REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

TRANSFERRED CASE (CIVIL) NO. 25 OF 2021

AMAN LOHIA **...APPELLANT**

Versus

KIRAN LOHIA **...RESPONDENT**

J U D G M E N T

A.M. Khanwilkar, J.

1. The appellant[1] had filed MAT Appeal (F.C.) No. 85/2020 in the High Court of Delhi at New Delhi[2], which stood withdrawn and transferred to this Court in light of other proceedings pending between the parties in this Court involving overlapping issues, as per the consent order passed on 29.7.2020. That appeal, filed by the appellant is against the judgment and orders dated 21.9.2019 of the Principal Judge, Family Court, Patiala

1 husband of the respondent
2 for short, "the High Court"

House, New Delhi[3], whereby the application filed by the respondent[4] for transposing her as petitioner in the petition filed by the appellant declaring him as guardian of person of baby Raina and appointing him as her guardian, came to be allowed on the finding that the appellant had abandoned the petition. On the same day, by a separate order, the respondent was appointed as sole, exclusive and absolute guardian and custodian of minor child.

2. Both the parties have resorted to multiple proceedings against each other, essentially emanating from the discordant marital relationship between them. Besides the guardianship petition filed by the appellant, the respondent had filed *habeas corpus* petition on two occasions and because of non-compliance of the directions issued by the Court regarding custody and visitation rights, both had to file contempt petition against each other. The appellant, as well as, his parents have also filed special leave petition(s) against the judgment of the High Court in *habeas corpus* petition(s) and contempt petition(s).

3. As aforesaid, during the hearing of the said proceedings, parties consented to the transfer of first appeal [MAT Appeal

3 for short, "the Family Court"
4 wife of the appellant

(F.C.) No. 85/2020] pending before the High Court against the orders of the Family Court, dated 21.9.2019, which essentially involves issue regarding guardianship. Besides, a divorce petition is also pending between the parties.

4. Be that as it may, when the cases between the parties in this Court were listed for analogous hearing, it was deemed appropriate to first deal with the question of guardianship, to which suggestion, the parties favourably responded and have addressed the Court on all aspects of that matter. Intriguingly, despite this Court vide order dated 29.7.2020 had withdrawn the stated first appeal pending before the High Court and transferred it to this Court, the High Court on 6.8.2020 in the very appeal, even after taking note of the order dated 29.7.2020 passed by this Court, proceeded to dispose of the appeal alongwith pending applications therein. That, obviously, could not have been done by the High Court. For, it had ceased to have jurisdiction to deal with the appeal any further after the order of this Court dated 29.7.2020. Nevertheless, both parties advisedly argued the transferred case (appeal) on merits without reference to the order of the High Court, dated 6.8.2020.

5. As aforesaid, there are multiple proceedings pending between the parties. But, in this judgment, we may confine to the basic facts for answering the matter in issue before us regarding guardianship.

6. At the outset, we may note that for the nature of order that we propose to pass in the present transferred case, it may not be necessary for us to advert to all the factual matters pointed out by both sides. Suffice it to note that the guardianship petition (G.P. No. 09/2018) was filed by the appellant under Section 7 of the Guardians and Wards Act, 1890[5] read with Section 7(g) of the Family Courts Act, 1984[6] on 9.2.2018 on the assertion that the minor child was in his custody at the relevant time. The appellant had prayed for following reliefs: -

> "A. To declare petitioner as guardian of person of baby Raina.
>
> B. Appointing the petitioner as guardian of person of baby Raina.
>
> C. Any other relief this Hon'ble Court may deem fit and proper."

Notice was issued on the said petition on 19.2.2018. The respondent did not file written statement until August, 2018,

5 for short, "the 1890 Act"
6 for short, "the 1984 Act"

when the appellant moved a formal application for amendment of the petition under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908[7] and Section 10 of the 1984 Act to bring on record certain subsequent events including regarding *habeas corpus* petition(s). This application was filed by the appellant on 21.8.2018. There is nothing on record to indicate that the Family Court dealt with and disposed of this application before the impugned order came to be passed on 21.9.2019. The appellant filed another application under Order VI Rule 17 read with Section 151 of the CPC and Section 10 of the 1984 Act for amendment of the petition, on 4.10.2018. The Family Court directed the respondent to file reply to this application. However, the respondent did not file reply even to this application. In view of certain further developments, the appellant moved another application before the Family Court on 20.2.2019 to place on record copy of order dated 13.2.2019 passed by the High Court in Civil Contempt Petition (CCP) No. 116/2019 against the respondent and for issuing further directions that because of the contemptuous conduct of the respondent, she should not be heard on any application until she purges contempt. The Family

7 for short, the "CPC"

Court, besides taking note of that application, also recorded in its order dated 20.2.2019 that the application filed by the appellant under Order VI Rule 17 was still pending and notified the same for hearing on 8.3.2019. When the matter was listed before the Family Court on 8.3.2019, the respondent without any prior intimation, started arguing application under Section 26 of the Hindu Marriage Act, 1955[8] filed by her, despite the fact that the said application was not listed for argument on that date. What was listed on that day were the four applications, namely, two applications under Order VI Rule 17 of the CPC filed by the appellant, an application to take on record copy of High Court order dated 13.2.2019 in CCP No. 116/2019 and the fourth one - filed by the respondent under Order VII Rule 11 for dismissal of the guardianship petition (G.P. No. 09/2018). However, all the four applications stood deferred on that day.

