Smriti Madan Kansagra vs Perry Kansagra on 28 October, 2020

Equivalent citations: AIRONLINE 2020 SC 875

Author: Indu Malhotra

Bench: Uday Umesh Lalit, Indu Malhotra, Hemant Gupta

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3559 OF 2020
(Arising out of SLP (C) No. 12910/ 2020
(Diary No.8161 of 2020)

Smriti Madan Kansagra … Appellant

Versus

Perry Kansagra … Respondent

JUDGMENT

INDU MALHOTRA, J.

Leave granted.

1. The present Appeal arises out of a Guardianship Petition filed by the Respondent-father under Section 7, 8, 10 and 11 of the Guardian and Wards Act, 1890 for the custody of the minor child- Aditya Vikram Kansagra, before the District Courts, Saket, New Delhi.

2. The Appellant-mother Smriti is an Indian citizen, who was a practicing lawyer prior to her marriage to the Respondent-Perry, in New Delhi.

The Respondent-father Perry is of Indian origin, and Gujrati descent, whose family shifted to Kenya and settled there since the last three generations, when his grandfather migrated in 1935. Perry and his family have been settled in Kenya, where Date: 2020.10.29 16:38:51 IST Reason:

> they have established a vast business establishment in Kenya and U.K., and Perry holds a dual citizenship of Kenya and the U.K.

3. Prior to marriage, Smriti and her mother visited Kenya for a week to see the place, and satisfy themselves of the family background, social and financial status, and lifestyle of Perry and his family.

4. Smriti got married to Perry on 29.07.2007 at New Delhi.

After marriage, Smriti shifted to Nairobi, Kenya and settled in her matrimonial home.

5. In 2009, Smriti returned to India for childbirth. The son Aditya Vikram Kansagra was born on 02.12.2009 at New Delhi. Even though the child was an Indian citizen by birth, a considered decision was evidently taken by his parents, that he would hold a dual citizenship of Kenya and UK.

On 01.07.2010 about six months after his birth, Aditya went to Kenya with his parents. Smriti lived with Perry in Kenya for 5 years after her marriage, and occasionally visited Delhi since her mother lives in India.

In February 2012, the entire family had gone to see a school in Kenya, where Aditya would be admitted for his education.

6. On 10.03.2012, Aditya came with both his parents to New Delhi on a return ticket, and was scheduled to return to Kenya on 06.06.2012.

7. Perry returned to India on 22.04.2012 to spend time with his family i.e. Smriti and Aditya, and stayed with them at Smriti's flat till 26.04.2012. On 26.04.2012, he returned to Kenya.

8. On 26.05.2012, Smriti filed a Suit for Permanent Injunction bearing C.S. (O.S.) 1604 of 2012 against Perry and his parents, before the Delhi High Court.

This was the starting point of the commencement of litigation between the parties for the custody of the minor child. The proceedings which ensued are briefly outlined hereinbelow. In para 11 of the Plaint it is stated that :

> "11. It bears mention that the Plaintiff No.2 and the Defendant No.3 were extremely happy with each other after their marriage. They lived in a state of conjugal happiness, spend time together, derive joy from each other's company and would travel together and the Plaintiff No.2 would participate, assist and guide the Defendant No.3 in his business. They had a happy time till the time the Plaintiff No.1 was born on 02.12.2009. The defendants were overjoyed of the birth of the male heir and there were lots and lots of celebrations in India as well as in Kenya." In the Suit, the following reliefs were prayed for :
>
> "(a) Pass a decree for permanent injunction restraining the defendants, their agents, representatives, servants and/or attorneys in perpetuity from in any manner removing the child either from the lawful custody of the Plaintiff No. 2 or removing

> the child from Delhi; the jurisdiction of this Hon'ble Court or accessing the child in his School "Toddlers Train" at Sunder Nagar, New Delhi.
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> (b) Pass an order directing the Airport Authority of India, Immigration Authority of India, 'FRRO' to ensure compliance of prayer 'a' above.
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> (c) Pass a decree of permanent injunction restraining the Defendants, their agents, representatives, servants and/or attorneys in perpetuity from meeting Plaintiff No. 1 without the consent / presence of Plaintiff No. 2." 8.1. A single Judge of the Delhi High Court vide an ex□parte Order dated 28.05.2012 observed that since the minor child is barely two years old, he would require to remain in the custody and care of his mother and ought not to be disturbed. The Court restrained the father from removing the minor child from the custody of his mother.

8.2. Perry filed I.A. No.12429/2012 in the pending Suit, seeking directions to meet Aditya at some common place, and for overnight access.

Smriti submitted that she was not averse to the meeting of the child by the defendants, but the meeting may be allowed only under her supervision. The meeting could take place at 'Hang Out' in Select City Walk, which could take place for 2□3 hours on Saturday and Sunday, but not for overnight access.

The Delhi High Court vide Order dated 13.07.2012 permitted Perry to meet the child on 3 days at "Hangout" in Select City Walk from 5 p.m. to 7 p.m., under the supervision of Smriti, who would maintain a comfortable distance during the said meeting.

8.3. Similar Orders were passed for the following months from August 2012 to January 2013, since Perry and his parents were travelling from Kenya to India every month to visit Aditya. 8.4. By a subsequent Order dated 05.11.2012 passed in I.A. 14034/2012 filed by Perry, the High Court granted Perry and his parents access through Skype for a maximum period of 15 minutes once a week in the presence of Smriti.

