

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 1389 of 2023

Rishi Agarwal

VERSUS

Dipika Agarwal Nee Khaitan

For the petitioner:

Mr. Uday Gupta, Sr. Adv.
Ms. Bishalaxmi Ghosh, Adv.
Mr. Amit Bikram Mahata, Adv.
Ms. Amrita Mitra, Adv.
Mr. Arindam Paul, Adv.
Ms. Debarati Das, Adv.
Ms. Jayeeta Das, Adv.
Ms. Dipannita Dutta, Adv.

For the opposite party :

Last Heard On: May, 22, 2024

Judgment on: May 24, 2024

Biswaroop Chowdhury,J:

This revisional application is directed against the order No-51 dated 11.04.2023 passed by Learned Additional District Judge 10th Court at Alipore 24 Parganas (s) in Act VIII case No-17 of 2019, in an application under Section 12 of the Guardians and Wards Act read with Section 151 CPC and

Order XXXIX Rule 1 and 2 CPC filed by the petitioner/father Rishi Agarwal. The Learned Trial Court by Order dated 11.04.2023 was pleased to reject the prayer for temporary/interim custody of the child made by the petitioner.

The Petitioner being aggrieved by the order of the Learned Trial Court has come up with the instant application.

The case of the petitioner may be summed up thus.

1. The petitioner and the opposite party/respondent got married as per the Hindu rites and ceremonies at Kolkata on 24-11-2012, and on 7-01-2013 the marriage was registered.
2. On 23-10-2013 a female child was born to the parties, and in the year 2016, the child was admitted to Lower Nursery Standard in La Martinere for Girls school Kolkata.
3. In the year 2017, the child was promoted to Upper Nursery Standard in La Martinere for Girls school Kolkata. On 24-11-2018 the Respondent/opposite party of her own volition left the matrimonial home along with the child and started staying at South City Residency Flat No. 5B, Tower III 375, Prince Anwar Shah Road, Kolkata-700068 and the Child attended La Martiniere for Girls School, Kolkata, while residing in the said flat till the initiation of winter vacations for the year 2018. The said flat belongs to the father of the respondent.

4. On 25-11-2018, Respondent came back to the matrimonial home, to collect her belongings and took all her belongings.
5. The Respondent issued an e-mail dated 16.01.2019 to the Administrator Head of the La Martiniere School for Girls, Kolkata stating that she was separating from the Petitioner due to personal reasons and that she was residing at her maternal house in Mallarpur, District Birbhum (West Bengal) and it was a matter of time that she would shift to Kolkata.
6. On 25-01-2019 the petitioner filed a suit for divorce against the Respondent before the Ld. Additional District Judge South 24 Parganas being MAT case No. 246/2019.
7. Again the Petitioner filed application under Section 25 of the Guardians and Wards Act 1890, dated 5-02-2019 before the Learned District Judge at Alipore South 24 Parganas and the same was registered as Act VIII case No-17 of 2019 against the Respondent along with an Interlocutory Application under Section 12 of the said Act.

The Prayers made in the application under Section 12 of the Guardians and Wards Act are as follows:

- a) An Order of injunction restraining the Respondent from taking the child outside the jurisdiction of the Learned Court below without permission of the said Court.

- b) An Order of injunction restraining the respondent from seeking any transfer certificate from La Martiniere School for Girls with respect to the minor daughter Sambhuti Agarwal, who is at present student of class K.G. in the said school.
 - c) An Order directing the Respondent to send the minor daughter Sambhuti Agarwal student of class KG in La Martiniere School for Girls, regularly for school;
 - d) An Order directing the Respondent to produce the minor daughter Sambhuti Agarwal at such place and time before the Petitioner and his family members.
 - e) An Order be passed for the temporary custody of the minor daughter and for her welfare and well being till the adjudication of the proceeding for grant of permanent custody.
 - f) Ad interim Order and/or Orders in terms of the prayers above.
8. By Order dated 05-02-2019 passed in Act VIII case No. 17 of 2019, the Ld. District Judge, Alipore, South 24 Parganas was pleased to record that the child was studying in La Martinier for Girls School Kolkata, and that prayer made in the Interim Application was that the child should not be taken outside the jurisdiction of the said Learned Court without prior permission. By ad-interim injunction in favour of the petitioner, the respondent/opposite party was restrained from taking Transfer Certificate of the child from La Martiniere for Girls School Kolkata.

9. In the meantime by email dated 16.01.2019 issued by the Respondent/opposite party the principal of La Martiniere School for Girls granted leave to withdraw the child with permission to re-join.
10. The respondent/opposite party instead of appearing before the Ld. District Judge at Alipore South 24 Parganas filed an application under Section 24 of the Code of Civil Procedure before this Court being 622/2019 for transfer of Act VIII Case NO. 17 of 2019 from the Court of Learned District Judge at Alipore South 24 Parganas to the Learned District Judge at Suri Birbhum.
11. By Order dated 04-07-2019 Learned Single Judge of this Court was pleased to dispose the application C.O. 622/2019 by refusing the prayer for transfer of Act VIII Case No. 17 of 2019 from the Court of Learned District Judge at Alipore South 24 Parganas to the Court of Learned District Judge at Suri Birbhum. In the same day the Learned Judge was pleased to dispose the application C.O. 1094 of 2019, by refusing to transfer Matrimonial suit being Matrimonial Suit No – 246 of 2019 pending before Learned Additional District Judge at Alipore.
12. The respondent/opposite party being aggrieved by the Orders dated 04-07-2019 passed by a Learned Single Judge of this Court in C.O. No- 622/2019 and C.O. No. 1094/2019 preferred 2 special Leave Petitions before the Hon'ble Supreme Court of India. The matter was referred to mediation by the Hon'ble Supreme Court. As the respondent/opposite Party did not appear mediation failed. Thereafter

- the special leave petitions were heard by the Hon'ble Apex Court and dismissed.
13. Thereafter the respondent/opposite party filed an application under Order 14 Rule 2 read with Sections 21 and 151 of the Code of Civil Procedure read with Section 9 of the Guardians and Wards Act 1890 dated 8.11.2019 for dismissal of the case on account of inherent and incurable lack of jurisdiction.
 14. By Order dated 10.01.2020 Learned Additional District Judge 10th Court Alipore South 24 Parganas was pleased to reject the application filed by the Respondent under Order 14 Rule 2 CPC.
 15. The respondent/opposite party being aggrieved by Order dated 10.01.2020 passed by the Learned Additional District Judge 10th Court at Alipore South 24 Parganas rejecting the application under Order 14 Rule 2 CPC moved an application under Article 227 of the Constitution of India being C.O. 249 of 2020.
 16. By Order dated 10.02.2020 a Learned Single Judge of this Court was pleased to dismiss the revisional application being C. O. 249 of 2020 filed by the respondent/opposite party.
 17. Apart from filing revisional application against the Order Dated 10.01.2020 by Learned Additional District Judge 10th Court at Alipore the respondent filed application being C.O. 543 of 2020, and the petitioner filed application being C.O. 528 of 2020. Both the revisional applications were preferred against the order of Learned Trial Court

granting visitation rights on every first and third week of every month in the Court room from 2.00 p.m. to 3.00 p.m.

