IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF JUNE, 2023

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.21685 OF 2022 (GM – RES)

BETWEEN:

SMT.K.M.SONIA MADAIAH
W/O LATE K.M.MADAIAH
AGED ABOUT 33 YEARS
R/AT MATHUR VILLAGE
VIRAJPET TALUK
KODAGU DISTRICT – 571 218.

PRESENTLY R/AT:
PRAKRUTHI APARTMENT
NEAR AISHWARYA PETROL BUNK
DOOR NO. 401-A
VIJAYA NAGAR
3RD STAGE, MYSURU DISTRICT
KARNATAKA – 570 017.

... PETITIONER

(BY SRI SACHIN B.S., ADVOCATE)

AND:

1 . SMT. K.M.LEELAVATHI
W/O. LATE K.G.MONAPPA
AGED ABOUT 59 YEARS
R/AT MATHUR VILLAGE
VIRAJPET TALUK
KODAGU DISTRICT – 571 218.

2 . THE C. D. P. O.
PONNAMPET TOWN
VIRAJPET TALUK
KODAGU DISTRICT – 571 218.

3 . STATION HOUSE OFFICER
PONNAMPET POLICE STATION
VIRAJPET TALUK
KODAGU DISTRICT – 571 218.

REPRESENTED BY
STATE PUBLIC PROSECUTOR
HIGH COURT BUILDINGS
BENGALURU – 560 001.

... RESPONDENTS

(BY SRI DEVAIAH I.S., ADVOCATE FOR R-1;
SMT.K.P.YASHODHA, HCGP FOR R-2 AND R-3)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF CR.P.C., PRAYING TO QUASH OF ORDER DTD.,4.8.2022 IN CRL APPEAL NO.5009/2019 ON THE FILE OF THE II ADDL. DISTRICT AND SESSIONS JUDGE KODAGU-MADIKERI SITTING AT VIRAJPET THEREBY DISMISSING THE APPEAL FILED UNDER SECTION 29 OF DOMESTIC VIOLENCE ACT., AS PER ANNEXURE-A AND CONSEQUENTLY ALLOW THE APPEAL IN CRL.APPEAL NO.5009/2019 AS PRAYED FOR IN THE INTEREST OF JUSTICE.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 01.06.2023, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioner is before this Court calling in question order dated 04-08-2022 passed by the II Additional District and Sessions Judge, Kodagu-Madikeri, sitting at Virajpet in Criminal Appeal No.5009 of 2019 rejecting the appeal filed by the petitioner under Section 29 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Act' for short).

2. Heard Sri B.S. Sachin, learned counsel appearing for the petitioner, Sri I. S. Devaiah, learned counsel appearing for respondent No.1 and Smt. K.P. Yashodha, learned High Court Government Pleader appearing for respondents 2 and 3 and.

3. Brief facts that lead the petitioner to this Court in the subject petition, as borne out from the pleadings, are as follows:-

Before embarking upon the journey, I deem it appropriate to notice the relationship of parties to the *lis*. The petitioner is the daughter-in-law of the 1st respondent who is the grandmother of the child – Dilan Devaiah, who is the main protagonist in the

conundrum. On 06-01-2008 the petitioner marries one Viju Madaiah, son of the 1st respondent. On 12-05-2013 Viju Madaiah dies. By then the couple had two children from the wedlock and are at present aged about 15 years and 12 years. Owing to certain matrimonial disputes, the petitioner leaves the matrimonial house i.e., the house in which the 1st respondent was staying. Meanwhile, the husband of the 1st respondent also dies. Therefore who remained in the family were the daughter-in-law, the mother-in-law and two children.

4. On 29-08-2018 the petitioner files an application under Section 12 of the Act and sought *ex-parte* direction to the 1st respondent/grand-mother to hand over the son to her. On 06-09-2018 the concerned Court passes an order *ex-parte* and grants custody of the son to the petitioner, the mother. The 1st respondent appears and files objections and seeks vacation of the *ex-parte* interim order. At that point in time, the concerned court interacts with the child in camera in which the son/child informs the Court that he would wish to stay with the grandmother and not with the mother. On 18-03-2019 the petitioner again gets an *ex-parte*