7. The respondent then filed an application under Section 151 of the CPC for declaring and appointing her to be the sole and absolute guardian and custodian of the minor child. This application was filed by the respondent on 13.9.2019. No notice was given to the appellant of this application nor advance copy

8 for short, "the HMA"

thereof was supplied to him personally or his counsel. It had been averred in that application, that from the proceedings before the High Court appended to the application it was amply clear that the appellant had proved himself to be unworthy, incapable and incompetent to act in the welfare of child and discharge any parenting privilege whatsoever. In the wake of serious allegations against the appellant, this application was ordered to be posted for hearing before the Family Court on 16.9.2019 at 2.00 p.m., as noted in the order dated 13.9.2019, which reads thus: -

> "GP No. 09/2018
>
> Aman Lohia vs. Kiran Lohia
>
> 13.09.2019
>
> Present: Ms. Rytim Vohra, Ld. Counsel for the respondent/ applicant.
>
> File taken up today on application under Section 151 CPC seeking appropriate directions filed on behalf of the respondent/applicant.
>
> **Let notice of the application be issued to the petitioner/non-applicant and his counsel on filing of PF as well as through E-mail as per law. Process be given dasti.**
>
> **Be listed on 16.09.2019 at 2.00 pm.**
>
> Ld. Counsel for the petitioner has filed on record photocopy of the order of the Hon'ble High Court of Delhi dated 12.09.2019 vide which the application for transfer of the case from this court to some other court has been dismissed. Since now there is no bar or restraint for this court to proceed with the case notice has been issued to the non-applicant/petitioner."
>
> (emphasis supplied)

In terms of the said order, the matter was notified on 16.9.2019 when following order came to be passed: -

"GP No. 09/2018
Aman Lohia vs. Kiran Kaur Lohia

16.9.2019

Present: Sh. Rajat Bhalla, Ld. Counsel for the petitioner.

Ld. Proxy Counsel for the respondent.

File taken up today as Sh. Rajat Bhalla, Ld. Counsel for the petitioner has been served with notice of the applications moved by ld. Counsel for the respondent for early hearing and issuance of directions.

Sh. Rajat Bhalla, Advocate who was appearing on behalf of the petitioner in the present petition and in HMA Bearing No. 625/18 (new No. 663/18) states that since he has not received any instructions from his client, therefore, he seeks discharge from this case. He has also pointed out that he has made similar request before the Hon'ble High Court of Delhi in same cases pending between the same parties and he was discharged in the same vide order dated 12.9.2019. He also states that he had written e-mail to his client and had tried other modes of service also to inform him that he should make alternative arrangements for a counsel as he is seeking discharge in this case. He states that he had sent e-mails to the counsel for the respondent that he was no more representing the petitioner Sh. Aman Lohia in any of the matters handled by him.

Heard.

After hearing counsel for the petitioner and having gone through the e-mails that he has sent to the petitioner and the copies of the orders of the Hon'ble High Court of Delhi, he is discharged from this case.

No one is present thus today on behalf of the petitioner. **Notice was sent to him dasti and report on the same is awaited**.

Be listed on 19.9.2019 at 2.30 pm.

Earlier date given i.e. 30.10.2019 stands cancelled."

(emphasis supplied)

In the meantime, the respondent filed another application under Order I Rule 10 and Order XXIII Rule 1A read with Section 151 of the CPC to transpose her as the petitioner in the guardianship petition (G.P. No. 09/2018). This application was filed on 18.9.2019. The reliefs claimed therein read thus: -

> "PRAYER
>
> In the above stated facts and circumstances, it is respectfully prayed that this Hon'ble Court may be pleased to:
>
> a. Transpose the Respondent as the Petitioner and the Petitioner as a Respondent in the present case.
> b. Pass such other orders or directions as it may deem fit and proper in the interest of justice."

8. On 19.9.2019, the matter was listed before the Family Court, when the Court passed the following order: -

> "GP No. 09/2018
>
> Aman Lohia vs. Kiran Kaur Lohia
>
> 19.09.2019
>
> Present: None for petitioner.
>
> Respondent in person with Ld. Counsel Ms. Malvika Rajkotia.
>
> Ld. Counsel for the respondent has filed an application under Order 1 Rule 10 and Order 23 Rule 1 a r/w Section 151 CPC to transpose the respondent.
>
> **Be listed for consideration on 20.09.2019 at 1.00 pm**."
>
> (emphasis supplied)

On 20.9.2019, when the matter was taken up, the Court recorded the following order: -

"GP No. 09/2018

Aman Lohia vs. Kiran Kaur Lohia

20.09.2019

Present: None for petitioner.

Respondent in person with Ld. Counsel Ms. Malvika Rajkotia.

Arguments have been heard from 2:15 to 5:00 pm on applications, one application under Order 1 Rule 10 and Order 23 Rule 1a r/w Section 151 CPC and other application under Section 151 CPC have been filed by the Ld. Counsel.

Ld. Counsel for the respondent seeks time to file case law.

Be listed for orders on 21.09.2019.

Sd/-
Swarna Kanta Sharma
Principal Judge, Family Court
Patiala House Court, New Delhi

20.09.2019 (R)"

Once again, the Court did not advert to the crucial aspects as to whether the application under consideration had been duly served upon the appellant much less notice relating to application under Section 151 of the CPC filed by the respondent, as also, the subsequent application for transposition under Order I Rule 10.

9. Accordingly, on 21.9.2019, the matter was posted for hearing before the Family Court when two separate orders came to be passed. The first order was that despite knowledge about the pending proceedings, the appellant had abandoned and

withdrawn from the case for which reason the respondent was entitled to be transposed as the petitioner in the guardianship petition and seek declaration that she was the guardian of the minor child. It is stated that no notice of the transposition application was ever served on the appellant nor was he given notice regarding hearing of the said application before the Court, despite the fact that his counsel had been discharged from the case and the appellant was not represented by any other counsel. On the same day, the Family Court then proceeded to decide the main guardianship petition (G.P. No. 09/2018). After recording the material facts pointed out by the respondent, it proceeded to hold that giving guardianship of the minor child, who was only two and half years of age, to the appellant, was not advisable. By virtue of his conduct, he (appellant) had disentitled himself to be declared as guardian of the minor child. After recording this finding, the Court proceeded to hold that in the paramount interest and welfare of the child, the respondent mother needs to be declared as the sole, exclusive and absolute guardian and custodian of the minor child.