8.5. By a further Order dated 10.04.2013, the High Court ordered that Perry and his parents would be permitted to visit Aditya, on Friday, Saturday and Sunday, in the second week of every month, for 2 hours each day in the presence of Smriti.

This schedule continued every month till March 2016. 8.6. In the meanwhile, on 06.11.2012, Perry filed a substantive Guardianship Petition No. 53 of 2012 before the District Courts, Saket, New Delhi wherein it was prayed:

> "a. Declare the petitioner who is natural father of the minor child master Aditya Vikram Kansagra as the legal guardian under Section 7 of the Guardianship and Wards Act, 1890;

b. Grant the permanent custody of the minor child master Aditya Vikram Kansagra to the Petitioner;

c. Pending the hearing and final disposal of the Suit, the Petitioner may be allowed to take minor child master Aditya Vikram to visit his parental home in Kenya MS, 166, 167, James Gichuru Road, Lavington Green, Nairobi, Kenya;

d. Pending the hearing and final disposal of the Suit, the Petitioner may be allowed to take minor child master Aditya Vikram for all holidays summers/ Diwali/ Christmas and any other holiday in India and abroad..." 8.7. During the pendency of proceedings, Smriti admitted Aditya to Delhi Public School, Mathura Road, New Delhi.

Perry moved an application MAT Appeal (FC) No.61/2014 u/S. 151, CPC before the Family Court seeking appropriate directions for the admission of Aditya to British School, which would be preferable since it follows the IB curriculum, which is recognized both in India and overseas. Since the child was holding a dual citizenship of Kenya and U.K., it would be preferable for the child to follow an international curriculum. It was further submitted that Smriti had not consulted him on the admission of the minor child, before admitting him to Delhi Public School.

The application was rejected by the Family Court vide Order dated 17.10.2013, since it would not be appropriate at this stage to uproot the child in the middle of the session. 8.8. Perry filed I.A. No.3924/2014 in the pending Suit before the Delhi High Court, seeking unsupervised visitation and sharing of vacations with Aditya during the 3 days when he would visit India every month.

Smriti in her reply to the said I.A. submitted that the Kenyan Passport of Aditya which was in her custody had got lost which she discovered on 28.05.2013. Smriti stated that she had filed a Non□ Cognizable Report on 03.07.2014 for loss of the passport. In Para 11 of the said reply, she alleged that Perry in April 2012 had in all probability clandestinely removed the Kenyan passport when he stayed with her. This would be a relevant factor before an Order of unsupervised visitation or shared vacations could be passed, since it would aid Perry to surreptitiously remove the child from the jurisdiction of the Court by a dishonest use of the Kenyan passport of the child. 8.9. On 31.08.2015, both the parties submitted before the Delhi High Court that the Suit may be disposed of, leaving the parties to pursue their remedies in the pending Guardianship Proceedings before the Family Court.

The Counsel for the defendant made a statement before the Court that the custody of the child would not be removed by any of the defendants without due process of law.

The High Court directed that the British passport of Aditya which had been deposited with the Family Court, be returned to the defendants for renewal, after which, it would be deposited with the Family Court. It was left open for the Family Court to consider the request of the parties for release of the passport in accordance with law.

The Suit was accordingly disposed of vide Order dated 31.08.2015 in the aforesaid terms.

8.10. On 02.09.2015, Perry filed an I.A. before the Family Court, wherein he made a prayer for unsupervised visitation and overnight custody of the child for 2 nights i.e. on Friday and Saturday on their monthly visits to India.

8.11. On 27.01.2016, the Principal Judge of the Family Court had a detailed interaction with Aditya in Chambers.

The Family Court took note that Perry and his parents had been meeting the child regularly every month, and found the child to be attached to his father and paternal grandparents. It was observed that it would be in the interest of the child if he could spend quality time and have better interaction with the father and paternal grandparents for his holistic growth.

The Family Court vide Order dated 09.02.2016 allowed Perry to meet the child for 2 hours on Friday, and from 10.30 am to 5 pm on Saturday and Sunday, in the second week of every month, in the presence of the Counsellor at a mutually agreed place. The Court directed Perry and his parents to deposit their passports with the Counsellor, before each visitation.

Perry offered to provide a sum of Rs. 1 lac per month for the maintenance of Aditya. Perry made a statement before the Court that he would not take the child out of the jurisdiction of this Court, and offered to deposit his passport alongwith that of his parents, so that he could avail of overnight custody of the child.As undertaken by Perry, the Court in the Order dated 27.01.2016 recorded that he would pay a sum of Rs. 1 lac towards the maintenance of the child.

8.12. The Family Court by a subsequent Order dated 09.03.2016 partially modified the visitation schedule recorded in the Order dated 09.02.2016 by consent of parties, and directed that Perry would meet the child only on two days i.e. Saturday and Sunday, with an increase in time by 1 hour from 10.30 am to 6 pm, with no visitation on Friday.

8.13. On 04.05.2016, when Perry was visiting India, he learnt that the child was unwell, and moved an application to meet the child on the same day. The Family Court directed that Perry would be allowed to meet the child on the same day from 5 p.m. to 6 p.m. in the presence of the Counsellor.

8.14. Smriti challenged the Order dated 04.05.2016 before the Delhi High Court.

The division bench vide Order dated 06.05.2016 directed that a personal interaction with Aditya would be necessary to enable the Court to decide the best interest of the child. However, the visitation Orders passed by the Family Court would continue to operate in the meanwhile.

The Court directed Smriti to apply for a Kenyan passport of the child within 10 days, and furnish a copy of the application to Perry for completing the formalities. The passport as and when delivered by the Kenyan authorities, would be handed over by Smriti to the Family Court in the Guardianship Petition, and kept in a sealed cover for safety.