18. By order dated 13/03/2023 Learned Single Judge of this Court was pleased to modify the order of visitation dated 5-2-2020 passed by Learned Court below by directing that the petitioner being father of the child to hire a suitable flat within the jurisdiction of Barasat Court within a period of two weeks from the date of communication of the Order and the opposite party mother will bring the ward in the said flat in the first half of third Saturday of every month and will be there at least till first half of the next day i.e. third Sunday and Petitioner father will be at liberty to visit the ward in the said flat for 2 hours on each date at a convenient time to be decided by the parties, keeping in mind the welfare of the child. It was further observed that the arrangement will continue for a period of three months from the date of communication of the Order, and that the arrangement in connection with the visitation can be altered in a particular month on consent of both the parties, taking into consideration the welfare of the child. The parties were also given liberty to pray for renewal and or modification of the arrangement as above after expiry of three months, before the Learned Trial Court if the Act VIII case no. 17 of 2019 be not disposed of within that period. The cost of hiring flat, journey and all other incidental costs shall be borne by the Father/petitioner.

19. The Petitioner/father also filed revisional application being C.O. 755 of 2019 against the order of the Learned Trial Court dated 5-03-2019 in not directing the opposite party to send the child to school daily and to hand over temporary custody of the child to the petitioner. The said revisional application was disposed by directing the Learned Trial Court to consider and dispose the application for injunction along with application under Section 12 of the Guardians and Wards Act preferably within four weeks from the date of communication of the Order.

20. Pursuant to the Order passed by a Learned Single Judge of this Court disposing C.O. 755/2019 C.O. 528/2020 and C.O. 543/2020 and directing the Learned Trial Court to dispose the application under Section 12 of the Guardians and Wards Act the Learned Trial Judge disposed the application under Section 12 of the said Act by observing and directing as follows:

The welfare of the child is the only consideration before this Court while deciding an application U/S 12 or 25 of the Act. In whose custody the best interest of the child would be secured is to be looked into by the Court. In the modern scenario marital disputes between married couple is not out of place and sadly, often the children are the worst sufferers who get entangled in nasty legal battle. Both the Parents are often ruthless in their egos and they tend to forget that the interest of the children is being prejudiced. The children have to undergo severe mental trauma on account of the dispute between their

parents. Regular visitation of the child more would benefit the child with the absent parent in a congenial environment and enable his/her over all development than growing up in a toxic environment where the parents are always at war against each other. The present case is still in its nascent stage and there is no overwhelming evidence to hold at this stage that the custody of the mother would be detriment to the interest of the child. The mere fact that the mother is working is not enough to hold against the mother. In modern times it is quite natural for a mother to work and be economically independent and also look after the well being of the child. The child is studying in Gurgaon for quite a few years, in such circumstances I am not inclined to uproot her and bring her to Kolkata as a part of an interlocutory order.

Hence it is ORDERED.

That the instant application under Section 12 of the Act read with Order XXXIX Rule 1 and 2 CPC is hereby rejected on contest without costs. The order of visitation as directed by the Hon'ble Court on 13.03.2023 shall continue till the prescribed time. Thereafter if the original case is not disposed of by then the parties may proceed as directed by the Hon'ble Court.

To 29.06.2023 for P. Hearing of the case.”

21. The petitioner being aggrieved by and dissatisfied with the Order dated 11-04-2023 passed by the Learned Trial Court has come up before this Court in an application under Article 227 of the Constitution of India.

It is the contention of the Petitioner that the Learned Court below failed to take note of all the contentions urged on behalf of the Petitioner on the basis of the records placed before it. It is further contended by the Petitioner that the Learned Trial Court erred in refusing to accept submissions prepared on behalf of the Petitioner via a Put-up Petition dated 05-04-2023. The non acceptance thereof amounts to a violation of the principles of natural justice. It is also contended that as the opposite party mother is a working lady the child remains at the mercy of domestic helps in Delhi which is detrimental to the overall development of the child. It is contended that the Learned Trial Court has failed to appreciate that if at all someone has uprooted the child from one of the best schools of Kolkata it is the Respondent-Mother. At the cost of development and education of the Child, Respondent – Mother admitted the child to a school at Rampurhat District – Birbhum. The admission in the school at Rampurhat is itself in considerable controversy. The petitioner quotes the observation made by a Learned Single judge of this Court which are as follows:

‘ 1) It is undisputed rather admitted by the mother of the child that the minor continued the session in ‘La Martiniere School’ till Christmas vacation and that there was an injunction from taking transfer certificate passed by the Civil Court. No plausible reasons has been furnished as to how without transfer certificate the child got admitted in a school at Mallarpur and that too without the consent of the natural guardian. The admission taken in the School at Mallarpur is therefore, by suppressing

the Order of injunction and by some other method which cannot be recognized to be legal and valid and the child is compelled to stay with the mother against the wish of the natural guardian under the provisions of Section 6 of the Hindu Minority and Guardian Ship Act 1956.’

It is further contended that the petitioner is the natural guardian of the child and that the Respondent – Mother had taken all steps to keep the child away from him for four years. Under such circumstances the Respondent Mother should not be allowed to raise an argument that since the child had been staying with her for the past 4 years or so she should not be directed to shift to Kolkata. The Learned Trial Court having accepted the argument of the Respondent – Mother has allowed her to take advantage of her own wrong which is another error of the order impugned. It is also contended that the conduct of the opposite party/respondent was reflected in the Orders passed by this Hon’ble Court in C.O. No-755 of 2019, C.O. No-528 of 2020 and C.O. 543 of 2020, but, the orders passed were ignored by the Learned Trial Court.

It is contended by the petitioner that in compliance of the Final Judgment and Order dated 13.03.2023 passed by this Hon’ble Court in C.O. No. 755 of 2019, C.O. No.528 of 2020, and C.O. No. 543 of 2020 petitioner has already taken on rent property bearing No. Flat 1B on the 1st Floor of the building situated at 25 Ballygunge Circular Road, Kolkata-700019, for a period of 11 months. It is further contended that the flat is fully furnished with all amenities, and every effort has been taken by the petitioner to ensure that the

child is comfortable. It is also contended that while staying at this flat petitioner shall have unhindered access to the child and ensure that the development of the child which is at peril while the child exclusively stays with the mother is also taken care off. Petitioner submits that he prays for temporary custody of the child.

Heard Learned Advocate for the Petitioner and Learned Advocate for the opposite party perused the petition filed and materials on record.

Learned Advocate for the petitioner submits that the respondent has absolutely no defence to the extra-marital relationship being maintained by her, and the respondent has not denied the transcripts on record which prove the extra-marital relationship. Learned Advocate further submits that the prayer of visitation which is granted by the Court is distinct and separate from granting relief of temporary custody in favour of either parent under Section 12 of the Guardians and Wards Act 1890. The grant of visitation cannot be linked with the relief which the Court can grant under Section 12 of the Act. Learned Advocate also submits that a girl child should not be allowed to stay with a woman who is in an extra-marital relationship, and the same will cause severe trauma to the child, and is detrimental to the welfare of the child.