10. Feeling aggrieved, the appellant approached the High Court by way of MAT Appeal (F.C.) No. 85/2020 to challenge the aforesaid judgment and orders passed by the Family Court, dated 21.9.2019. The appellant had raised diverse grounds to challenge the correctness of the view expressed by the Family Court including the manner in which the impugned orders were passed, without giving fair opportunity to him and also about failure to follow mandatory procedure. The impugned orders were passed by the Family Court without following due process of law and in breach of principles of natural justice, in the matters of discharging his advocate and not issuing notice to the appellant even thereafter, calling upon him to make alternative arrangements, and moreso in allowing transposition of the respondent as petitioner and appellant as respondent and on the same day to declare her (respondent) as the sole, exclusive and absolute guardian and custodian of the minor child.

11. According to the appellant, the judgment under appeal is not a judgment in terms of Section 17 of the 1984 Act. That the

record of the case makes it amply clear that the Family Court failed to adhere to the established practice and procedure to be followed for adjudicating the disputes brought before it under the 1984 Act. That is evident from the order dated 13.9.2019, which records that notice be issued to the appellant herein and his counsel returnable on 16.9.2019. at 2.00 p.m. However, on 16.9.2019, when the counsel appearing for the appellant – Mr. Rajat Bhalla informed the Court that he intended to take discharge and his application came to be allowed by the Court, no notice thereof was given to the appellant. The order clearly records that dasti report regarding service of notice sent to the appellant was still awaited. As a matter of fact, on an earlier date, the Court had posted the matter for 30.10.2019, which date stood unilaterally cancelled by the Family Court in terms of order dated 16.9.2019, again without notice to the appellant. Further, no affidavit of service was filed on record indicating the factum of service of notice on the appellant regarding the application under Section 151 of the CPC filed by the respondent praying that she be declared as the sole, exclusive and absolute guardian and custodian of the minor child. Despite that, the Court proceeded

with the matter on 19.9.2019, but before that date, another application came to be filed by the respondent for transposing her as petitioner in the guardianship petition and appellant as respondent therein, for the reasons mentioned in the application dated 18.9.2019. Even copy of this application was not served on the appellant and despite that, the Family Court proceeded therewith on 19.9.2019 without recording the fact as to whether the appellant was duly served with the earlier application or the earlier notice; and yet chose to list the matter on the next day i.e., 20.9.2019 for consideration at 1.00 p.m. In short, it is urged that the record plainly speaks about the manner in which the Family Court proceeded to pass the orders on 21.9.2019, with tearing hurry at the behest of the respondent whilst completely disregarding the mandatory procedure prescribed in the 1984 Act read with the provisions of the CPC. It was a clear case of infraction of principles of natural justice. It is urged that it was not open to the Family Court to assume the factum of appellant having abandoned the proceedings unless he had appeared in Court to say so or had informed the Court in writing in that regard. It is a question of fact and not a matter for deducing

legal presumption. Assuming that the Court was convinced that the appellant was not pursuing the proceedings diligently or was creating obstruction in any manner, the Court, at best, could have dismissed the petition filed by the appellant on the ground of default or non-prosecution under Order IX Rule 8 of the CPC. In any case, since the Court chose to proceed with the transposition application *ex parte* against the appellant, it should have clearly recorded that fact in its order and the reasons in support thereof. Besides, after transposition of respondent as the petitioner in the guardianship petition (G.P. No. 09/2018) filed by the appellant and appellant as respondent therein, it was imperative for the Court to issue notice to the appellant to file his response in the proceedings. As a matter of fact, in guardianship proceedings, the question of transposition does not arise. For, it is a substantive petition founded on cause of action personal to the person claiming to be guardian of his own ward. Moreover, admittedly, the respondent had never filed written statement to oppose the guardianship petition filed by the appellant much less reply to the application(s) for amendment of petition, which could be treated by the Court as guardianship petition filed by the

respondent herself. In either case, the Court was obliged to issue notice to the appellant and only after service of notice, could have proceeded in the matter. If the respondent had any difficulty in effecting service of notice on the appellant, the Court could have allowed the respondent to serve the appellant through substituted service under Order V of the CPC. Even that attempt was not made by the Court. Instead, it presumed that the appellant had abandoned the proceedings. That approach is manifestly wrong. Hence, the procedure followed by the Family Court until culmination of proceedings into judgment and orders dated 21.9.2019, is vitiated in law.

12. The appellant is relying on dictum in ***Mamata Mayee Sahoo vs. Abinash Sahoo***[9], wherein the Orissa High Court took note of the procedural compliances to be made by the Family Court. According to the appellant, the decision relied upon by the Family Court of Delhi High Court in ***Someshwar Dayal vs. Anupama Dayal***[10], was inapposite. It was clearly distinguishable, as there was nothing on record to indicate that the petitioner had expressly abandoned the proceedings or after

