foreign court.

If an interim or an interlocutory order passed by a foreign court has to be disregarded, there must be some special reason for doing so. No doubt we expect foreign courts to respect the orders passed by courts in India and so there is no justifiable reason why domestic courts should not reciprocate and respect orders passed by foreign courts. This issue may be looked at from another perspective. If the reluctance to grant respect to an interim or an interlocutory order is extrapolated into the domestic sphere, there may well be situations where a Family Court in one State declines to respect an interim or an interlocutory order of a Family Court in another State on the ground of best interests and welfare of the child. This may well happen in a case where a person ordinarily resident in one State gets married to another person ordinarily resident in another State and they reside with their child in a third State. In such a situation, the Family Court having the most intimate contact and the closest concern with the child (the court in the third State) may find its orders not being given due respect by a Family Court in the first or the

second State. This would clearly be destructive of the equivalent of the principle of comity of courts even within the country and, what is worse, destructive of the rule of law.

What are the situations in which an interim or an interlocutory order of a foreign court may be ignored? There are very few such situations. It is of primary importance to determine, prima facie, that the foreign court has jurisdiction over the child whose custody is in dispute, based on the fact of the child being ordinarily resident in the territory over which the foreign court exercises jurisdiction. If the foreign court does have jurisdiction, the interim or interlocutory order of the foreign court should be given due weight and respect. If the jurisdiction of the foreign court is not in doubt, the "first strike" principle would be applicable. That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic). There may be a case, as has happened in the present appeal, where one parent invokes the jurisdiction of a court but does not obtain any substantive order in his or her favour and the other parent invokes the jurisdiction of another court and obtains a substantive order in his or her favour before the first court. In such an event, due respect and weight ought to be given to the substantive order passed by the second court since that interim or interlocutory order was passed prior in point of time. As mentioned above, this situation has arisen in the present appeal – Mayura had initiated divorce proceedings in India before the custody proceedings were initiated by Surya in the U.K. but the foreign court passed a substantive order on the custody issue before the domestic court. This situation also arose in ***Ruchi Majoo v. Sanjeev Majoo, AIR 2011 SC 1952*** where Ruchi Majoo had invoked the jurisdiction of the domestic court before Rajiv Majoo but in fact Rajiv Majoo obtained a substantive order from the foreign court before the domestic court. While the substantive order of the foreign court in Ruchi Majoo was accorded due respect and weight but for reasons not related to the principle of comity of courts and on merits, custody of the child was handed over to Ruchi Majoo, notwithstanding the first strike principle.

As has been held in ***Arathi Bandi v. BandiJagadrakshaka Rao, (2013) 15 SCC 790*** a violation of an interim or an interlocutory order passed by a court of competent jurisdiction ought to be viewed strictly if the rule of law is to be maintained. No litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of a court merely because he or she is of the opinion that that order is incorrect – that has to be judged by a superior court or by another court having jurisdiction to do so. It is in this context that the observations of this court in ***Sarita Sharma v. Sushil Sharma, AIR 2000 SC 1019*** and ***RuchiMajoo*** (supra) have to be appreciated. If as a general principle, the violation of an interim or an interlocutory order is not viewed seriously, it will have widespread deleterious effects on the authority of courts to implement their interim or interlocutory orders or compel their adherence. Extrapolating this to the courts in our country, it is common knowledge that in cases of matrimonial differences in our country, quite often more than one Family Court has jurisdiction over the subject matter in issue. In such a situation, can a litigant say that he or she will obey the interim or interlocutory order of a particular Family Court and not that of another? Similarly, can one Family Court hold that an interim or an interlocutory order of another Family Court on the same subject matter may be ignored in the best interests and welfare of the child? We think not. An interim or an interlocutory is precisely what it is - interim or interlocutory – and is always subject to modification or vacation by the court that passes that interim or interlocutory order. There is no finality attached to an interim or an interlocutory order. We may add a word of caution here – merely because a parent has violated an order of a foreign court does not mean that that parent should be penalized for it. The conduct of the parent may certainly be taken into account for passing a final order, but that ought not to have a penalizing result.