Learned Advocate submits that while deciding an application under Section 12 of the Act conduct of the parties is most crucial aspect which is required to be considered. Learned Advocate further submits that the conduct of the Respondent has been deliberated upon by this Hon'ble Court on four

occasions. Learned Advocate draws attention to the orders passed by this Hon'ble Court in C.O. No-622 of 2019, C.O. 249/2020 C.O. 528/2020 and C.O. 543/2020 and submits that the conduct of the Respondent will go to show that she has no respect for the rule of law and has tendency to frustrate the orders passed by this Court.

The observations made in the four cases referred to by Learned Advocate of the petitioner are as follows:

In C.O. 622 the observation of this Hon'ble Court are as follows:

'I hold that the Child was shifted from Alipore jurisdiction to Mallarpur by the mother firstly to defeat the jurisdiction of the Court and such action is still in conflict with Court's order and should be condemned when this fact has been brought to the notice of the Court. Court cannot ignore the same and direct transfer of the Act VIII case to any other place.'

In C.O. 249/2020 the Hon'ble Court observed as follows:

After the petitioner left her matrimonial home with the minor she took shelter in a flat at South Residency, Prince Anwar Shah Road Kolkata. Till date the petitioner did not make any formal application for transfer of her minor child from La Martiniere School for Girls too. This Court is not in a position to rely upon two money receipt purportedly issued by one St. Paul's School, Vidyadanga, Rampurhat and one St. Paul's International School at Munsuba. In the money receipt issued by the School at Munsuba, even the name of the

minor or date of admission are not mentioned. Therefore this Court has every reason to hold that those documents were created for creating jurisdiction of the District Court at Birbhum. Since the minor was ordinarily residing at Kolkata since her birth and she was pursuing her studies in a premier school at Kolkata, I cannot but to hold that the minor's ordinary place of residence is within the jurisdiction of the Learned District Judge, South 24 Parganas at Alipore.

The observation of this Hon'ble Court in C.O. 528/2020 and C.O. No. 543/2020 by Order dated 27.02.2020 are as follows:

'13. From the facts and circumstances of the case as stated hereinabove it appears that the alleged contemnor Smt Dipikia Agarwal has been evading the direction of the Courts given to her from time to time. Earlier she made an attempt to establish contact with the Hon'ble Judge, adjudicating a Civil Revisional Application being C.O. No 622 of 2019. 'to obtain an order of recusal.' As observed by the Hon'ble presiding Judge who was in session of the matter.

"16. The report of Institute for Exceptional children, Mumbai indicates two possibilities. i) it is tailor made to create a pressure upon this Court to recuse as was done with the Learned co-ordinate Bench by sending Whatsapp message or ii) the child was taken to someone stranger to her for some purpose, best known to the mother."

“18. The conduct of the alleged contemnor unerringly indicates that she has developed a mechanism within herself to be in conflict with the Order of the Court.

Her conduct is eloquent about her disrespect towards Rule of Law her lack of faith in truth. Law is a command of sovereign and it cannot be afford to be violated again and again for the interest of civilization. When a person makes it a point to evade or defy the command of law it becomes inevitable to confront with such a situation with heavy hand in order to upheld the majesty of law.”

Learned Advocate submits that it is strange and axiomatic that the conduct of Respondent has not been seen by Ld. Additional District Judge Alipore South Parganas (West Bengal) while passing the Impugned Final Judgment and Order No. 51 dated 11.04.2023.

Learned Advocate further submits that by Judgment and Order dated 04.07.2019 this Hon’ble Court held that Petitioner is the natural guardian of the child. Thus the temporary custody of the child should have been granted in favour of the petitioner, and the impugned Order dated 11.04.2023 is absolutely silent on this aspect. Learned Advocate also submits that the petitioner is not agreeable for the child to study in Lancers International School Gurgaon because in the said School the child is not going to be instituted with correct values and proper upbringing. Academics and co-curricular activities are not the only factors when a school is chosen. Learned Advocate submits

that a school which can give admission to a child without the name of her father being mentioned in the admission form and a school which does not even share the developments regarding the child with the father cannot be an institution which can be delegated the function of imparting education to the child which includes a holistic development. Even till date Lancers International School Guargaon does not share development regarding the child Learned Advocate for the Petitioner relies upon the following decisions:

- **Smt Surinder Kaur Sandhu Vs Harbax Singh Sandhu [Reported in (1984) 3 SCC P-698.]**
- **Mrs Elizabeth Denishow Vs Arvand M. Denishow and Anr. [Reported in (1987) 1 SCC. P.42.]**
- **Gaurav Nagpal Vs Sumedha Nagpal [Reported in (2009) 1 SCC. P-42.]**
- **Mausomi Maitra Ganguly Vs Jayant Ganguly. [Reported in (2008) 7 SCC. P. 673.]**
- **Vivek Singh Vs Romani Singh. [Reported in (2017) 3 SCC. P.321.]**

Learned Advocate for the respondent/opposite Party wife justifies the Order passed by the Learned Trial Judge dated 11/04/2023.

Learned Advocate for the respondent submits that there are criminal charges against all the family members of the petitioner who have beaten up the opposite party and tried to outrage her modesty. Thus it would not be in the interest of the child if the family members of the petitioners, visits the child.

The second submission of Learned Advocate for the respondent is that the petitioner has not taken any financial responsibility of the child and in spite of being a well-established businessman in India Vietnam and Nigeria he has given a false affidavit that his income is INR – 25,000/- per month. It is submitted that the respondent has filed a Domestic violence petition before the Mallarpur Court and Rs. 50,000/- maintenance is awarded by the Learned Court in the false statement of the Petitioner.

It is submitted that the expenses of her education, medical transport, day to day other maintenance cost of the child is incurred by the respondent mother with the help of her father Dip Chand Khaitan. However Rishi Agarwal and his father TapanAgarwal are successful business men having Rice Mills, Salvent Plant and other business. It is further submitted that the petitioner Rishi Agarwal in a Domestic Violence case filed a written objection claiming that he is working as a Market and Sales Executive in a private company at Kolkata and draws a monthly net salary of Rs. 25,000/- per month only, from where he can barely maintain his personal expenses and he submitted false salary slip for last few months. The whole statement made by Rishi Agarwal is false and mala fide, which is another Criminal offence by him. He suppressed his profession as well as his income.

The third submission of the Learned Advocate for the respondent is that Sambhuti is extremely attached to her mother/Respondent and she is well settled in her school. It would be emotionally traumatic and against her well-

being if she is uprooted. Learned Advocate submits that the humble contention of her client is that the child is affectionate to her father and she should meet the father in every month and whenever the father comes to Delhi. There will be no restriction from the mother if he does show the same interest. The father can have two holidays with the child and be fully involved with her life. But specifically only the father should be allowed in all these occasions. It is submitted that the respondent is quite aware of the father's right and for the said purpose she had introduced the father in the school and she always keeps the father informed about the child's life and her education through e-mail. She sends emails regularly to let him know the child's whereabouts. With regard to the issue of sending the child to the hostel Learned Advocate submits that the respondent mother has expressed via e-mail that the child is too small and she is so well settled and attracted with the mother in Delhi and she is deeply embedded in her current school i.e one of the top IB School and her constant affection towards her mother is of incalculable value so there is no need of hostel for the minor child right now. Further the child expressed that she is not willing to live separately from her mother.