9 2015 SCC Online Ori 167
10 2016 SCC Online Del 4585

due opportunity, had committed default in any manner. The present case indeed, was one of counsel appearing for the appellant having withdrawn from the case. That does not mean that the appellant had abandoned the proceedings. It is urged that the application filed by the respondent under Section 151 of the CPC, in law, could not be regarded as a substantive petition required to be filed under Section 25 of the 1890 Act for a declaration/appointment as guardian. In any case, the Family Court was under obligation to insist for the written statement to be filed by the respondent including reply to the applications filed by the appellant under Order VI Rule 17 of the CPC and then to frame issues on which the matter could proceed. Not only that, the Family Court was obliged to record evidence before adjudicating the matters in issue and pronounce final declaration and judgment under Section 17 of the 1984 Act, which obliges the Family Court to record a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision. The Family Court in the guise of entertaining application under Section 151 of the CPC, cannot assume the plenary power of a constitutional Court, but is obliged to decide the case as per the mandatory procedure prescribed in the

concerned Act and/or the CPC, as the case may be, for conduct of trial and inquiry. Strikingly, the Family Court, after pronouncing the impugned judgment and orders on 21.9.2019, upon an application filed by the respondent under Section 151 of the CPC, despite becoming *functus officio*, issued directions vide order dated 16.10.2019 to the effect that the custody of the minor child be handed over to the respondent mother within specified time. It was matter of record that the child was away from the jurisdiction of the Family Court when the relevant orders came to be passed. In law, therefore, the Family Court could not have exercised jurisdiction as noted in ***Ruchi Majoo vs. Sanjeev Majoo***[11].

13. The appellant asserts that he is a loving, caring, concerned and affectionate father and the minor cannot be denied of all that merely because of events that unfolded during the pendency of *habeas corpus* petition(s) or contempt petition(s) before the High Court. The central concern of the Court should be the paramount welfare and interest of the minor child. The approach of the Court in that regard ought to be child-centric. The issue

11 (2011) 6 SCC 479

cannot be answered on the basis of claims and counter claims of the warring parents, as to deny the child of parentage of her father because of other acts of commission and omission of the father. To do so would, in effect, be punishing the minor child and depriving her of the love and affection of her father. That must be eschewed. The Family Court in such proceedings is obliged to record a clear finding about the unfitness or otherwise of the father to be a guardian. That must be in the context of the child care and not other matters or worldly activities of father. As a matter of fact, contends the learned counsel, the most appropriate course would be to follow the joint shared parenting plan, in which the child would interact with both the parents in equal measure. Further, the paramount interest and welfare of the child is not limited to being connected with father and mother, but even other family members from both sides for her well-being and holistic growth. That is vital in the context of child psychology and upbringing. As a matter of fact, during counselling, the respondent had accepted the fact that because she is a working woman, the child can remain with the grandparents, who were staying only few houses away, during

the day time on working days. The appellant had highlighted several aspects about the unfitness of the respondent to groom the child or devote enough time and attention herself.

14. Reliance has been placed on the dictum in ***Savitha Seetharam vs. Rajiv Vijayasarathy Rathnam***[12], ***JK vs. NS***[13], ***Tushar Vishnu Ubale vs. Archna Tushar Ubale***[14], ***Law Commission of India Report No. 257***[15] and ***Child Access & Custody Guidelines alongwith Parenting Plan***[16]. According to the appellant, joint custody or shared parenting would be in the "best interest and welfare of the child". That would ensure that every decision taken regarding the child is for fulfilment of her basic rights and needs, identity, social well-being and physical, emotional and intellectual development. Reliance is placed on decision in ***Lahari Sakhamuri vs. Sobhan Kodali***[17], ***Ashish Ranjan vs. Anupma Tandon & Anr.***[18], ***Tejaswini Gaud & Ors.***

12 2020 (4) AKR 372 (paragraphs 9-11, 13, 23 and 32)
13 2019 SCC Online Del 9085 (paragraphs 89 and 95-97)
14 AIR 2016 Bom 88 (paragraphs 15 and 17-20)
15 Law Commission of India Report No. 257 – Reforms in Guardianship and Custody Laws in India (May, 2015)
16 Child Access & Custody Guidelines alongwith Parenting Plan by Child Rights Foundation NGO, Mumbai, 2014
17 (2019) 7 SCC 311
18 (2010) 14 SCC 274

vs. Shekhar Jagdish Prasad Tewari & Ors.[19], and ***Vivek Singh vs. Romani Singh***[20].

15. It is urged that the respondent for reasons best known to her, precipitated the matter despite the pre-emptory directions given by this Court in connected proceedings between the parties, by taking U.S. nationality of the minor child and also obtained a Consular Report of Birth Abroad Status (CRBA) in December, 2019 from the U.S. Embassy. The respondent herself is a U.S. citizen. Therefore, the appellant apprehends that the respondent has intention to remove the child away from the jurisdiction of the Courts in India and permanently deny access to him and his family members. Since the respondent has secured CRBA status on the basis of declaration given by the Family Court vide impugned judgment and orders, upon setting aside of that order, all consequential claims/benefits accrued or derived by the respondent on that basis, must also become *non-est* in the eyes of law.

16. As a matter of fact, in the Indian context, neither provisions of the 1984 Act nor the 1890 Act, envisage a declaration in favour

19 (2019) 7 SCC 42
20 (2017) 3 SCC 231

of the parent to be the sole, exclusive and absolute guardian and custodian of the minor child. Such declaration has been intentionally obtained by the respondent from the Family Court to serve her ulterior purpose. The appellant has taken us through other points to buttress the argument that the respondent is not a fit person for parental custody or guardianship of the minor child. The appellant has also relied on the observations in ***Nithya Anand Raghavan vs. State (NCT of Delhi) & Anr.***[21], ***Prateek Gupta vs. Shilpi Gupta & Ors.***[22], ***Kanika Goel vs. State of Delhi & Anr.***[23] and ***ABC vs. State (NCT of Delhi)***[24]. According to the appellant, the father being a natural guardian under the Hindu Laws, is entitled for declaration of guardianship unless it is found in a given case that he is unfit in the context of parenting of the minor child or would act against the interest and welfare of the minor child, as the case may be. According to the appellant, the father is a natural guardian. Irrespective of the mother's custody, the guardianship of the father cannot be divested in law. To buttress this

21 (2017) 8 SCC 454
22 (2018) 2 SCC 309
23 (2018) 9 SCC 578
24 (2015) 10 SCC 1

contention, reliance is placed on ***Roxann Sharma vs. Arun Sharma***[25]. It is contended that unless the father is declared as unfit, the relief of declaring him to be the guardian cannot be declined. The fact that the appellant had taken the child away from the jurisdiction of the Family Court, does not mean that he was a kidnapper of the child, as he continues to be a natural guardian.