The High Court appointed Ms. Sadhna Ramachandran as the Mediator to enable the parties to arrive at a negotiated settlement of all their disputes. It was further recorded that it shall be open for the Mediator to join any other person or relative of the parties, as may be considered necessary for a holistic mediation.

8.15. Pursuant to the Order of the High Court, the Mediator requested Ms. Swati Shah, Child Counsellor to join in the mediation.

8.16. On 11.05.2016, the High Court had a personal interaction with Aditya. It was noted that the child was comfortable in his interaction with his father and grandfather, and expressed happiness on their visitations, and unreservedly stated that he looked forward to the same. It was apparent that the child was well bonded with his paternal family. At the same time, it was observed that the child was deeply attached to his mother and nani. It was opined that his bearing and personality revealed fine upbringing by his mother and maternal grandmother. For his holistic development, the child required nurturing from both his parents, as well as love of grandparents on both sides. The Court noted that the British passport of the child had been deposited by Perry with the Family Court.

The Court directed that visitation would be maintained as per the Order 09.03.2016 passed by the Family Court.

It was agreed by the parties that given the ensuing summer vacations, Perry and his parents could be given longer visitation in the first week of June 2016.

8.17. On 11.08.2016, the report of the Child Counsellor was submitted before the High Court, which was taken on record, and a copy whereof was provided to both the parties. Smriti raised an objection on the admissibility of the reports submitted by the Mediator and Counsellor, contending that the Reports of the Mediator and Counsellor could not be relied upon in view of the principle of confidentiality.

8.18. The division bench vide order dated 17.02.2017 held that where the subject of mediation pertains to a parent child issue, the report of a Mediator, or Child Counsellor would not fall within the bar of confidentiality. Such reports were a neutral evaluation of expert opinion, and guide the Court as to what orders may be passed in the best interest of the child. These reports were not confidential communications of the parties.

It was directed that the Family Court would consider granting overnight interim custody to Perry on his trips to India, by imposing such terms and conditions which would ensure that the child is not removed from the territory of India. The proceedings in the Appeal before the High Court being MAT. App (F.C.) 67 of 2016 were closed since no further orders were required to be passed in the Appeal.

8.19. Smriti filed C.M. Appl. 42790/2017 for review of the judgment dated 17.02.2017 passed by the division bench on the issue whether the Counsellor's report could be used by either of the parties

during trial. The matter came up for consideration before another division bench of the High Court, which allowed the review petition. The division bench vide Order dated 11.12.2017 held that the mediation report should contain nothing except the report of failure. The report of the Mediator, or the Counsellor, should not be treated as part of the record, and must be disregarded by the Family Court when it proceeds to decide on the merits of the case.

8.20. Aggrieved by the Order dated 11.12.2017, passed in the review application, Perry filed SLP (C) No.9267/2018. This Court vide a detailed judgment dated 15.02.2019 allowed the Appeal, and set aside the Order passed in the review petition, and restored the Order dated 17.02.2017 which had been passed by the earlier division bench of the High Court. It was held that the Court while exercising parens patriae jurisdiction, is required to decide upon what would be in the best interest of the child. In order to reach the correct conclusion, the Court may interview the child, or may depend on the analysis of an expert who would be able to spend more time with the child, and gauge the upbringing, personality, desires or mental frame of the child, and render assistance to the Court. It is for this reason that confidentiality is departed from in child custody matters under sub-rule (viii) of Rule 8 of the Family Courts (Procedure) Rules, 1992. It was held that a child may respond naturally and spontaneously in the interactions with the Counsellor who is professionally trained to make the child feel comfortable. A record of such interactions may afford valuable inputs to the Court while exercising its parens patriae jurisdiction. If during such interaction, aspects concerning the welfare of the child are noticed, there is no reason why the Court should be deprived of access to such reports, for deciding the best interest of the child.

The normal principle of confidentiality would therefore not apply in matters concerning custody or guardianship, and the Court must be provided with all material touching upon relevant issues to render complete justice between the parties. 8.21. The Family Court framed two issues for final determination

(i) whether the Guardianship Petition was maintainable, since it was contended by Smriti that Perry Kansagra was a foreigner, and could not invoke the jurisdiction of the Guardians and Wards Act, 1890 read with the Hindu Minority and Guardianship Act, 1956; (ii) whether the father was entitled to be declared the guardian of the minor child, and granted custody.

(a) With respect to the first issue of maintainability, the Family Court held that this objection had been raised only during arguments. Perry was therefore denied the opportunity to rebut these objections in his pleadings. Since this issue was not purely legal, and was a mixed question of fact and law, it could not be raised at this stage. Furthermore, since it was not disputed that Perry was a Hindu by religion, who was living outside the territories of India, he would also be governed by the Hindu Minority and Guardianship Act, as provided by Section of the said Act. The Court further held that in a case of custody the domicile of the child would be the determinative factor, and not the domicile of the Petitioner. Accordingly, the Guardianship Petition was held to be maintainable.

(b) With respect to the second issue, the Court held that Perry being the biological father of Aditya was a natural guardian as per Section 6(a) of the Hindu Minority and Guardianship Act. Despite the distance, the father had been visiting the child every month, and paying a substantial amount

towards his maintenance.

While examining the issue relating to the welfare of the child, the Court was of the opinion that for all□round best development and growth of the child, the love and affection, and care by both parents was necessary. A suggestion was made to work out a shared parenting schedule. However, Smriti declined to hold any talks to work out a shared parenting schedule.