Finally, this court has accepted the view that in a given case, it might be appropriate to have an elaborate inquiry to decide whether a child should be repatriated to the foreign country and to the jurisdiction of the foreign court or in a given case to have a summary inquiry without going into the merits of the dispute relating to the best interests

and welfare of the child and repatriating the child to the foreign country and to the jurisdiction of the foreign court.

However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

(a) The nature and effect of the interim or interlocutory order passed by the foreign court.

(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.

(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the concerned foreign court or the concerned domestic court is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.

Discussion on facts:

The facts in this appeal reveal that Surya and Mayura are citizens of the U.K. and their children are also citizens of the U.K.; they (the parents) have been residents of the U.K. for several years and worked for gain over there; they also own immovable property (jointly) in the U.K.; their children were born and brought up in the U.K. in a social and cultural milieu different from that of India and they have grown up in that different milieu; their elder daughter was studying in a school in the U.K. until she was brought to India and the younger daughter had also joined a school in the U.K.

meaning thereby that their exposure to the education system was different from the education system in India. The mere fact that the children were admitted to a school in India, with the consent of Surya is not conclusive of his consent to the permanent or long term residence of the children in India. It is possible, as explained by his learned counsel, that he did not want any disruption in the education of his children and that is why he consented to the admission of the children in a school in India. This is a possible explanation and cannot be rejected outright.

Mayura has not taken any steps to give up her foreign citizenship and to acquire Indian citizenship. She has taken no such steps even with respect to her children. Clearly, she is desirous of retaining her foreign citizenship at the cost of her Indian citizenship and would also like her children to continue with their foreign citizenship, rather than take Indian citizenship. That being the position, there is no reason why the courts in India should not encourage her and the children to submit to the jurisdiction of the foreign court which has the most intimate contact with them and closest concern apart from being located in the country of their citizenship. The fact that Mayura is of Indian origin cannot be an overwhelming factor.

Though Mayura filed proceedings for divorce in India way back in August 2012, she made no serious effort to obtain any interim order in her favour regarding the custody of the children, nor did she persuade the trial court for more than two years to pass an interim order for the custody of the children. On the other hand, the foreign court acted promptly on the asking of Surya and passed an interim order regarding the custody of the children, thereby making the first strike principle applicable.
It would have been another matter altogether if the Family Court had passed an effective or substantial order or direction prior to 13th November, 2012 then, in our view, the foreign court would have had to consider exercising self-restraint and abstaining from disregarding the direction or order of the Family Court by applying the principle of comity of courts. However, since the first effective order or direction was passed by the foreign court, in our opinion, principle of comity of courts would tilt the balance in favour of that court rather than the Family Court. We are assuming that the Family Court

was a court of competent jurisdiction although we must mention that according to Surya, the Family Court has no jurisdiction over the matter of the custody of the two children of the couple since they are both British citizens and are ordinarily residents of the U.K. However, it is not necessary for us to go into this issue to decide this because even on first principles, we are of the view that the orders or directions passed by the foreign court must have primacy on the facts of the case, over the Family Court in Coimbatore. No specific or meaningful reason has been given to us to ignore or bypass the direction or order of the foreign court.

We have gone through the orders and directions passed by the foreign court and find that there is no final determination on the issue of custody and what the foreign court has required is for Mayura to present herself before it along with the two children who are wards of the foreign court and to make her submissions. The foreign court has not taken any final decision on the custody of the children. It is quite possible that the foreign court may come to a conclusion, after hearing both parties that the custody of the children should be with Mayura and that they should be with her in India. The foreign court may also come to the conclusion that the best interests and welfare of the children requires that they may remain in the U.K. either under the custody of Surya or Mayura or their joint custody or as wards of the court during their minority. In other words, there are several options before the foreign court and we cannot jump the gun and conclude that the foreign court will not come to a just and equitable decision which would be in the best interests and welfare of the two children of the couple.