17. It is also urged that interparental child removal is not a statutory offence. Reliance has been placed on ***the Hague Convention on the Civil Aspects of International Child Abduction, dated 25.10.1980***[26] to contend that issue of accession to the 1980 Hague Convention is still under consideration of the Government of India and interparental child abduction has not yet found any recognition in Indian law.

18. According to the appellant, the impugned judgment and orders cannot be sustained on any parameter and need to be set aside and instead, the guardianship petition (G.P. No. 09/2018) filed by the appellant be made absolute in favour of the appellant.

25 (2015) 8 SCC 318
26 for short, "the 1980 Hague Convention"

19. The respondent has stoutly refuted the stand taken by the appellant. It is urged that the Family Court had no other option, but to proceed on the basis that the appellant had abandoned the proceedings before that Court. Merely because there is no express statement forthcoming from the appellant in the proceedings before the Family Court, does not mean that he had not abandoned the proceedings before the Family Court by his conduct and other circumstances established from the record and so noted even by the High Court. The appellant admittedly filed proceedings in the UAE Court claiming himself to have converted to Islam. It is only when it became impossible for him to continue with those proceedings and his arrest became inevitable, he had no other option, but to withdraw those proceedings and submit to the jurisdiction of this Court. Such a litigant cannot be shown any indulgence nor would deserve any sympathy. The appellant is required to discharge high burden of *estoppel*, in raising procedural deficiencies in the decision-making process by the Family Court. In any case, the facts and the record would reveal that the appellant had full notice about the progress of the matter and the applications filed by the respondent, as is evident from his email trail. It is urged that the

appellant because of his conduct, has denied himself of raising technical pleas about procedural lapses committed by the Family Court. The procedural justice is always subservient to the substantive justice. It is urged that hyper technical argument of the appellant regarding non-compliance of procedure by the Family Court, needs to be negatived in light of the exposition in ***Sangram Singh vs. Electional Tribunal, Kotah & Anr.***[27], ***State of Punjab & Anr. vs. Shamlal Murari & Anr.***[28] and ***Rosy Jacob vs. Jacob A. Chakramakkal***[29].

20. In the alternative, it is submitted that there are strong reasons why the order passed by the Family Court needs to be upheld. For, the appellant not only converted himself to Islam but also indulged in misadventure by abducting minor child and taking her away outside India and obtained Dominica citizenship and Dominica passport for the minor. The mother being the natural guardian and the appellant having misconducted rendered himself to be unfit as guardian, the Family Court justly recognised the respondent as the sole guardian of the minor.

27 AIR 1955 SC 425 (paragraph 16)
28 (1976) 1 SCC 719 (paragraph 8)
29 (1973) 1 SCC 840

21. As regards the U.S. citizenship taken by the respondent of the minor child and U.S. passport, the respondent through counsel submits that she would surrender the same. That was taken by the respondent in good faith and for the welfare of the minor child. It is urged that the Family Court has done independent evaluation of the relevant factual matrix before concluding that giving guardianship to the appellant father would not be advisable and instead, the respondent was the fit person to be appointed as sole, exclusive and absolute guardian and custodian of the minor child. That can be discerned from the discussion in paragraphs 15, 17 to 28 of the impugned judgment. It is urged that the minor child is not comfortable while in company of the appellant or his family members, whereas, she is being properly looked after by the respondent and her family members. Even though the respondent is a working woman being a professional, she is conscious of her obligation towards the minor child and gives her best for the welfare and upbringing of her daughter. The present arrangement of visitation permitted by this Court in the connected proceedings to appellant can continue on same terms without disturbing the decision of the Family Court declaring the respondent as the sole guardian of

the minor. The respondent is willing to abide by any terms and conditions, as may be imposed by this Court to secure the welfare and interest of the minor child. The appellant having converted himself to Islam for reasons best known to him, has disentitled himself from acting as a guardian of the child who continues to remain Hindu.

22. Reliance is placed on Section 6 of the Hindu Minority and Guardianship Act, 1956[30]. As per the proviso therein, no person is entitled to act as the natural guardian of a minor under the provisions of Section 6, if he has ceased to be a Hindu. There being a clear embargo by statute coupled with the welfare of the minor child, the appellant is unfit for a declaration sought by him. The appellant had indulged in abduction of the minor child on two occasions, which has been frowned upon by the High Court in *habeas corpus* proceedings and more particularly, in contempt action initiated against the appellant and his family members. That itself is a good reason to deny any relief to the appellant. Rather, the appellant should not be heard until he purges contempt and those proceedings are still pending before this Court. This Court ought to exercise *parens patriae*

30 for short, "the 1956 Act"

jurisdiction, keeping in mind the paramount interest of the minor child as observed in ***Gaurav Nagpal vs. Sumedha Nagpal***[31], especially because the appellant has acted against the welfare of the minor. Any other view would result in rewarding him for his misconduct and misadventure including the disobedience of the directions issued by the High Court, by abducting the minor on two occasions, the first one when she was seven months old and the second when she was only two years old. The minor must have undergone traumatic experience because of such abduction and taking her away to foreign country completely blocking out from her mother (respondent). This is not a case of over-zealous emotional father, who loves his child, but is a revengeful father who hates his wife (mother of minor child), much more than his proclaimed love for his child. The appellant is unfit as a model parent and does not have moral values of an upstanding citizen who respects the law and cares about the people around him.