On the undisputed facts, the Family Court was of the view that given the future prospects of the child, the same would be best taken care of by the father. Aditya was the heir apparent of the vast businesses set up by Perry and his family, and to deprive him of his legitimate right to inherit the aforesaid business, would definitely not be in his best interest. The grooming of the child under the care of his father and grandfather would be in his best interest. Business interest and the knack to deal with people could not be learnt in any business school. The local language in Kenya i.e. Kiswahili could not be learnt overnight. The child can best pick up the local language by being brought up in the atmosphere where the language is spoken and widely used. The Family Court also placed reliance on the observations of the High Court with respect to the personal interaction with the child, recorded in the Order dated 11.05.2016, which revealed the positive observations made about the comfort level between the child and his father and paternal grandparents.

That even though, the mother had sought to restrain the father from meeting the child without her consent, which was evident from Prayer (c) of her Suit filed before the Delhi High Court, the father was able to obtain visitation pursuant to Orders passed by the High Court from time to time. The attempt of the wife to alienate the child from the father was evident from the Aadhaar Card of the child, his bank opening account form, and his school admission form, wherein the name of the father was not even mentioned. The admission to Delhi Public School, Mathura Road was obtained in the 'single parent category'. The conduct of the mother was held not to be in the best interest of the child.

On a conspectus on the fact situation, the Family Court took the view that the father, who is the natural guardian of the child, was a more suitable guardian for the child. The future of the child was most secure with the father. The mother had unauthorizedly retained the custody of the child for a period of almost 6 years.

Smriti being a parent, however could not be deprived of her right to maintain her contact and relationship with the child. It was directed that during the summer and winter vacations in school, the child would remain in the temporary custody of his mother.

To facilitate the transfer of permanent custody of Aditya to Perry, it was directed that during school holidays longer than 5 days, Perry would be entitled to take the child to U.K. or Kenya, so that the minor child gets familiarised with the atmosphere to which he would be eventually transferred. All visitations henceforth would be unsupervised with overnight stay.

Accordingly, the Family Court vide its final judgment and order dated 12.01.2018 allowed the Guardianship Petition filed by Perry Kansagra, and granted permanent custody to him at the end of

the academic session 2017□18. 8.22. Aggrieved by the judgment passed by the Family Court, Smriti filed Mat. App. (F.C.) 30/2018 and CM App. 49507/2018 before the Delhi High Court.

The High Court vide Order dated 13.04.2018 directed that, during all visitations, the passports of Perry and his parents would be deposited with the Court, and released after the visitation was over. It was further ordered that Perry would have overnight visitation of Aditya from 10:30 am on the second Saturday of every month till 6 pm on the following Sunday. 8.23. The Delhi High Court vide the impugned judgment and order dated 25.2.2020, dismissed the appeal filed by Smriti. The preliminary objection raised by Smriti that the Guardianship Petition filed by Perry was not maintainable, was rejected inter alia on the ground that Section 9 of the Guardians and Wards Act provides territorial jurisdiction to the Court, if the application is made before the District Court where the minor ordinarily resides. By virtue of Explanation (g) to Section 7(1) of the Family Courts Act, 1984 r.w. Section 7(1)(b), the Family Court established under the said Act is deemed to be a District Court for proceedings with respect to the guardianship of the custody of a minor. Reliance was also placed on Section 1 of the Hindu Minority and Guardianship Act, 1956 which provides that this Act extends to the whole of India, and also to Hindus domiciled outside India.

The High Court rejected the issue raised by the Appellant that the Respondent was racist and considered persons of African descent to be beneath him. This allegation was found to be unfounded, since the Respondent and his family had a vast business interest in Kenya, where he had been residing ever since his birth. If the Respondent had such an attitude, it would have been impossible for him to run such a vast business enterprise in that country.

The issue regarding Perry being an alcoholic, was held to be unsupported by any evidence. This allegation was sought to be corroborated by Smriti through the testimony of RW□2. The Family Court had discredited the evidence of this witness regarding the alleged incidents mentioned by her, since the same were not corroborated by her own evidence, despite being present at that event. The evidence of RW□2 was also discarded on the ground that he was an interested witness, who was close to the Counsel for the Appellant. The High Court affirmed these findings, and disbelieved the testimony of RW□2, being an interested witness, and found the allegations to be uncorroborated.

With respect to the allegation of Smriti, that Perry was allegedly in an adulterous relationship with a woman named Sonia from Mozambique, which she had discovered from certain messages on his Blackberry, could not be relied on as the same was not free from doubt, and could not be proved.

With respect to the allegation that a criminal case had been registered against Perry on account of a dam burst in Solai farms owned by Perry and his family, which led to the death of 48 persons, the Court held that the mere registration of a criminal case in Kenya, could not be read to mean that Perry was guilty of the offence of manslaughter. There was nothing brought on record to even remotely suggest that the incident had created a hostile environment in Kenya against Perry. The other contention that if Perry would remain busy with the trial, he would not be able to look after the child, was also rejected as being devoid of any merit.

The High Court found that even though the child was born in India, a conscious decision had been taken by both Smriti and Perry to obtain dual citizenship of Kenya and United Kingdom for Aditya, which was indicative of the intention that the child would not be brought up in India. Furthermore, Smriti could not take advantage of the fact that the child had remained in India throughout since 10.03.2012. This had occurred on account of the Suit filed by Smriti, wherein she had obtained an injunction from the High Court in the Suit, and deprived Perry of custody of the child. The child had stayed in India since 2012 only on account of the time taken by the litigation between the parties. Despite the same, Perry had been visiting the child every month, and had made repeated attempts for extending his visitation rights.