The fourth submission of the Learned Advocate for the respondent is that in a matter relating to custody of child, the court must remember that it is dealing with very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of the life. It is submitted that custody orders are always considered interlocutory orders, and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of

being altered and moulded keeping in mind the needs of the child. It is submitted that this whole matter came up before this Hon'ble Court to address the future of the minor child, Sambhuti and to release her from this constant shuffling and travelling from Delhi to Kolkata on alternative months and the very next day again join the school. At this tender age her mind has gone through lots of hustle which has already ruined her childhood earlier. As a kid she has to cope up with her studies in school soon after she comes back from Kolkata. However her mental well being is badly affected for this continuous process of drudgery.

Learned Advocate relies upon the following decisions

- **Vikram Vir Vohra Vs Shalini Bhalla [reported in AIR 2011 (S.C) CIVIL-P- 2157]**
- **Ritika Sharan Vs Sujay Ghosh [reported in AIR ONLINE-2020 S.C. 832]**
- **Lekha Vs P.Anil Kumar [reported in AIR. SCW- 6358]**
- **Anuradha Sharma Vs Anuj Sharma [reported in laws (BOM) 2022-7-213]**

The fifth submission of the Learned Advocate for the respondent is that the Learned Trial Court has in the injunction matter appreciated the fact that pending the final hearing of the custody matter it would be in the interest of the justice to give the father monthly visitation rights as has been held by this Hon'ble Court vide Order dated 13.03.2023 by Hon'ble

Justice Ajoy Kumar Mukherjee. It is submitted that the Respondent/mother is extremely responsible towards the child and is without any financial support from the father bringing up the child at Delhi NCR for the last five years. She has enrolled the child in the best possible IB School and is making sure that the child has healthy upbringing. She has moved to Delhi NCR just to provide the child with the best possible education. It is further submitted that the allegation of the Respondent having an affair and the child being exposed to an unhealthy atmosphere is completely baseless and defamatory in nature. The mother and child live alone with servants in a very posh locality in Delhi and the child has the best atmosphere at home. It is submitted that the visitation of child with the father continue on a monthly basis as ordered by this Hon'ble Court and C.O 1389/2023 be dismissed so that the final custody matter in Act VIII Case No 17 of 2019 is heard and decided.

In order to decide the issue before this Court it is necessary to consider Section 25 and section 12 of the Guardians and Wards Act 1890. Section 25 of the Guardians and Wards Act provides as follows :

25. Title of guardian to custody

1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian may make an order for his

return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

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

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

Section 12 of the Guardians and Wards Act provides as follows:

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

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

3) Nothing in this Section shall authorize

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

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

The Petitioner/father in the case instituted under Section 25 of Act VIII being Act VIII case No-17 of 2019 have prayed for temporary custody of the child of the parties under Section 12 of the said Act. Although the earlier view of the Hon'ble Gujarat High Court in the case of Ruxmaniben Tribhovandas Jethabhai V Narmada (Minor) reported in AIR-1962 Guj P-227 was that during the pendency of the proceeding, for restoration of the minor to the custody of the applicant guardians under Section 25 of the Guardians and Wards Act an application for interim custody under Section 12 of the said Act was not maintainable but the Hon'ble Allahabad High Court subsequently in the case of Hafirur Rahman VS Shakila Khatoon reported in 1983 ACC W.C. 572 was pleased to observe as follows.

‘ It will be seen that intrinsically there is nothing in S. 12 which might indicate that the power of the Court to make interlocutory order for production of a minor and interim protection of his person or property is available only in proceedings for appointment or declaration of a guardian. The words used in the statute “the Court may direct the person, if any, having the custody of the minor shall produce him at such place and time.....and make such order for the temporary custody and protection of the person and property of the minor as it thinks proper” are words of wide amplitude and insofar as the plain

language of the section goes there is nothing to suggest that S.12 should be read down and be restricted in its application only in respect of proceedings for appointment or declaration of a guardian. Section 12 is part of the same statute of which S. 25 is. Except, therefore, that S. 12 appears in the chapter in which Ss. 15 and 16 dealing with the power and procedure for appointment or declaration of guardian appears, there does not exist any valid ground for limiting its application only to the proceedings initiated under Chapter II of the Act. Section 12 itself does not state that this power to make interlocutory order is exercisable pending the disposal of an application under Ss. 15 to 19 of the Act.’

Thus from the above judicial pronouncement it is clear that the application under Section 12 of the Guardians and Wards Act 1890 is maintainable, pending application under section 25 of the said Act.

Before discussing the relevant facts with regard to the issue at the very outset it is to be kept in mind that the bedrock of the law of guardianship is the welfare of the minor. The law is framed to take care both the property and person of the minor by appointing Guardians. Guardians are of three categories namely natural guardian, guardian appointed by court and testamentary guardian. The appointment of guardian and granting of custody is not a permanent measure which in changed circumstances is liable to be changed or cancelled. The petitioner and respondent/opposite party are both natural parents of their minor daughter Sambhuti. Due to matrimonial

dispute both the parties are residing separately and have claimed custody of the child although at present the child is residing with the mother.

While deciding the issue of custody the Court should always be careful for protecting the interest of such minor child and its welfare would always be a paramount consideration.

Reading Articles 39(e) and (f) of the Constitution of India it is obvious that one of the objectives is that the State should in particular direct its policy towards securing that childhood and youth are protected against exploitation and against moral and material abandonment. Those Constitutional provisions indicate that the constitution makers were very anxious to protect and safeguard the interest and welfare of the children.

In the case of Lakshmi Kant Pandey VS Union of India reported in AIR 1984.S.C. P 469 the Hon'ble Supreme Court observed as follows:

It is obvious that in a civilized Society the importance of child welfare cannot be over emphasized, because the welfare of the entire community its growth and development depend on the health and well being of its children. Children are a supremely important national asset and the future well-being of the nation depends on how its children grow and develop'.

As welfare of the child is of paramount importance it is to be remembered that Parents are the best Judges with regard to the welfare of the child. When there is normal relationship of parents, there is unconditional love for the child

and the parents in a peaceful State of mind is able to decide what is necessary for the welfare of the child.

The situation changes slightly when parents are separated due to matrimonial dispute or when the marriage tie is broken. In such state of affairs parents are always not able to apply their mind with regard to the best interest, and welfare of their children. As ego creeps into the mind of parents and due to existence of depression there is conflict between the parents, for which the aggrieved parent knocks the door of court. In such a situation Courts have duty to make endeavor that the disputes between parents are resolved for the interest of child failing which courts have the responsibility to pass necessary orders with regard to custody considering the welfare of the child.

The argument of the petitioner father is firstly based on the ground that the petitioner is the Natural Guardian of the child and hence he is entitled to the child's custody. Secondly the petitioner submitted that the respondent violated the Order of the trial Court by withdrawing the child from La-Martiniere School for girls which is a contempt of Court and the conduct of the respondent makes her ineligible for custody. The third argument of the petitioner is with regard to the child staying with the maids when the respondent/mother is at her office. According to the petitioner staying with maids throughout the day is not conducive for healthy development of the child and the child will get the company of her grandparents and aunt if she resides with the petitioner at Calcutta. The fourth submission of the petitioner is that

the School which admits students without name of the father and where father is not informed about the development of his ward the petitioner does not have faith in such institution.