order of custody of the son and seeks to execute it through the Child Development and Protection Officer – CDPO. Later the 1st respondent appears and gets the order set aside and the earlier order which had continued stay of the son with the 1st respondent was restored. Against this, the petitioner prefers a criminal appeal in Criminal Appeal No.5009 of 2019 seeking suspension of the order dated 25-03-2019 which had annulled the beneficial order in favour of the mother. When no orders were passed in the criminal appeal, the 1st respondent seeks a mandamus at the hands of this Court in Writ Petition No.51009 of 2019. It is then the concerned Court passes an order dated 11-12-2019 which becomes the subject matter of Writ Petition No.2488 of 2020. Writ Petition No.2488 of 2020 was dismissed on 23-06-2020 upon which the child returned to the grandmother by himself. The child's return was reported to the Court and the Criminal Appeal No.5009 of 2019 which had been filed against the order dated 25-03-2019 comes to be dismissed. It is this order that is called in question by the petitioner.

5. The learned counsel appearing for the petitioner contends that in the best interest of the child, the child should always be with

the mother. The Courts have erred in directing the grandmother to be the guardian of the child and granting visitation rights to the mother, which ought to have been other way round. Merely because the child wants to stay with the grandmother who has pampered the child, the Court cannot grant custody of the child to the grandmother during existence of the mother. He would seek quashment of the order and allow the criminal appeal that was filed wherein the petitioner has sought custody of the child to her hands.

6. On the other hand, the learned counsel for the 1st respondent/grandmother would seek to refute the submissions to contend that what the Courts will have to look into is the best interest of the child. The child, in the interaction, not once but twice has made it clear that he wants to stay with his grandmother and not the mother. Whether it is of pampering or otherwise, the intention of the child and interest of the child should be looked into by the Court hearing such cases. It is not that the child is in the custody of a stranger, but in the safe hands of his grandmother which could not have been taken objection to by the petitioner. He would therefore seek dismissal of the petition.

7. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

8. In a family that had four and two children, what remains now are two children and two protagonists in the *lis*. The father of the child is no more. The grandfather of the child is also dead. Therefore, the child, in particular the son, has grown with the grandmother. The issue is whether the order which directs custody of the child with the grandmother is tenable in law or otherwise. The long story of squabble between the mother-in-law and the daughter-in-law need not be gone into in great detail. Several orders were passed granting interim custody of the child and the allegation is that the mother had taken away the son from the school itself but the son voluntarily comes to the grandmother. These are all matters that would require adjudication. They are on facts that have happened. What is necessary to be considered is the present impugned order. To consider the contentions against the present impugned order, it is germane to notice the original order

which came to be challenged in Criminal Appeal No.5009 of 2019. The original order is passed by the learned Magistrate in Criminal Miscellaneous Case No.157 of 2018 filed by the mother. Certain paragraphs of the said order become germane to be noticed and they read as follows:

> *"12.During the course of arguments, the 1st respondent was present in the court and submitted that since the death of her son she developed great affection towards her grandson and she is unable to live without him. She prayed for the custody of her grandson till her death and further submitted that she is ready to give a substantial portion of her self acquired properties to her grandchildren if the court allows her to take custody of her grandson. She further submitted that if the custody of her grandson isn't given she would donate all her properties to some orphanages. She further submitted that she wants to give few properties to 2nd respondent for her livelihood and all other remaining properties would be given to the petitioner.*
>
> ***13. On hearing both the parties this court thought it necessary to speak to the child before implementing the exparte order. Hence on 15.09.2018, an in camera proceedings was held and the child expressed its unwillingness to go with the mother and chose to stay with the 1st respondent. Considering the affection of the child towards its grandmother and submission of the parties this court thought it improper to implement the exparte order in hurry and hence adjourned the case for settlement as both the parties expressed their wish for settlement.***
>
> … … …
>
> ***15. After going through the pleadings and hearing the parties, this court is of the opinion that the***

present case isn't for custody of the child but for partition of family parties. It appears that the 1st respondent wants to give few properties to her daughter i.e 2nd respondent but the petitioner wants entire properties to herself and her children. Hence the settlement has failed.