The High Court held that Smriti had tried to alienate the child from the father, since she had sought to restrain Perry and his parents from even meeting the child without her consent, or in her absence. The Court took note of the fact that she had withheld the name of the father in the Aadhaar card, the school admission form, wherein the name of the respondent had been struck off and "single parent" had been written.

The Court took note of the fact that Perry had been visiting India every month since 2012 to spend time with Aditya, which showed his genuine love and affection for his child. His dedication despite all odds kept the bond alive.

The High Court vide judgment and order dated 25.02.2020 dismissed the Appeal, and held that the father was in a better position to take care of the child, and it would be in the best interest of the child, if the custody was granted to the father. 8.24. By a separate Order dated 25.02.2020, the High Court recorded that Perry was willing to file an undertaking of his mother who holds an Indian passport, before the Court, to ensure compliance with the Order of the Family Court granting visitation rights to Smriti. Perry would file an undertaking before the Indian embassy in Kenya, in token of his acceptance of the Order, and that he would submit to the jurisdiction of the Court and the consequences which may follow, in case the Order is not faithfully complied with.

The High Court passed the following additional directions:

> (i) Perry shall apply for a Kenyan passport for the child, if not already done, and Smriti would co□operate in filing the application;
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> (ii) Smriti shall be entitled to talk to the child over audio calls/ video calls for at least 10 minutes everyday at a mutually agreed time which is least disruptive to the schooling and other activities of the child;
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> (iii) Smriti shall be entitled to freely exchange e□mails, letters and other correspondences with the child without and hindrance by Perry or his family;
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> (iv) In addition to the grant of temporary custody of the child to Smriti during summer and winter vacations on the dates to be mutually agreed upon, Smriti may visit the child at Nairobi, Kenya. However, she shall not be entitled to take the child

out of Nairobi, Kenya. Perry shall bear the cost of her return air ticket for travel from India once a year and accommodation for seven days;

(v) Smriti shall also file an undertaking before the Court once the order has attained finality that the order of the Family Court and the directions given by this Court shall be complied with. The undertaking shall state that the period of visitation as stipulated would be strictly adhered to, and she would return the child to the respondent at the stipulated time. Further, she would not abuse her visitation and contact rights to brainwash the child with negative comments about the respondent, his family or Kenya.

8.25. In compliance with the Order dated 25.02.2020, Perry filed an Undertaking dated 02.03.2020 before the High Court, wherein it was stated that he would honour and comply with the visitation rights granted to Smriti in the judgment dated 12.01.2018 passed by the Family Court, and affirmed by the High Court vide judgment dated 25.02.2020.

8.26. Aggrieved by the judgment passed by the High Court, Smriti filed the present Special Leave Petition before this Court. This Court vide Order dated 04.03.2020 requested both the parties and Aditya to remain present in Chambers on 16.03.2020. In the meanwhile, it was directed that the extent and nature of visitation granted by the High Court would continue. 8.27. By a further Order dated 12.03.2020, an interim direction was passed whereby Perry would continue to comply with the directions of the High Court in the Order dated 13.04.2018, whereby Perry and his parents would deposit the passports before the registry of the High Court prior to each visitation. 8.28. On 17.03.2020, Smriti, Perry and Aditya appeared in Chambers before this Court, when we had a personal interaction with both Perry and Smriti individually, and thereafter we spoke to Aditya in the absence of his parents, to gauge his inclinations, expectations, preferences and aspirations. We found Aditya to be self confident and articulate for his age, who was comfortable and at ease in interacting with us. He had great clarity about his interest to pursue his education overseas, and was interested to travel to the U.K. and other places. He revealed deep love and affection for his mother and naani. At the same time, we observed that he had a strong bond and attachment to his father and paternal grandparents.

9. Submissions of Smriti Smriti has objected to the custody of Aditya being handed over to Perry at this juncture till he attains majority, for various reasons, which are briefly mentioned hereinbelow :

9.1. Smriti submitted that she had sacrificed her career in the legal profession to bestow her undivided attention to look after Aditya. She had single handedly got Aditya admitted to a premier school in Delhi. Aditya while he was under her care, had excelled in his studies, and had ranked amongst the top five in his class. Apart from academics, it was submitted that he was the captain of his cricket team, and actively participated in dramatics.

9.2. Smriti submitted that she had provided Aditya with a holistic upbringing, by encouraging him to meet his father and paternal grandparents, and would invite

Perry and his parents for Aditya's birthdays, and ensure that Aditya would call Perry on his birthday. In school projects pertaining to family members, Smriti would ask Aditya to put up pictures of Perry and his paternal grandparents.

9.3. Smriti has alleged that Perry was a racist and an alcoholic who would turn violent, and misbehave socially after drinking, and would not be a fit and suitable guardian for Aditya. 9.4. Smriti has alleged marital infidelity against Perry, and submitted that he was in an adulterous liaison. It was submitted that he had got into an affair with a woman in Mozambique called Sonia, which came to her knowledge in April 2012, when Perry was on a visit to New Delhi. She stumbled upon certain loving and explicit messages exchanged on his Blackberry between Perry and Sonia.

9.5. It was further submitted that the Solai Dam burst tragedy which took place in May 2018 on the Solai farms owned by Perry, led to the death of 48 persons, and resulted in widespread hostility and anger against Perry and his family. Perry was facing trial on the charge of manslaughter before the Kenyan criminal courts. It would therefore not be in the interest of the child, if Perry who is facing a criminal trial in these cases, is made the guardian of Aditya.