23. Reliance has been placed on the pleadings filed by the appellant, wherein he had gone to the extent of showing distrust in the judicial system of this country and had converted himself to Islam only to ensure that the custody of the child remains with

31 (2009) 1 SCC 42

him. He did not stop at that, but also fraudulently obtained passport for the minor child from the Dominica when her Indian passport was in custody of the High Court. He devised a legal stratagem of using Indian legal system, as well as, the Courts in UAE for achieving his immoral plan of retaining custody of the minor child with him and to completely deny the respondent of any access or interaction whatsoever with the minor child. The appellant had approached the Court of equity and having misconducted himself and abused the judicial process, is not entitled for any relief whatsoever. It is urged that by now, it is well established that "maternal preference rule" is the rule codified in the form of Section 6(a) of the 1956 Act, which gives right to the mother to get absolute custody of the minor daughter. Reliance is placed on dictum in ***ABC*** (supra) in support of this proposition. According to the respondent, there is an ongoing risk of third kidnapping or attempt in that behalf by the appellant. The appellant is a flight risk and cannot be pinned down in the event he manages to escape with the minor child. To safeguard the interest of the minor child in appropriate way and to ensure that she is not denied of the motherly love of the respondent and her family members as well, it will be just and

proper to uphold the decision of the Family Court. Further, there is no merit in the argument of the appellant that because of stated procedural lapses committed by the Family Court, the matter needs to proceed afresh before the Family Court. That would be a futile exercise because the conduct of the appellant all throughout has disentitled him for being declared as a fit person for being the guardian of minor child.

24. Our attention was drawn to various documents to support the argument about the manner in which the appellant had misconducted with her (respondent) including disobeying the directions issued by the High Court and resultantly, caused immense tension and stress to the minor child of such a tender age, because of her abduction on two occasions. According to the respondent, the appeal filed by the appellant questioning the impugned judgment and orders passed by the Family Court does not merit any interference and the same be dismissed.

25. We have heard Mr. Anil Malhotra, learned counsel for the appellant and Mr. Shyam Divan, learned senior counsel for the respondent.

26. After cogitating over the rival submissions, in our considered opinion, it may not be appropriate for us to delve into the factual matrix of the case, especially regarding the conduct of the parties as alleged by them against each other, for the nature of order that we propose to pass.

27. We are more than convinced that the Family Court, in the present case, exceeded its jurisdiction by hastening the entire proceedings. Indubitably, the Family Court is obliged to inquire into the matter as per the procedure prescribed by law. It does not have plenary powers to do away with the mandatory procedural requirements in particular, which guarantee fairness and transparency in the process to be followed and for adjudication of claims of both sides. The nature of inquiry before the Family Court is, indeed, adjudicatory. It is obliged to resolve the rival claims of the parties and while doing so, it must adhere to the norms prescribed by the statue in that regard and also the foundational principle of fairness of procedure and natural justice.

28. The Family Courts came to be established under the 1984 Act. Section 7 specifies the jurisdiction of the Family Court and

about the nature of claims to be adjudicated by it in the form of suits and proceedings delineated in the explanation in sub-section (1). Section 10 predicates about the procedure generally. The provisions of the CPC are made applicable for resolution of disputes falling under the 1984 Act. The Family Court is deemed to be a Civil Court having all powers of such Court. Consequent to bestowing such power on the Family Court, comes with it a primary duty to make efforts for settlement, as prescribed under Section 9. If that does not happen, during the resolution of disputes between the parties, the Family Court then has to bear in mind the principles enunciated in the Indian Evidence Act, 1872, which had been made applicable in terms of Section 14 of the 1984 Act. A Family Court can receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872. There is another provision, which gives insight into the working of the Family Court in the form of Section 15. It posits that the Family Court shall not be obliged to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to

be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record. An incidental provision regarding efficacy of recording of evidence can be traced to Section 16 of the 1984 Act. That envisages that evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court.

29. These provisions plainly reveal that the Family Court is expected to follow procedure known to law, which means insist for a formal pleading to be filed by both sides, then frame issues for determination, record evidence of the parties to prove the facts asserted by the concerned party and only thereafter, to enter upon determination and render decision thereon by recording reasons for such decision. For doing this, the Family Court is expected to give notice to the respective parties and provide them sufficient time and opportunity to present their claim in the form of pleadings and evidence before determination of the dispute.

30. We may usefully refer to the provisions of the 1890 Act, as invoked by the appellant by filing petition before the Family Court. The appellant admittedly filed petition before the Family Court under Section 7 of the 1890 Act read with Section 7(g) of the 1984 Act. Section 7 of the 1890 Act bestows power in the Court to make order as to guardianship in respect of a minor. Such prayer can be made by anyone interested in the welfare of the minor and "not limited to the father and mother of the minor". In this inquiry, the Court, if so satisfied that it is for the welfare of the minor, is free to appoint the applicant as a guardian of person or property of the minor or both or merely declaring a person to be such a guardian. Section 8 of the Act makes it amply clear as to who is entitled to apply for the order. It has specified four categories of persons. First is person desirous of being the guardian of the minor. The second is any relative or friend of the minor. The third is the Collector of the district or other local area within which the minor ordinarily resides and the fourth is the Collector having authority with respect to the class to which the minor belongs. Such application is required to be filed before the District Court having jurisdiction in the place where the minor ordinarily resides under

Section 9 of the 1890 Act. As regards procedure for such an application, it is delineated by providing for the form of application in Section 10 of the Act, which must contain necessary information referred to therein. Section 11 prescribes for the procedure in the event the Court is satisfied that there is ground for proceeding on the application. That would require adducing of evidence before making an order in terms of Section 13 of the 1890 Act. The Court is required to consider certain matters as specified in Section 17 of the 1890 Act and while making order, must also bear in mind the exception provided in Section 19 as to who should not be appointed as guardian.