The orders passed by the foreign court are only interim and interlocutory and no finality is attached to them. Nothing prevents Mayura from contesting the correctness of the interim and interlocutory orders and to have them vacated or modified or even set aside. She has taken no such steps in this regard for over two years. Even the later order passed by the foreign court is not final and there is no reason to believe that the foreign court will not take all relevant factors and circumstances into consideration before taking a final view in the matter of the custody of the children. The foreign court may well be inclined, if the facts so warrant, to pass an order that the custody of the

children should be with Mayura in India. There is also nothing on the record to indicate that any prejudice will be caused to the children of Mayura and Surya if they are taken to the U.K. and subjected to the jurisdiction of the foreign court. There is nothing to suggest that they will be prejudiced in any manner either morally or physically or socially or culturally or psychologically if they continue as wards of the court until a final order is passed by the foreign court. There is nothing to suggest that the foreign court is either incompetent or incapable of taking a reasonable, just and fair decision in the best interests of the children and entirely for their welfare. There is no doubt that the foreign court has the most intimate contact with Mayura and her children and also the closest concern with the well being of Mayura, Surya and their children. That being the position even though Mayura did not violate any order of the foreign court when she brought her children to India, her continued refusal to abide by the interim and interlocutory order of the foreign court is not justified and it would be certainly in the best interests and welfare of the children if the foreign court, in view of the above, takes a final decision on the custody of the children at the earliest. The foreign court undoubtedly has the capacity to do so.

We have considered the fact that the children have been in Coimbatore since August 2012 for over two years. The question that arose in our minds was whether the children had adjusted to life in India and had taken root in India and whether, under the circumstances, it would be appropriate to direct their repatriation to the U.K. instead of conducting an elaborate inquiry in India. It is always difficult to say whether any person has taken any root in a country other than that of his or her nationality and in a country other than where he or she was born and brought up. From the material on record, it cannot be said that life has changed so much for the children that it would be better for them to remain in India than to be repatriated to the U.K. The facts in this case do not suggest that because of their stay in India over the last two years the children are not capable of continuing with their life in the U.K. should that become necessary. However, this can more appropriately be decided by the foreign court after taking all factors into consideration.

It must be noted at this stage that efforts were made by this court to have the matter of custody settled in an amicable manner, including through mediation, as recorded in a couple of orders that have been passed by this court. Surya had also agreed to and did temporarily shift his residence to Coimbatore and apparently met the children. However, in spite of all efforts, it was not possible to amicably settle the issue and the mediation centre attached to this court gave a report that mediation between the parties had failed. This left us with no option but to hear the appeal on merits. Given these facts and the efforts made so far, in our opinion, there is no reason to hold any elaborate inquiry as postulated in ***L. (Minors), In re, (1974) 1AII ER 913 (C.A.)***. This elaborate inquiry is best left to be conducted by the foreign court which has the most intimate contact and the closest concern with the children. We have also noted that Surya did not waste any time in moving the foreign court for the custody of the children. He moved the foreign court as soon as he became aware (prior to the efforts made by this court) that no amicable solution was possible with regard to the custody of the children. We are conscious that it will not be financially easy for Mayura to contest the claim of her husband Surya for the custody of the children. Therefore, we are of the opinion that some directions need to be given in favour of Mayura to enable her to present an effective case before the foreign court. Accordingly, we direct as follows:-

1. Since the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan are presently studying in a school in Coimbatore and their summer vacations commence (we are told) in May, 2015 Mayura Vadanan will take the children to the U.K. during the summer vacations of the children and comply with the order dated 29th November, 2012 and participate (if she so wishes) in the proceedings pending in the High Court of Justice. Surya Vadanan will bear the cost of litigation expenses of Mayura Vadanan.
2. Surya Vadanan will pay the air fare or purchase the tickets for the travel of Mayura Vadanan and the children to the U.K. and later, if necessary, for their return to India. He shall also make all arrangements for their comfortable stay in their matrimonial home, subject to further orders of the High Court of Justice.