… … …

17. Now the crucial question is whether or not there was such a great threat to the life of the child of the petitioner. The petitioner avers that she was thrown out of the matrimonial house by the respondents but she doesn't whisper the date of the incident. In the absence of such pleading or since the said fact is willfully suppressed by the petitioner this court has to rely on the documents on record. I have perused the copy of police complaint produced by the petitioner dated 26.07.2018 and the police endorsement. In the said complaint it is specifically stated that on 03.04.2017 the petitioner and her daughter was thrown out of the matrimonial house. The present petition is filed on 29.08.2018 i.e., after the lapse of 1 year and four months. The petitioner has made a very strong allegation against the respondents, as per her own contention there was a life threat to the life of her son but she waited 1 year and four months to file this petition. Further, it is to be noted that the petitioner isn't some illiterate woman, she is a graduate, she studied law and she almost completed the law degree. Considering the facts it is very difficult to believe that there was such a life threat to the son of the petitioner. Further on perusal of police complaint, present petition, and submission of the parties it appears that the petitioner is more interested in the partition of family properties than the safety of her own son. The court takes judicial notice of the fact that it is very difficult for a mother to spend a single day when her son is in such grave danger and this petitioner being educated hasn't made any efforts for 1 year and four months. Hence the contention of respondent that the petitioner abruptly vacated her

matrimonial house abandoning her son at the mercy of respondent appears to be true.

18. Further, the petition is drafted by suppressing material facts, the whole petition is silent about the date on which the petitioner was thrown out of the matrimonial house. However, on a plain reading of the petition as a whole, it creates an illusion that it might have happened a few days ago. However, the respondent alleges that the petitioner left the house after 3 years after the death of the petitioner's husband. If the allegation was really true certainly she would have filed first information or at least the present petition a few years back. The petitioner has deliberately suppressed the material fact i.e., the date on which she left the matrimonial house. This court doesn't appreciate the suppression of fact which was intended to mislead the court.

… … …

21. On perusal of the records, it is crystal clear and this court has absolutely no doubt that the petitioner in her petition at para 8 made false and misleading allegations against the respondents only to obtain exparte order. Hence the court holds that she hasn't approached the court with clean hands.

… … …

23. The respondent further contended that for past 2 years the petitioner was silent and now all of sudden in her petition stated that there is a life threat to the child, if the contention was true she would have filed the petition 2 years back. I have carefully perused both the versions, on perusal of materials produced by the respondent it is difficult to believe the version of the petitioner."

(Emphasis added)

On all the aforesaid reasons *inter alia*, the Court holds that the son has to be with the grandmother. The Court holds interaction with

the son. The interaction is recorded at paragraph 38 and it reads as follows:

> *"38. Considering the above judgment and the psychological impact on the child this court thought it necessary to speak to the child before implementing the exparte custody order. Hence on 15.09.2018 one in camera proceedings was held and the child expressed its unwillingness to go with the mother and chose to stay with the 1st respondent. Considering the affection of the child towards its grandmother and submission of the parties this court thought it improper to implement the exparte order in hurry.* ***In view of the above judgment, it is clear that the opinion of the child is very important. In that case, the child was 6 years old, but in the present case the child is 10 years old and has more maturity. Further, it is crucial to note that the 1st respondent brought the kid to the court to assist the court to arrive at a right decision, hence the court was able to talk to the child to know its heart. On the other hand, after forcefully taking the custody of the child the petitioner appeared before the court and intimated the court that the child doesn't wish to go with its grandmother. The conduct of the petitioner is blameworthy, she is not even ready to bring the child to the court, hence adverse inference can be drawn. Hence the contention of the respondent that the petitioner has threatened the child and forcefully confined the child appears to be true and it can't be ruled out easily. The conduct of the petitioner is corroborating the allegations of the respondent. Hence in view of the judgment, after going through the records this court is of the opinion that the child wants to go with its grandmother but the petitioner has taken the custody of the child without following due procedure. In the above judgment, in the interest of the child, the Hon'ble Apex court passed custody orders in favor of grandparents of the kid overruling the right of the natural father. In the***

> ***present case also in my humble opinion, the child's psychological health would be better if it stays with the grandmother."***
>
> *(Emphasis supplied)*

It is based upon the aforesaid interaction, by a detailed order, the custody of the child was handed over to the grandmother. The petitioner calls this in question the said order dated 25-03-2019 before the learned Sessions Judge in Criminal Appeal No.5009 of 2019. The learned Sessions Judge, again considering the entire spectrum of law and by rendering cogent and coherent reasons, affirms the order passed by the learned Magistrate. While doing so, the Appellate Court observes as follows:

> *"Even though in the appeal the appellant stated that, now her minor son is in her custody, the counsel for respondent No.1 filed memo stating that on 19.03.2022 the minor Dillan Devaiah came to the house of respondent No.1 and he is residing with respondent No.1, which is not disputed by the appellant. Now the age of minor Dillan Devaiah is 13 years. Further it is also not in dispute that the minor Dillan Devaiah is studying in KALS Gonikoppa. In the case on hand the appellant stated that, her parents used pay money to full fill her basic needs. Further she stated that, she studied up to 2nd PUC, hence she is not eligible to get disciplined job. Further the appellant stated that, respondent No.1 has got vast property and getting minimum annual income up to 70 lakhs per annum. As such one thing is clear that, the appellant is indirectly admits that, the respondent No.1 has got financial capacity to maintain the minor Dillan Devaiah. As per the address furnished in the appeal memo, the appellant is residing at Mysore. As already*

> *stated that the age of minor child is 13 years and he is studying at KALS School, Gonikoppa. In the case on hand the trial court has obtained wish of the child while passing orders regarding interim custody of the child. Further as per the documents available before the court the respondent No.1 is having financial capacity to provide good education and to provide basic amenities to minor child. Further the trial court is empowered to alter, modify or revoke any order made under Domestic Violence Act by assigning the reasons. For the aforesaid reasons, I did not find any illegality in the order passed by the trial Court and there is no merits in the appeal. The appellant has not made out ground to allow this appeal. Accordingly.* ***Point No.1*** *is answered in the* ***Negative.”***

The concerned Court holds that the minor son is in the custody of the grandmother and now the age of the son is 13 years and is studying in a school at Gonikoppa and all the basic needs of the child is met by the grandmother. The interaction with the child has revealed that the child wants to stay with the grandmother and not with the mother and in the best interest of the child the Appellate Court has rendered the impugned judgment. But, the mother who has given birth to the son cannot be left in the lurch. Equal visitation right to the petitioner, to her satisfaction, will also have to be looked into. In the circumstances, reference being made to certain judgments of the Apex Court rendered in such

circumstances where the interest of the child is held to be of paramount importance becomes apposite.

9. The Apex Court in the case of ***MAUSAMI MOITRA GANGULI v. JAYANT GANGULI***[1] has held as follows:

> ***"19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute.*** *Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.*
>
> ***20.*** *The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the*

[1] ***(2008)7 SCC 673***

court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

(Emphasis supplied)

Further, the Apex Court in the case of ***NIL RATAN KUNDU AND ANOTHER v. ABHIJIT KUNDU***[2] has held as follows:

> ***"24.*** *In Halsbury's Laws of England, 4th Edn., Vol. 24, Para 511 at p. 217, it has been stated:*
>
> *"511. … Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."*
>
> *(emphasis supplied)*
>
> *It has also been stated that if the minor is of any age to exercise a choice, the court will take his wishes into consideration. (Para 534, p. 229).*
>
> ***25.*** *Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ court is "welfare of the child".*
>
> ***26.*** *In Habeas Corpus, Vol. I, p. 581, Bailey states:*
>
> *"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the*

[2] ***(2008) 9 SCC 413***

interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."

It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be in the best interest of a child to grant its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment.

***27.** In McGrath (infants), Re [(1893) 1 Ch 143 : 62 LJ Ch 208 (CA)] Lindley, L.J. observed : (Ch p. 148)*

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

(emphasis supplied)

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

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

(emphasis supplied)

In Para 148, pp. 280-81, it is stated:

"Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence, a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment."

(emphasis supplied)

.. ..

***39.** The principles in relation to 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.

.. ..

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this : in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

.. ..