31. Suffice it to observe that both the enactments (the 1984 Act and the 1890 Act), provide for procedure in the form of disclosures, declarations and assertions and its refutations by the other party opposing the claim, whereafter the matter proceeds for recording of evidence followed by the declaration or order passed by the Court. Intrinsic in all these steps is to guarantee fair opportunity to all concerned.

32. The question, therefore, that needs to be answered in light of the grievance made by the appellant is: whether the Family

Court in the present case had followed procedure prescribed by the concerned Act, much less a fair procedure adhering to principles of natural justice?

33. It is not in dispute that the appellant had filed the petition by invoking provisions of Section 7 of the 1890 Act read with Section 7(g) of the 1984 Act. Admittedly, no written statement was ever filed by the respondent to oppose the said petition. On the other hand, the appellant took out two applications for amendment of the pleadings under Order VI Rule 17 of the CPC. No reply was filed by the respondent even to these applications, despite Court directing her to do so vide order dated 4.10.2018. There is nothing on record to indicate that the Family Court decided these two applications for amendment of pleadings taken out by the appellant. Although the main objection alongwith two applications for amendment filed by the appellant remained pending from February, 2018, the respondent never filed response to the main petition or the amendment applications and instead took out application under Section 151 of the CPC for being appointed the sole and absolute guardian and custodian of the minor child, on 13.9.2019. This application was posted for hearing on 13.9.2019, on which date the Court issued notice to

the appellant and his counsel. As per that order, the matter was again notified on 16.9.2019 when the counsel appearing for the appellant – Mr. Rajat Bhalla requested the Court to discharge him from the case, which request was acceded to by the Court. As a matter of fact, before discharging the counsel, the Family Court should have ensured that notice was given to the appellant about the request made by his counsel including to make alternative arrangements, if he so desired. Admittedly, no such notice was issued by the Family Court. That is reinforced from the order dated 16.9.2019 reproduced in paragraph 7 above. It has been plainly noted that dasti notice sent to the appellant was still awaited.

34. Assuming that the Family Court could have allowed the request of the counsel for the appellant to unilaterally take discharge without giving notice to the appellant. However, after accepting that request, it was obligatory to issue notice to the appellant to inform about the order so passed and also calling upon the appellant to make necessary arrangements on the next date. The Family Court instead set down the main matter on 19.9.2019 at 2.30 p.m. In terms of order dated 16.9.2019, the Family Court additionally cancelled the already scheduled

returnable date of 30.10.2019, unilaterally. There is nothing on record to show that the respondent had made such a request.

35. What is more striking, is that, before 19.9.2019, the respondent took out another application under Order I Rule 10 read with Order XXIII Rule 1A of the CPC for being transposed as petitioner in the guardianship petition and to transpose appellant as respondent therein, for the reasons stated in the application dated 18.9.2019. Admittedly, even copy of this application was not served on the appellant nor a formal notice came to be issued by the Family Court on this application, when it was taken up for hearing on 19.9.2019. The Family Court merely ordered to place the matter on 20.9.2019 at 1.00 p.m. The order dated 19.9.2019 (in paragraph 8 above), makes no reference to the fact as to whether the notice sent to the appellant vide order dated 16.9.2019 had been duly served nor about the filing of any affidavit of service effected on him. Be that as it may, when the matter was listed on 20.9.2019, the Court after hearing the learned counsel for the respondent passed the following order (also reproduced in paragraph 8 above): -

20.09.2019

Present: None for petitioner.

Respondent in person with Ld. Counsel Ms. Malvika Rajkotia.

Arguments have been heard from 2:15 to 5:00 pm on applications, one application under Order 1 Rule 10 and Order 23 Rule 1a r/w Section 151 CPC and other application under Section 151 CPC have been filed by the Ld. Counsel.

Ld. Counsel for the respondent seeks time to file case law.

Be listed for orders on 21.09.2019.

Sd/-
Swarna Kanta Sharma
Principal Judge, Family Court
Patiala House Court, New Delhi
20.09.2019 (R)"

Once again, there is no mention even in this order about service of (i) the application under Section 151 of the CPC filed by the respondent, (ii) the application under Order I Rule 10 of the CPC read with Order XXIII Rule 1 read with Section 151 of the CPC filed by the respondent, (iii) order dated 16.9.2019 and (iv) order issuing notice on application under Order I Rule 10 on the appellant. Despite this, the Court proceeded on the assumption that the appellant had abandoned the proceedings. There can be no legal presumption about the factum of abandonment of proceedings. The abandonment has to be express or even if it is to be implied, the circumstances must be so strong and convincing that drawing such inference is inevitable. Rather, no

other view is possible. For that, the Court ought to have adverted to the material/evidence indicating that the appellant/petitioner was duly served with the applications filed by the respondent and that he was fully aware about the discharge of the counsel representing him in the proceedings including about service of Court notices. Even if the Court was to infer abandonment, it could at best have dismissed the petition for default in exercise of power under Order IX Rule 8 of the CPC.

36. Further, the Court could not have entertained the transposition application filed by the respondent *ex parte* and that too without ensuring that it was duly served on the appellant consequent to notice issued thereon by the Court. Admittedly, there is no official Court record to indicate that such service was effected on the appellant including that the Court had issued notice on the transposition application. *Arguendo*, such transposition was permissible but after allowing the transposition application *ex parte*, unless the cause title was amended and appropriate changes/amendments made in the petition including parties producing evidence in support of their claim, the matter could not have proceeded for final

determination. After such amendment, in any case, opportunity was required to be given to the appellant by issuing Court notice so as to enable him to respond to the amended petition including to contest the same. We may not be understood to have accepted the proposition that transposition in guardianship proceeding is permissible, much less permissible as a matter of course at the instance of the other parent of the minor child. We leave that question open.