3. Surya Vadanan will pay maintenance to Mayura Vadanan and the children at a reasonable figure to be decided by the High Court of Justice or any other court having jurisdiction to take a decision in the matter. Until then, and to meet immediate out of pocket expenses, Surya Vadanan will give to Mayura Vadanan prior to her departure from India an amount equivalent to £1000 (Pounds one thousand only).

4. Surya Vadanan shall ensure that all coercive processes that may result in penal consequences against Mayura Vadanan are dropped or are not pursued by him.

5. In the event Mayura Vadanan does not comply with the directions given by us, Surya Vadanan will be entitled to take the children with him to the U.K. for further proceedings in the High Court of Justice. To enable this, Mayura Vadanan will deliver to Surya Vadanan the passports of the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan.

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16. POINT INVOLVED

Section 6 of the Hindu Minority and Guardianship Act, 1956 – Infant, custody of – Must ordinarily be given to the mother – Proviso places burden on father to prove that grant of custody to mother is not in the welfare of the child – Order refusing interim custody to mother on the ground that she has failed to establish her suitability to be entitled for interim custody of infant, held to be not proper

Parties – ***Roxann Sharma v. Arun Sharma***

Reported in – AIR 2015 SC 2232

Section 3 of the Hindu Minority and Guardianship Act clarifies that it applies to any person who is a Hindu by religion and to any person domiciled in India who is not a Muslim, Christian, Parsi or Jew unless it is proved that any such person would not have been governed by Hindu Law. In the present case, the Mother is a Christian but inasmuch as she has not raised any objection to the applicability of the HMG Act, we shall presume that Thalbir is governed by Hindu Law. Even in the proceedings before us it has not been contested by the learned Senior Advocate that the HMG Act does not operate between the parties. Section 6 of the HMG Act is of seminal importance. It reiterates Section 4(b) and again clarifies that guardianship covers both the person as well as the property of the minor; and then controversially states that the father and after him the mother shall be the natural guardian of a Hindu. Having said so, it immediately provides that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. The significance and amplitude of the proviso has been fully clarified by decisions of this Court and very briefly stated, a proviso isin the nature of an exception to what has earlier been generally prescribed. The use of the word "ordinarily" cannot be over-emphasised. It ordains a presumption, albeit a rebuttable one, in favour of the mother. The learned Single Judge appears to have lost sight of the significance of the use of word "ordinarily" inasmuch as he has observed in paragraph 13 of the Impugned Order that the Mother has not established her suitability to be granted interim custody of Thalbir who at that point in time was an infant. The proviso places the onus on the father to prove that it is not in the welfare of the infant child to be placed in the custody of his/her mother. The wisdom of the Parliament or the Legislature should not be trifled away by a curial interpretation which virtually nullifies the spirit of the enactment.

We shall abjure for making any further observations as the trial is still pending. Keeping in mind the facts and circumstances which have been disclosed before us, we set aside the impugned Order dated 18.09.2014. It is not in consonance with the previous order of a co-ordinate Bench and in fact severely nullifies its salient directions. We set aside the impugned Order dated 2nd August, 2014 inter alia for the reason that it

incorrectly shifts the burden on the Mother to show her suitability for temporary custody of the infant Thalbir and, therefore, runs counter to the provisions contained in Section 6 of the HMG Act. We clarify that nothing presented by the Father, or placed on the record discloses that the Mother is so unfit to care for the infant Thalbir as justifies the departure from the statutory postulation in Section 6 of the HMG Act. Visitation rights succinctly stated are distinct from custody or interim custody orders. Essentially they enable the parent who does not have interim custody to be able to meet the child without removing him/her from the custody of the other parent. If a child is allowed to spend several hours, or even days away from the parent who has been granted custody by the Court, temporary custody of the child stands temporarily transferred.

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