10. Submissions of Perry

10.1. It was submitted on behalf of Perry that Smriti had indulged in parental alienation. The first step was when she came back to India in March 2012, she filed a Suit before the Delhi High Court, wherein she had inter alia prayed for a permanent injunction restraining Perry and his parents from even meeting the child in perpetuity, without her consent / presence.

10.2. During the past 8 years, Perry was provided with very limited access and visitation rights with Aditya, even though he and his parents were travelling for 36 hours every month to meet him.

10.3. On the issue of parental alienation, Perry contended that Smriti had filed a Suit for injunction before the Delhi High Court wherein it was inter alia prayed for a decree of permanent injunction restraining Perry and his parents in perpetuity from meeting Aditya without the consent/presence of Smriti.

It was only after Perry moved an I.A. for Directions before the High Court to meet Aditya at a neutral venue, that he was granted supervised access in the presence of Smriti. Throughout the proceedings, Perry moved several I.A.s from time to time praying for increased visitation rights and overnight access.

The applications moved by Perry for increased visitation were opposed at every stage by Smriti, and she insisted on supervised and limited access, even though there was no chance of him removing the child from the jurisdiction of the Court, since the passports of his parents and himself, were deposited with the Court before every visitation. Till 2016, the visitation rights were under the supervision of Smriti, and thereafter vide Order dated 09.02.2016, under the supervision of the

Child Counsellor.

The maximum visitation granted to Perry was two days every month, which was increased to overnight access for one day vide Order dated 13.04.2018 passed by the High Court. 10.4. It was submitted on behalf of Perry that Smriti had, in all the official documents of the child, represented Aditya to be the child of a "single parent" in the Admission Form to School, and the name of the father was scored out; even in the Aadhar Card, the name of the father was not mentioned; as also in the bank account opening form.

Perry submitted that Smriti withheld information regarding the admission of the child to regular school. She firmly opposed the suggestion made by Perry to admit Aditya in an international school, whether British School or Pathways School, which would be more beneficial to him, being a foreign national.

On 16.12.2013, Perry sent an email to Smriti that it would be in the best interest of the child to admit him in Pathways School, Noida (an international school which follows the IB curriculum).

Smriti replied to this email on 30.12.2013, stating that :

> "The aspect of education forms part of the larger scheme of comprehensive settlement as mutually agreed. At the cost of repetition, I would like to reiterate that the primary aspects in this regard are suitable accommodation and creation of a fund for Aditya's ongoing education and maintenance. Therefore, simultaneously kindly finalise all these aspects, including alimony, in entirety...." (emphasis supplied) It was submitted on behalf of Perry that her response showed that she was using the custody of Aditya to work out a more beneficial settlement for herself, rather than consider the best interest of the child.
>
> 10.5. Smriti was unwilling to share Aditya's progress reports in school. The progress reports were made available only after a legal notice was issued to Smriti, followed by an application being filed before the Family Court. Smriti gave an undertaking to the Family Court on 19.12.2016, that she would mail the academic record and school reports of Aditya to Perry, as also the school calendar for each year.
>
> 10.6. It was further submitted that academics was not high on priority for Smriti, which would be evident from Aditya's school records for the years 2015□16 and 2016□17. The academic session for 2015□16 revealed poor attendance of 111 days out of 175 working days, which would show that the child remained absent for 36.5 % of that academic session. In 2016□17, the attendance was 138 out of 178 working days, which was absence of 22.5% of the academic year. Such absence from school was reflective of the indifference of the mother to the education of the child.

11. Discussion and Analysis We have carefully considered and deliberated upon the oral and written submissions made by Mr. Shyam Divan, Senior Advocate, instructed by Mr. P. Banerjee and Ms.

Nidhi Mohan Parashar on behalf of the Appellant; and the submissions made by Mr. Anunaya Mehta, Advocate instructed by Ms. Inderjeet Saroop, Advocate representing the Respondent.

The issue which has arisen for our consideration is as to what should be the dispensation to be followed with respect to the custody of the minor child Aditya who is now 11 years of age, till he attains the age of majority in 7 years' time. 11.1. It is a well settled principle of law that the courts while exercising parens patriae jurisdiction would be guided by the sole and paramount consideration of what would best subserve the interest and welfare of the child, to which all other considerations must yield. The welfare and benefit of the minor child would remain the dominant consideration throughout.

The courts must not allow the determination to be clouded by the inter se disputes between the parties, and the allegations and counter allegations made against each other with respect to their matrimonial life. In Rosy Jacob v. Jacob A Chakarmakkal 1 this Court held that :

> "15...The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society." (emphasis supplied) A three Judge bench of this Court in V.Ravichandran (2) v Union of India & Ors.2 opined :
>
> "27...it was also held that whenever a question arises before a Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of the parties, but on the sole and predominant criterion of what would serve the best interest of the minor." (emphasis supplied) 11.2. Section 13 of the Hindu Minority and Guardianship Act, 1956 provides that the welfare of the minor must be of paramount consideration while deciding custody disputes.

Section 13 provides as under : "13. Welfare of minor to be paramount consideration (1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor." This Court in Gaurav Nagpal v. Sumedha Nagpal 3 held that the term "welfare" used in Section 13 must be construed in a 1 (1973) 1 SCC 840.

2 (2010) 1 SCC 174.