65. *As already noted, Antariksh was aged six years when the trial court decided the matter. He was, however, not called by the court with a view to ascertain his wishes as to with whom he wanted to stay. The reason given by the trial court was that none of the parties asked for such examination by the court.*

> ***66.*** *In our considered opinion, the court was not right. Apart from the statutory provision in the form of sub-section (3) of Section 17 of the 1890 Act, such examination also helps the court in performing onerous duty, in exercising discretionary jurisdiction and in deciding the delicate issue of custody of a tender-aged child. Moreover, the final decision rests with the court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. Normally, therefore, in custody cases, wishes of the minor should be ascertained by the court before deciding as to whom the custody should be given.*
>
> .. ..
>
> ***71.*** *In the instant case, on overall consideration we are convinced that the courts below were not right or justified in granting custody of minor Antariksh to Abhijit, the respondent herein without applying relevant and well-settled principle of welfare of the child as the paramount consideration. The trial court ought to have ascertained the wishes of Antariksh as to with whom he wanted to stay.*
>
> ***72.*** *We have called Antariksh in our chamber. To us, he appeared to be quite intelligent. When we asked him whether he wanted to go to his father and to stay with him, he unequivocally refused to go with him or to stay with him. He also stated that he was very happy with his maternal grandparents and would like to continue to stay with them. We are, therefore, of the considered view that it would not be proper on the facts and in the circumstances to give custody of Antariksh to his father, the respondent herein."*
>
> *(Emphasis supplied)*

A Division Bench of this Court in the case of ***SANKAR VISWANATHAN v. STATE OF KARNATAKA***[3] has held as follows:

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[3] ***2023 SCC OnLine Kar 9***

"10. *From careful scrutiny of the decision of a three Judge Bench of Hon'ble Supreme Court in 'NITYA ANAND RAGHAVAN v. STATE', (2017) 8 SCC 454, following broad propositions which are relevant for deciding the controversy in hand can be culled out:*

(i) When the child is removed from the foreign country by a parent, the custody of the child would he presumed to be legal and. merely because there is an order of the foreign court directing the mother to produce the child before it, the custody of the child would not be unlawful per se.

(ii) In such a case, the parent of the child who does not have the custody of the child can be asked to resort to the substantive remedy prescribed for getting the custody of the child.

(iii) In dealing with the issue pertaining to the custody of the child, the welfare of the child is of paramount consideration and the court has to take into account all the attending circumstances as well as totality of situations.

(iv) If the child has been brought to India, the Courts in India may conduct either a summary enquiry or an elaborate enquiry on the question of custody. In case of a summary enquiry, the Court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child.

(v) It is open for the Court to decline the relief of return of the child to the country from where the child was removed irrespective of a pre existing order of return of child by a foreign court.

(vi) The principle of Comity of Courts cannot be given primacy or more weightage for declining the matter

> *of custody or for return of the child to the native State.*
>
> ***13. The principle of comity of courts is salutary in nature, yet it cannot override the consideration of best interest and welfare of the child. The principle of comity of courts in the facts of a case has to yield to paramount consideration i.e., interest and welfare of the child, which has to be examined in the facts of each case. The issue with regard to best interest and welfare of the child has to be answered bearing in mind the totality of facts and circumstances of each case."***
>
> *(Emphasis supplied)*

What would unmistakably emerge from the aforesaid judgments of the Apex Court and that of this Court is that, consideration of best interest and welfare of the child in any given fact should be the paramount consideration which is "interest and welfare of the child". The Apex Court further holds that Courts exercising jurisdiction over such issues should act as *parens patriae* and ascertain the wish of the minor child and not go against the wish of the minor child. The wish of minor child was ascertained not once but twice and in both the occasion, the child wished to stay with his grandmother.

10. Though the wish of the minor child is to stay with the grandmother, the mother cannot altogether be denied of interaction with the child. Therefore, certain visitation rights are to be conferred upon the mother of the child. The mother shall thus be entitled to visitation two days a week, at the agreed day and time. The day and time of such visitation shall be on consensus and the grandmother shall permit such visitation on the dates agreed. The duration of such visitation is also a matter to be agreed upon by the parties.

11. Therefore, in the light of the judgments of the Apex Court and the one rendered by the Division Bench of this Court ,the order that is impugned would not warrant any interference. The order protects the interest of the child, the mother and the grandmother.

12. For the aforesaid reasons, the following:

ORDER

a. The writ petition stands rejected.

b. The rejection of the petition will not mean that the mother is not entitled to visitation rights.

c. The mother shall be entitled to visitation rights two days a week on the agreed date and time, which can be on consensus and the grandmother shall permit such visitation to the mother.

d. The duration of the visitation shall also be on the agreed terms of the parties.

Sd/-
JUDGE

bkp
CT:MJ