37. In ***Sangram Singh*** (supra), this Court in paragraph 16 observed that procedure is something designed to facilitate justice and further its ends – not a penal enactment for punishment and penalties; not a thing designed to trip people up. Further, too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. These observations are contextual and have no application to the case where there is no semblance of procedure followed by the Family Court and the entire matter is disposed of in a short span of less than eight days after filing of an application (on 13.9.2019) by the respondent under Section

151 of the CPC for declaring her to be the sole, exclusive and absolute guardian and custodian of the minor child including the transposition application under Order I Rule 10 (filed on 18.9.2019) and culmination of the proceedings in favour of the respondent on 21.9.2019 vide impugned judgment and orders, that too without notice to the appellant nor waiting for service of notice already issued on the former application. This is substantial non-compliance of the prescribed mandatory procedure and infraction of principles of natural justice, not a technical irregularity to be overlooked.

38. Reliance was also placed on the dictum in ***Shamlal Murari*** (supra). In paragraph 8, while construing the concerned rule, this Court opined that every minor detail in that rule cannot carry a compulsory or imperative import. On that finding, the Court construed the said rule as directory and not having the effect of vitiating proceedings as in the present case, both on account of non-compliance of statutory procedural safeguards and in violation of principles of natural justice.

39. Reliance was then placed on ***Rosy Jacob*** (supra). In that case, the Court dealt with proceedings under Section 25 of the

1890 Act and in the fact situation of that case, noted that 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 requirements of welfare of the minor children and the rights of their respective parents over them. This issue may have to be debated in the remanded proceedings. We do not wish to dilate on this aspect.

40. Suffice it to observe that the appellant is justified in contending that the impugned judgment and orders came to be passed by the Family Court in a tearing hurry, may be because of the insistence of the respondent and her counsel to do so in light of the observations made by the High Court in *habeas corpus* and contempt matters against the appellant. The impugned judgment does make reference to those orders. We may hasten to add that the conduct of the appellant frowned upon by the High Court in the *habeas corpus* petition or contempt petition, cannot be made the sole basis to determine the factum of fitness or otherwise of the appellant for being a guardian of the minor child. That fact has to be decided on its own merits taking all aspects into account including possibility of joint shared parenting

arrangement and more particularly, child-centric approach with paramount welfare and interest of the minor child. It is for that reason, even the High Court whilst disposing the *habeas corpus* and contempt proceedings, had added a word of caution at the end of its judgment that guardianship petition or other proceedings between the parties must proceed on their own merits in accordance with law, which observation has been completely glossed over by the Family Court in the present case.

41. We have chosen not to dilate on other aspects or reported decisions brought to our notice by both sides including about the conduct of parties as alleged by each of them against the other. Nor it is necessary for us to examine the necessity of exploring the possibility of joint shared parenting plan, to assuage the psychological barriers likely to be encountered by the minor child of tender age and more particularly, for her holistic development, welfare and paramount interest. Those are matters which the Family Court ought to examine after giving due opportunity to both sides on their own merits and in accordance with law.

42. *A priori*, we have no hesitation in setting aside the *ex parte* impugned judgment and orders dated 21.9.2019 passed by the Family Court on transposition application, as well as, on the application for declaration that the respondent is the sole, exclusive and absolute guardian and custodian of the minor child. For the same reasons, the purported follow up order passed on 16.10.2019 by the Family Court, directing handing over custody of the minor child within the time specified therein, is also set aside. As these orders are set aside, any action taken on the basis of the aforesaid orders is to be regarded as *non-est* in law and is so declared hereunder. That does not mean that the custody of the minor child needs to be restored to the father (appellant) forthwith. That issue will have to be decided finally by the Family Court in the proceedings remanded in terms of this order.

43. By this order, we direct remand and revival of the Guardianship petition (G.P. No. 09/2018) and also all applications filed in the main guardianship petition by the

appellant. In other words, the two applications for amendment of petition filed by the appellant under Order VI Rule 17 read with Section 151 of the CPC shall stand restored and revived and be heard in the first place. Similarly, the other applications filed by the appellant to bring on record subsequent events/documents be also decided first. As the appellant has already withdrawn all proceedings between the parties pending in UAE Court, as recorded in connected matters pending in this Court, it is indicative of the fact that he intends to pursue the guardianship petition to its logical end, and for that reason, the transposition application under Order I Rule 10 read with Order XXIII Rule 1 read with Section 151 of the CPC, filed by the respondent, needs to be dismissed. We, however, revive the application filed by the respondent under Section 151 of CPC for declaring her to be the sole and absolute guardian in place of the appellant. That shall proceed before the Family Court on its own merits in accordance with law. All contentions available to both sides including about its maintainability are left open to be decided by the Family Court in accordance with law.

44. It was brought to our notice that the respondent has taken U.S. citizenship for the minor child and also U.S. passport in her name. In the context of that grievance, the respondent through counsel had assured that she will not precipitate the said claim and is willing to surrender the same in this Court to avoid any misapprehension entertained by the appellant. The respondent may do so within two weeks from today. At the same time, we direct the respondent not to travel with the minor child outside Delhi or abroad without prior permission of this Court to be taken in the connected matters.

45. The appeal is partly allowed in the aforementioned terms (referred to in paragraphs 42 to 44). The transferred case is accordingly disposed of. No order as to costs. All pending applications in this case are disposed of.

.....J.
(A.M. Khanwilkar)

.....J.
(B.R. Gavai)

.....J.
(Krishna Murari)

New Delhi;
March 17, 2021.