3 (2009) 1 SCC 42.

manner to give it the widest interpretation. The moral and ethical welfare of the child must weigh with the court, as much as the physical well being. This was reiterated in Vivek Singh v. Romani

Singh4, wherein it was opined that the "welfare" of the child comprehends an environment which would be most conducive for the optimal growth and development of the personality of the child.

11.3. To decide the issue of the best interest of the child, the Court would take into consideration various factors, such as the age of the child; nationality of the child; whether the child is of an intelligible age and capable of making an intelligent preference; the environment and living conditions available for the holistic growth and development of the child; financial resources of either of the parents which would also be a relevant criterion, although not the sole determinative factor; and future prospects of the child.

11.4. This Court in Nil Ratan Kundu v. Abhijit Kundu5 set out the principles governing the custody of minor children in paragraph 52 as follows:

> " Principles governing custody of minor children
>
> 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 4 (2017) 3 SCC 231.
>
> 5 (2008) 9 SCC 413.

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." 11.5. Section 17 of the Guardian and Wards Act, 1890 provides :

> "17. Matters to be considered by the Court in appointing guardian (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
>
> (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with

the minor or his property. (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) deleted (5) The Court shall not appoint or declare any person to be a guardian against his will." (emphasis supplied) 11.6. In the present case, the issue of custody of Aditya has to be based on an overall consideration of the holistic growth of the child, which has to be determined on the basis of his preferences as mandated by Section 17(3), the best educational opportunities which would be available to him, adaptation to the culture of the country of which he is a national, and where he is likely to spend his adult life, learning the local language of that country, exposure to other cultures which would be beneficial for him in his future life.

12. Personal Interaction of the Courts with the minor :

Section 17(3) of the Guardians and Wards Act, 1980 provides that if the minor is old enough to form an intelligent preference, such a choice would be of crucial importance in assisting the Court to arrive at a judicious decision on the issue of custody of the minor child.

In the present case, Aditya is by now almost 11 years of age. It has been observed by the Family Court, the Child Counsellor, and the High Court in their personal interactions with the child at different stages of the proceedings, that he was a bright and articulate child, who was capable of unequivocally expressing his preferences and aspirations.

We will now briefly touch upon the interactions of the Courts with Aditya, and the findings in this regard :

(a) The Principal Judge, Family Court had a personal interaction with Aditya on 27.01.2016 when he was 6 years old. The Family Court in the Order dated 09.02.2016 notes that the child was attached to his father and grandparents, and observed that it would be in the interest and welfare of the child to have better interaction with his father for strengthening the bond, and for his holistic growth. The Court took the view that longer meeting hours would enable the father to spend quality time with the child, and that it would be in the interest of Aditya to have exclusive time with his father, in the absence of the mother.

(b) During the mediation proceedings, the Child Counsellor interacted with the child on 08.07.2016 and 11.07.2016, based on which the Report dated 21.07.2016 was submitted to the High Court.

The detailed report of the Counsellor gives a clear and valuable insight of the mental disposition and inclination of the child, which are most relevant for deciding the issue of custody and guardianship of the child.

The relevant extract from the Report reads as under:

> "...Aditya stays with his mother in Delhi while his father travels from Kenya once every month to visit him. While speaking of his parents, Aditya showed lot of closeness and affinity for his father which was surprising for a child who lives with his mother and spends very little time with the father only during visitation. Father seems to be the person he idolises. He also talked affectionately of his Dada in particular and Dadi (paternal grandparents). He talked about the house in Kenya which he might be knowing only through pictures seen during visitation as he was very young when Smriti returned to India alongwith him.
>
> Various questions were asked to know more about Aditya's leanings towards his father and whether his expressions of love and affinity were genuine. Aditya is ready to go to Kenya. He also mentioned that if he can't go to Kenya now, he would do so when he grows up a bit. He talked about staying in England for further education which his Papa would provide for. His affection and bond with his father seemed genuine and not something that appears tutored or forced in some manner.
>
> Aditya seems comfortable with his mother and Nani (maternal grandmother) as well. In my second session with Aditya, he talked about his recent vacation in Kashmir alongwith his mother and how he went fishing there. When asked if he goes to Kenya and doesn't like it there or misses his mother what could be done, he answered that he would come back to Delhi. However, he is not uncomfortable at the idea of making a trip to Kenya. When asked about acquiring a toy game or a skill (playing darts) his talk was all father centric. According to Smriti, his scholastic progress is satisfactory at the moment. However, he may face difficulties in higher grades as it was observed that his general ability to spell and calculate seems somewhat weak.
>
> In matrimonial disputes, when custodial issues arise, young children generally show affinity and inclination towards the parent to whom their custody belongs and they live with. Aditya surprisingly shows more affection towards Perry and his demeanour sounds genuine.
>
> While adopting holistic approach to the child's growth, it may be considered to allot more time to Perry during further visitations and then extend it to overnight visitations...." (emphasis supplied)

(c) The High Court had a personal interaction with the child, which is recorded in the Order dated 11.05.2016. The relevant extract from the said Order reads as:

> "3. The son of the parties ☐Master Aditya Vikram Kansagra has been produced before us today. We have also had a long conversation with him and are deeply impressed with the maturity of this intelligent 6½ year old child who displays self confidence and a remarkable capacity of expressing himself with clarity. He exhibits

no sign of confusion or nervousness at all.

4. We also note that the child was comfortable in his interaction with his father and grandparents in court. The child has expressed happiness at his visitations with his father and grandparents. He unreservedly stated that he looks forward to the same. Master Aditya Vikram Kansagra is also able to identify other relatives in Kenya and enthusiastically refers to his experiences in that country. It is apparent that the child has bonded well with them.