Learned Advocate for the respondent has mainly confined her argument on the ground that the respondent/mother is extremely responsible towards the child and is without any financial support from the father bringing up the child at Delhi NCR for the last five years. She has enrolled the child in the best possible IB School and is making sure that the child has a healthy upbringing. She has moved to Delhi NCR just to provide the child with the best possible education. Learned Advocate has also submitted that the point of boarding School was never brought up before the Ld Trial Court and was an afterthought before this Court when the petitioner realized that the custody would in any event remain with the mother.

Learned Advocate for the respondent submits that the custody of the child remain with the mother in the best interest of the child.

With regard to the 1st submission of Learned Advocate for the petitioner that the petitioner/father is the Natural Guardians of the child and hence the petitioner is entitled to the custody of the child it is to be remembered that guardianship of minor is an obligation provided under law for the welfare of minor Guardianship is not an indefeasible right under law and where there are materials before Court that the welfare of minor will be served if the minor is placed under any other relation other than the Guardian Courts are not

powerless to place the minor under the custody of such person who in the opinion of the Court is competent to look after the welfare of the minor.

In Halsbary'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.'

In the case of Gaurav Nagpal VS Sumedha Nagpal reported in (2009) 1 SCC. P. 42 the Hon'ble Supreme Court observed as follows:

"43. The principles in relation to the custody of a minor child are well settled. 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.'

With regard to the 2nd submission of the Learned Advocate for the petitioner that the conduct of the parties are required to be considered and the Orders made by this Hon'ble Court in C.O. No 622 of 2019, C.O. 249/2020, C.O. 528/2020 and C.O. 543/2020 go to show that the respondent has no respect for rule of law and has tendency to frustrate the orders passed by this

court, this court finds from record that although some acts of the respondent mother were contumacious but considering the caution already given by this court earlier and that her subsequent conduct is not deplorable this court does not think reasonable to make any more observation on her conduct. At this stage it would not be proper to conclude that the respondent/wife is incompetent to have custody of child on the basis of a finding with regard to observation made by Court in contempt matter without considering the evidence as to whether the interim custody with the mother serves the welfare of the child. As guardianship and custody of child is to protect the child's interest and promote his welfare and is not an indefeasible right of the parents the child's welfare is to be taken into consideration while granting custody.

With regard to the submissions of the Learned Advocate for the petitioner that the child is required to stay with the maids when the respondent is at office and in the event the child resides with the petitioner she will have the company of her grandparents and paternal aunt this court is of the view that the mere fact that the child is residing with the maids during office hour of the respondent is not a ground to conclude that the child is uncomfortable and is against child's welfare without any specific evidence in this regard and without interaction with the child. Moreover the child is not at home for the entire day as considerable time is spent in school.

Now with regard to the fourth submission of the Learned Advocate for the petitioner that his client does not have any faith in the Institution where the

child is studying on the ground that the school has admitted the child is without the name of the father and that the school does not inform the petitioner about developments of the child and that La Martiniere School Calcutta is a better school this court is of the view that as Courts are not experts to assess the merit of any school, Courts should refrain from making any observation with regard to the merits of any school. All schools at present are making endeavor to impart standard education for the development of children. Although all schools may not have same facilities but that is not a ground for the court to conclude that a school is sub-standard in comparison to another school. The fact that child was admitted by the school authority without name of the father may be a wrong decision of the school authority but that is not a cogent ground to withdraw the child from the said school and disturb her education if the child is otherwise comfortable and receiving proper education. Thus in the absence of specific evidence that the child is not receiving proper education or continuation of the child in the said school is to her detriment no order can be passed for withdrawal of the child from her present school. Moreover from the letters enclosed it appears that the respondent is intimating the petitioner about different development in school and the school authority has also communicated with the petitioner.

With regard to the last submission of the Learned Advocate that the respondent is living an immoral life by having extra-marital relationship such contentions also cannot be considered without cogent evidence, at the time of trial.

Learned Advocate for the petitioner has also relied upon the decision of the Hon'ble Supreme Court in the case of Gaurav Nagpal V Sumedha Nagpal reported in [2008] 16 SCR P-396. The Hon'ble Court in the said decision observed as follows:

'The trump card in appellants argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments.'

It is true that a party cannot be permitted to take benefit of his own wrong but the decision of the Hon'ble Supreme Court in the matter of Gaurav Nagpal(Supra) is not fully applicable to the facts of the case relied upon. In that case there was an order of interim custody in favour of the mother which was violated by the father, for which the father was punished for contempt and the custody was granted upon considering welfare of minor child. In this matter also the application for custody of child under section 25 of the Guardians and Wards Act is pending to be decided and the Order passed under section 12 of the said Act is for temporary custody of the Child.

As upon perusing the judicial decisions relied upon it appears that the well settled principle of law laid down with regard to custody of child is that prior to granting custody of a child to either of the parents or to any other

relation the paramount welfare of the child is to be considered, the Court is imposed with duty to consider the welfare of the child concerned before passing any order.

Now the question as to what constitutes welfare of the child, enlightenment can be drawn from para – 42, and 43 of the decision of the Hon'ble Supreme Court in the case of Gaurav Nagpal (supra) where the Hon'ble Apex Court observed as follows:

‘ 42. When the Court is confronted with conflicting demands made by the parents each time it has to justify the demands the Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Maitra Ganguly's case (supra), the Court has to give due weightage to the child's ordinary contentment health, education intellectual development and favourable surroundings but over and above physical values have also to be noted. They are equal if not more important than the others.

43. The word 'welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. Though the Provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which

can stand in the way of the Court exercising its parents Patriae jurisdiction arising in such cases.’

As welfare of child consists of different factors which is to be taken into consideration in custody matters, the contentions made by the parties cannot be gone into at this stage without evidence at trial and interaction with the child and considering report of special officer in this regard, if special officer is appointed.

The petitioner has not been able to establish at this stage the exigency for which temporary custody should be given from mother to father. The allegation of the petitioner that the child’s stay with the mother is prejudicial to child, or that child is not receiving proper education at Lancert International School and that the mother is leading an immoral life can be considered after evidence is adduced.

‘12. As the child is with the mother for a period of five years without prejudice to the rights of parties it would not be out of context to quote the observation of the Hon’ble Madras High Court in the case of Venkatsubramaniam Ravichandran Vs V.Nithya reported in AIR-2024 Madras. 327. The Hon’ble Court observed as follows:

‘Shifting the minor children all of a sudden in the name of interim custody would cause disequilibrium to the life and convenience being enjoyed by the children in India. It is found that the children are quite comfortable with

their mother. And the elder child has started to like her school, facilities and her friends and well adapted to the life style in India. Though Narsha was at United States for some time there is no longer in her mind that she should return to United States immediately. Since the welfare of children are the paramount consideration in deciding their custody, this Court is unable to accommodate the prayer made by the petitioner.

13. Further, the petitioner cannot be allowed to get the right claimed by him in the main petition itself as an interim relief without undergoing the process of trial. Since the petitioner has got no difficulty to meet the children whenever he comes to India and the children also do not suffer from any parental alienation against the petitioner there is no need to disturb the balance now. The immediate arrangement now claimed by the application does not serve the best interest of the children in the given circumstances where the family and the children are placed. Hence, the interim relief as claimed by the petitioner cannot be granted. In view of the reasons stated above, the application in A. No. 3076 is dismissed.'

The Hon'ble Karnataka High Court in the case of Suganda Bai V Sulu Bai reported in AIR-1975 Kant observed as follows:

' The father has a natural right, he being the natural guardian of the minor. He remains the natural guardian. But under the HMG Act we have to consider what will be in the best interest of the minors. This is always a painful subject. But at the same time the right of the mother to the custody of her

young children is recognized in this country. Orders as to the custody of child are always of a temporary nature. Those interested in the minor are at liberty to apply to Court. In this case the father can apply to court at any time, if he thinks that the minors are not being brought up as expected.'

As it is observed in different judicial pronouncement that when temporary custody remains with the mother the father is granted visitation rights as well as permission to stay with the child on certain occasions and vice versa visitation right is to be granted to the petitioner father as well as permission to stay with the child at his residence on some occasions. Although the Learned Advocate for the opposite party submitted that visitation right be confined only to the petitioner/father as there are criminal cases against the grand-parents and paternal aunt of the child and the child has witnessed the mother being tortured by the petitioner's relations, this Court is unable to accept such submission. It is true that criminal cases are pending against the petitioner's parents, sister and the petitioner himself but the said case is instituted on the allegations of torture committed upon the respondent mother and not upon the child. As per the criminal jurisprudence all persons are presumed to be innocent till proved guilty. Moreover in Indian society there is a custom and practice to respect the elders thus a child is taught to respect not only elder relations but also elderly people. Thus love and respect for elders should flow in the minds of children and seeds of hate should not be sown in their mind. It is only when a child grows up and is matured he may be permitted to make healthy and constructive criticism, and not before that.

In the facts and circumstances the following arrangement is made for the visitation with the child and stay with her on some occasions.

- A. With regard to monthly visitation of the child the petitioner is permitted to stay with the child at the flat hired by him at 25 Ballygunge Circular Road Flat 1B, 1st Floor Calcutta- 700019 on the 3rd Saturday of the month till 3rd Sunday of the said month. The period of stay shall commence from 1 p.m of the 3rd Saturday till 4 p.m of the 3rd Sunday. During this period the mother may stay at her relative's house at Calcutta or in any hotel to be arranged by petitioner at his cost for 2 days.
- B. Where the child has stayed with the petitioner on a particular month, the petitioner in the following month is permitted to visit the child at Delhi where the child is residing with the mother and vice versa. On the first two alternate month of the visitation at Delhi the petitioner shall meet and interact with the child at her residence on 3rd Saturday 4 p.m – 7 p.m and on 3rd Sunday from 4 p.m-5p.m. After the 2 monthly visits at the residence of the child if the petitioner is uncomfortable he shall arrange visitation at the Hyatt Regency, where earlier visitation used to take place. In such a case the petitioner will be permitted to stay with the child from 11 a.m to 5 p.m on 3rd Saturday of the concerned month. While selecting place of visitation at Delhi the Petitioner shall only visit himself and shall not take any other relations. With regard to place of visitation at Delhi the

- petitioner should not only confine to his own convenience but also consider the comfort and convenience of the child. Thus he may upon interaction with the child select the place of visitation.
- C. The Petitioner's visit to the child's residence at Delhi and the child's visit and stay at the petitioner's residence at Calcutta shall be at every alternate months. In the event the child cannot be brought to Calcutta in a particular month or the petitioner father is unable to attend child's residence at Delhi the subsequent visitation and stay shall upon notice be fixed on the fourth Saturday of the said month. The cost of journey of the mother as well as the child from Delhi to Calcutta and back shall be borne by the petitioner.
- D. Now with regard to the School holidays of the child which in summer vacation is 2 months and in winter vacation is one month the following schedule should be maintained as far as practicable.
- i) After 10 days of the closure of School due to summer vacation the petitioner is permitted to take the child for tour in any place in India for a period of seven days excluding the date of journey. On completion of the journey the petitioner is permitted to take the child to his house where he resides with his parents. The stay in the said house shall not exceed 7 days. After the period of Seven days the petitioner may take the child to the flat which he has hired at 25 Ballygunge Circular Road Flat 1B at 1st Floor for purpose of visitation. He may keep the child for a period of

fifteen days. During this period the petitioner shall arrange a tutor to teach her so that the child can study for this period. Apart from keeping a teacher the petitioner shall keep a female attendant for the child. The petitioner may also arrange for the visitation of the cousin brothers and sisters thrice during the period of fifteen days. The petitioner shall not take the child outside Calcutta during the period of 15 days without leave of trial court. It is made clear that during the period of seven days when the child remains at the house of the petitioner along with his grandparents the respondent/mother is permitted to visit the child twice upon prior notice. The time for visitation shall be between 4 p.m – 7 p.m. During the period of 15 days when the child is with the petitioner at 25 Ballugunge Circular Road, the respondent/mother is permitted to visit the child thrice upon prior notice. The time for visitation shall be between 4 p.m-7 p.m.

In the event the respondent/mother thinks fit she may take her Learned Advocate on the dates of visitation, upon prior information. In such an event petitioner/father's Advocate may also be present. On the completion of fifteen days either the mother/respondent can come and take custody of the child from the petitioner or the petitioner may go to the residence of the child and hand over the child to the mother. This issue has to be decided by agreement between the parties.

- E. After the child is handed over to the mother/respondent, the respondent may take the child to her parent's house or house of her relative in any place in India upon intimation to the petitioner and may keep the child in the place of her relative and may return to Delhi. However after the period of ten days, the Child must be brought back to her residence at Delhi. After returning from the relatives's house, the child should not be taken out of Delhi during the residuary period of the vacation, unless there is exigency.
- F. In the event the respondent/ wife is required to leave station for few days due to exigency she shall hand-over custody of the child for those days to the petitioner/father or shall bring any of her relative during the said period in her residence, upon intimation to the father. During the said period the petitioner father may meet the child once, at her residence if the custody is not handed over to the father and the relatives are brought in the house.
- G. Now with regard to the child's holiday during winter vacation which is about one month the petitioner is permitted to take the child after five days from date of closure due to winter vacation for tour in any place at India for a period of seven days which includes the date of journey. On completion of tour the petitioner is permitted to take the child to the house where the petitioner is residing with his parents, for a period of three days. During this period the mother/ respondent is permitted to meet the child once upon prior intimation.

Respondent/mother if she thinks fit may take her Advocate on the date of visitation and in that case petitioner is permitted to keep his Advocate.

On completion of three days the petitioner shall take the child to the flat which the petitioner has hired at 25 Ballygunge Circular Road for the visitation of the child, and may keep the child for a period of seven days. During this period the respondent/mother is permitted to visit the child twice along with her Learned Advocate upon prior information and in that case the petitioner will be also entitled to have his Learned Advocate present at the time of visitation. Upon completion of seven days the petitioner either has to take the child at her residence in Delhi or the mother/respondent may take the child from the residence of the petitioner. This issue has to be decided by discussion among both parties. After taking the child from the residence of the petitioner the respondent/mother may take the child for tour of 7 days including the period of journey in any place within India upon prior intimation to the father or keep the child in the house of her relative for seven days upon information. On completion of seven days the child must be taken to the residence of the mother at Delhi. The child shall stay at Delhi during the residuary period of her vacation and shall not be taken to any other place unless there is exigency.

H. It is however made clear that whenever the child is taken for tour by the petitioner or when the petitioner brings the child to his flat which is hired by him the petitioner shall depute a female attendant for the

child during the period. The respondent mother if she thinks fit may also depute female attendant when the child is on tour with the petitioner and when the child is at the flat hired by him at 25 Ballygunge Circular Road and both the attendants may take care of the needs of the child.

- I. During visitation in presence of Learned Advocates, it is to be ensured by the learned Advocate that the visitation is done in a peaceful manner. Where visitation of respondent/mother is at the residence of petitioner's house where his parents and relatives stay Learned Advocates must ensure that during visitation programme except parents of the child no one else are present.

Pursuant to the conclusion of hearing of the case when the matter was reserved for Judgment a petition being CAN – 4 of 2024 was taken out by the petitioner/father on the ground of new development. It is the contention of the petitioner that the summer vacation of the child is to begin from June first week and will end in the last week of July. The petitioner-father along with his family would like to spend half of the vacation with the child and also take her to some destination as per her desire including an international destination. It is further contended that the Respondent has once again breached the undertaking submitted by her before this Hon'ble Court in as much as she has taken an independent and unilateral decision to take the child to United Kingdom during vacations and also send the child to Woodstock School Mussorie. It is also contended that it is a breach of her undertaking submitted

before this Hon'ble Court Heard Learned Advocate for the petitioner and Learned Advocate for the respondent/opposite party. Learned Advocate for the petitioner submits that by not consulting his client and taking unilateral decision to take the child to foreign country respondent has committed contempt of Court. Learned Advocate submits that the respondent ought to have intimated the petitioner or obtained leave of the Court before taking such decision.

Learned Advocate for the respondent submits that her client has not violated the Order of the Court as the respondent upon taking a decision has intimated the petitioner in this regard.

Upon hearing the Learned Advocates and upon perusing the petition filed first of all it is necessary to decide as to whether the respondent has violated an undertaking given to this Court.

In the instant matter it appears that the respondent upon deciding to take the child to U.K for 8 days for the period. (8th June – 15th June) has intimated the petitioner by letter dated 3rd May 2024 in this regard. Thus this letter is given not only for information but also for the views of the petitioner, in that regard. When decisions are communicated well in advance there remains two possibilities, either the decision may be confirmed within the said period or the decision may be changed/revoked. Unless the decision is implemented keeping petitioner in the dark it cannot be said that the respondent/wife has committed contempt of Court. Contempt is a willful disobedience of any order

passed by Court or any undertaking given to Court. In this matter the conduct of the respondent does not establish that she has committed contempt of Court. Now the question comes for consideration is whether the respondent/mother should be restrained by an order of injunction from taking the child to foreign country. In this regard it is to be remembered that when an order is to be passed under the provisions of Guardians and Wards Act 1890 the welfare of the child is to be considered. The question comes whether order of injunction restraining the mother from taking the child to foreign country is for the welfare of the child. The obvious answer is in the negative. When a child comes to know that he/she will be taken out for tour, the heart of the child is filled up with joy and the child waits patiently for the said day, with full of curiosity. The joy is more when the child knows that he will be going to foreign country and it also becomes a matter of pride. Thus when the decision of cancellation of the tour is intimated to the child the child is at a loss and the joy cherished in the mind and heart disappears and sadness, creeps into the mind of the child. Hence the feeling of sadness and pain is prejudicial to the welfare of the children. The more the children are in joy and peace the more it helps in their development. Hence the Order of injunction restraining the respondent from taking the child to foreign country cannot be passed. It cannot be concluded also that the very decision of taking the child to foreign country is bad. Upon perusing the petition of the petitioner it appears that the petitioner has contended that he intends to take the child to some international destination thus it is not open to the petitioner to contend that the very

decision to take the child to foreign country is bad and unreasonable. However this Court appreciates the parental anxiety when child is taken to foreign country. Moreover it is the mother alone who is going and there is no mention that there are other parents going along with the respondent or that respondent is going with any tour company group along with others. Thus the anxiety of the petitioner has to be taken into consideration, before decision.

The petitioner is thus permitted to go to U.K between 8th June to 15th June separately. As it appears from record that the pass-port of the petitioner was handed over to the Investigation Officer with regard to a criminal case, the petitioner may proceed only if he has received back the passport and there is no restrain order by the concerned Criminal Court in the petitioner proceeding to a foreign country. In the event there is no restriction in this regard imposed by the respective Court the petitioner upon intimating the lawyer who is conducting his case and the public prosecutor, and the officer in charge of the police Station where the case was instituted proceed to U.K, so that his absence in the criminal Court in connection with the case on any date if fixed within the said period is condoned.

In the event there is no restriction order issued by Criminal Court upon the petitioner in travelling to foreign country the petitioner upon compliance of the Legal requirement may travel to U.K separately. The petitioner is permitted to stay at a place in U.K which is atleast 10 Kilometres from the place where the respondent will reside with the child. The petitioner is permitted to meet

the child for 3 days during the said period. In order to facilitate the tour of both the petitioner and the respondent for the welfare of the Child Sri Niraj Gupta Learned Advocate of this Court having mobile no 9830168776 is appointed as Special Officer. Learned Special officer upon being satisfied that there is no restriction of the petitioner going abroad shall hold meetings between the parties and their Learned Advocates. In the event the respondent is unable to come to Calcutta the Learned Special officer shall hold virtual meeting with the respondent or any arrange meeting at Delhi with the respondent and the petitioner and the cost has to be borne by the petitioner. Special Officer in the meeting shall fix the date and time when the petitioner/ father will meet the child at UK and the time for such visitation. The Schedule of the places of visit shall be furnished to the Special officer and the tour programme. Learned Special Officer shall help the parties so that the parties get the necessary documents in accordance with law without delay. During the period of stay of the parties at UK the special officer shall maintain record of the communication made with the parties and must enclose the same in his report. Upon ascertaining the return of the parties from UK Learned Special Officer shall prepare final report and submit the same before Learned Additional District Judge 10th Court at Alipore South 24 Parganas by 25-06-2024.

Now in the event the petitioner is unable to go to UK due to some difficulties then in that case also the special officer shall hold meeting with the parties alongwith their Learned Advocates either physically at Calcutta or in

virtual made if the respondent is unable to come to Calcutta. The special officer may also arrange the meeting at Delhi at the cost of the petitioner. The Learned special Officer shall record the tour programme of the respondent and give a copy to the petitioner. During the period of stay of the respondent at U.K Learned Special Officer shall keep contact with both the petitioner and the respondent and record the communication made every-day. The respondent shall intimate the Special Officer if there is any difficulty during her period of visit and necessary help and advice should be given by the Special Officer. Upon ascertaining the return of the respondent from U.K the Learned Special Officer shall incorporate the same in his report and submit the same before the Learned ADJ 10th Court at Alipore South 24 Parganas by 25-06-2024.

It is made clear that in the event the petitioner is unable to go to U.K he shall be entitled to meet his daughter two days before the date at departure, and also on the date of departure at the Airport. Learned Special Officer in such case will be required to fix the place of visitation upon discussion with the parties and their Learned Advocates.

The Learned Special Officer shall be entitled to a remuneration of 2000 gms to be paid by the petitioner. In the event the Learned Special Officer is required to go to Delhi further remuneration of 2000 gms is to be paid. Learned Special Officer upon submission of report before Learned Trial Court will stand discharged. On the date of discharge by Learned Trial Court the Special Officer

shall be further entitled to a remuneration of 600 gms to be paid by the petitioner.

Now the schedule with regard to visitation of the child with the father and his stay with the child is given hereinbelow for this summer vacation:

- A. After return from U.K the respondent/mother shall bring the child to Calcutta on or before 22/06/2024 or shall intimate the father who shall bring the child from Delhi.
- B. In order to facilitate the Smooth visitation of the child by the father and some relatives, Smt Aparna Bannerjee Learned Advocate High Court Calcutta having mobile no – 9830143023 is appointed as Special Officer.
- C. Learned Special Officer shall upon holding meeting with the parties as well as Learned Advocates fix the date and time for bringing the child to Calcutta and handing over to the petitioner which should not be later than 22/06/2024. In the event the respondent cannot come to Calcutta for the purpose of meeting, the respondent may be permitted to join the meeting in virtual mode. Further if the respondent is unable to bring the child to Calcutta the petitioner shall bring the child to Calcutta and Learned Special Officer shall hold meeting with respondent in virtual mode along with petitioner and Learned Advocates after the child is produced before her.

D. On the date of arrival of the child, the child shall be produced before the Learned Special Officer at her chamber or such other place as may be fixed by the Learned Special Officer. The Special Officer shall upon interacting with the child take her to the flat which is hired by the petitioner at 25 Ballygunge Circular Road for the purpose of visitation the child. The father and mother of the child are to accompany the Learned Special Officer along with their Learned Advocates. No one else shall accompany the Special Officer, nor shall be present at the flat during visitation of the Special Officer. Learned Special Officer upon holding discussion at the said flat with the parties and their Learned Advocates and issuing necessary instruction dissolve the meeting and the petitioner along with the child shall remain at the Flat. The Petitioner during the period of stay with the child shall arrange a female attendant to take care of the child and the respondent/mother may also send her attendant so that both the attendants can take care of the child. The period of stay for the child in the flat shall not exceed 30-06-23024. During this period the grand parents of the child as well as her paternal aunt may visit the child once for two hours in the presence of the Special Officer. Upon notice the mother of the child may also visit the child in presence of the special officer once during this period. On completion of the period in the event the mother of the child is present on the date of departure her presence shall be recorded by the special

Officer. In the event the mother/respondent is not present the departure shall be recorded by Learned Special Officer in presence of the Learned Advocates for the parties. During this period if the child is to be taken to any relatives house for any occasion or outside Calcutta leave is to be obtained by the petitioner from the Trial Court. On completion of the period of stay if the petitioner is not willing to take the child for any tour, the child must be handed over to the mother, in the event the mother comes to Calcutta or else the child has to be taken to her residence at Delhi by the father. In the event the child is to be taken by the father for some tour upon intimation to the mother, then the tour period should be between 1st July 2024 till 4th July 2024 in any place in India but the child must be handed over to the mother/respondent by 5th July 2024.

In the tour except the father and 2 attendants no one else shall accompany. On the date of departure of the child from Calcutta Learned Special Officer shall prepare the final report and submit before Learned Trial court by 6/07/2024. On submission of report the learned special officer shall stand discharged unless the trial court is of the view that her continuation is necessary for the interest of the child in such case further remuneration and terms may be fixed by Learned Trial court. In the event the Learned Special Officer is discharged by Learned Trial Court she shall be entitled to a further remuneration of 600 gms to be paid by the petitioner.

E. Upon the child returning from Mussouri on or after 20th July 2024 the petitioner shall be entitled to meet the child at her residence at Delhi on 27th July 2024 between 4pm and 6 pm upon prior notice. On the 3rd Saturday in the month of August the petitioner may visit the child at her residence from 4 pm-6 pm and thereafter in the month of September the child shall come to Calcutta at the residence of the petitioner in the 3rd Saturday and visitation days of every month and stay of child shall be as per the Schedule mentioned above.

As the respondent has not yet filed written statement in the application under Section 25 of the Guardians and Wards Act the respondent is permitted to file written statement in the interest of justice. The written statement must be filed by 02/07/2024. The Learned Trial Court thereafter upon framing the issues shall proceed with the case in accordance with law.

Before concluding this court thinks just and proper to quote the observation made by the Hon'ble Karnataka High Court in the case of CS Reddy V Smt Yamuna Reddy reported in AIR- 1975 Karnataka p- 134. The Hon'ble Court made the following observation :

21. Before departing, we would like to express our earnest hope that the mother and the father would forget the past and turn a new leaf in their family life and live together for the sake of happiness of their own

children for which they are entitled. In this connection we would like to quote the following observation of the Supreme Court in a similar situation in Rosy Jacob v. Jacob, AIR- 1973 S.C and hope that in the interest of the children the mother and the father live together:

"Before concluding we must also express our earnest hope, as was done by the learned single Judge, that the two spouses would at least for the sake of happiness of their own offspring, if for no other reason, forget the past and turn a new leaf in their family life, so that they can provide to their children a happy domestic home, to which their children must be considered to be justly entitled. The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses before us who are both educated and cultured and who come from highly respectable families must realise that reasonable wear and tear and normal jars and shocks of ordinary married life has to be put up with in the larger interests of their own happiness and of the healthy, normal growth and development of their offspring whom destiny has entrusted to their joint parental care. Incompatibility of temperament has to be endeavoured to be disciplined into compatibility and not to be magnified by abnormal impulses or impulsive desires and passions. The husband is not disentitled to a house and a house wife, even though the wife has achieved the status of an economically emancipated woman, similarly the wife is not a domestic slave, but a

responsible partner in discharging their joint parental obligation in promoting the welfare of their children and in sharing the pleasure of their children's company. Both parents have, therefore, to co-operate and work harmoniously for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home".

This revisional application stands disposed. Order dated 11-04-2023 passed by the Learned Additional District Judge 10th Court at Alipore 24 Parganas(s) in Act VIII case no-17 of 2019 with regard to temporary custody of the child is confirmed. However with regard to visitation and stay of the child with the petitioner during vacation and some other occasions, the order of learned trial court is modified in terms of the observations and directions hereinabove. It is however made clear that during the pendency of the proceedings if there are subsequent developments the same may be brought to the notice of the learned trial court for necessary orders.

All interlocutory applications stand disposed along with this main case. Learned Advocates are requested to serve a copy of this order upon the Learned Special Officers.

Urgent certified copy shall be issued.

(Biswaroop Chowdhury, J:)