5. We must note that the child is at the same time deeply attached to his mother and Nani. His bearing and personality clearly bear the stamp of the fine upbringing being given to him by the appellant and her mother.

6. As of now, since 9th February, 2016, the child is meeting his father and grandparents between 10:30 am and 05:00 pm on Saturday and Sunday in the second week of every month and for two hours on Friday in the second week of every month. The visitation is supervised as the court has appointed a Counsellor who has been directed to remain present throughout the visitation.

7. We are informed that the child has two passports – one Kenyan and the other British. The Counsellor appears to have been appointed for two purposes □firstly to assuage the appellant's fear that the child would be removed from India and secondly, to ensure his comfort. The second purpose appears to have been achieved.

8. It cannot be disputed that for his complete development, the child needs nurturing from both parents and the love of all grandparents and relatives, if possible.

Quality time with his parents and relatives is undeniably in his welfare. The constant presence of the counsellor – certainly an outsider – would certainly prevent the intimacies between a son, his father and grandparents i.e. close family. They have no quality "private" family time." (emphasis supplied)

(d) In the Supreme Court, we had called Perry, Smriti and Aditya for a personal interaction in Chambers on 17.03.2020. By this time, the child was over 10 years old. We found Aditya to be a bright and articulate child for his age, who was quite confident, and expressed with clarity about his inclinations and aspirations. We found the child to be emotionally balanced, who was deeply attached to his mother and maternal grandmother, with whom he lives, and at the same time exhibited a strong and deep bond with his father, which had evidently grown by the regular visitations of his father and grand□parents every month during the past 8 years. He expressed a strong interest for going to Kenya for his education, and for higher studies to the U.K. He expressed a keen interest to travel overseas, for which he had got no opportunity so far.

(e) What emerges from all these interactions of Aditya with the Courts since 2016 when he was 6 years old, till the present when he is almost 11 years old, is a very positive attitude towards his father and paternal grandparents, even though he has not lived with them since the age of 2½ years when

he was a toddler, and had come to India on a visit in March 2012, after which he did not go back.

We place reliance on the Report of the Counsellor dated 21.07.2016, wherein it has been recorded that Aditya idolises his father Perry, and was ready to go to Kenya. The affection and bond of the child with his father was found to be genuine, and not something which was tutored or forced in any manner. The Counsellor recorded that Aditya surprisingly showed more affection towards Perry, and that his demeanour sounded genuine.

As per Section 17(3), the preferences and inclinations of the child are of vital importance for determining the issue of custody of the minor child. Section 17(5) further provides that the court shall not appoint or declare any person to be a guardian against his will.

In view of the various personal interactions which the courts have had at different stages of the proceedings, from the age of 6 years, till the present when he is now almost 11 years old, we have arrived at the conclusion that it would be in his best interest to transfer the custody to his father. If his preferences are not given due regard to, it could have an adverse psychological impact on the child.

13. Other considerations regarding the welfare of the minor Having considered his preferences and aspirations, we will now consider other aspects with respect to the welfare of the child.

(a) Aditya is a citizen of Kenya and U.K., even though he was born in India. Evidently, his parents took a conscious decision to obtain dual citizenship of Kenya and U.K. for him soon after his birth, when he ceased to be an Indian citizen, by virtue of the Explanation to Clause 2 of Rule 7 of the Registration of Foreigners' Rules, 1982 and Section 9 of the Citizenship Act, 1955.

Aditya travelled to India in 2012 on a Kenyan passport, with an OCI card attached to his passport. The Kenyan passport was cancelled in 2016 when a non□cognizable report was filed by Smriti regarding the loss of his passport. Subsequently, no steps were taken to obtain a fresh Kenyan passport to date.

The factum of his nationality is a relevant aspect which has to be given due consideration while deciding the issue of custody of the child.

In Re L (minors) (wardship: jurisdiction)6, the Court of Appeal in England held that every matter having relevance to the welfare of the child should be taken into account and given such weight as the court deems fit, subject always to the welfare of the child being treated as paramount. Nationality is a factor which is an important aspect and must be taken into consideration, to determine where the welfare of the child would lie.

6 [1974] 1 All ER 913.

(b) The educational opportunities which would be available to the child is an aspect of great significance while determining the best interest of the child.

It was submitted on behalf of Perry that he has secured admission for Aditya in the Nairobi International School, which follows the IB curriculum. This would be more beneficial to him, given the fact that he is a dual citizen of Kenya and United Kingdom, and intends to pursue further education overseas. Being a citizen of United Kingdom, the child would get various opportunities as a citizen for admission to some of the best universities for further education, which would be in his best interest.

(c) It is necessary that Aditya gets greater exposure by overseas travel. It is important for him to be exposed to different cultures, which would broaden his horizons, and facilitate his all-round development, and would help him in his future life.

(d) The minor child Aditya is the heir apparent of a vast family business established by the family of Perry in Kenya and U.K. Since the businesses of the paternal family are primarily established in Kenya and the U.K., it would be necessary for Aditya to imbibe and assimilate the culture and traditions of the country where he would live as an adult.

It would also be necessary for him to learn the local language of Kiswahili, and adapt himself to the living conditions and surroundings of the country. Since the child is still in his formative years of growth, it would be much easier for him to imbibe and get acclimatized to the new environment.

(e) The minor child has been in the exclusive custody of his mother from birth till adolescence, which is the most crucial formative period in a person's life. Having completed almost 11 years in her exclusive custody, Aditya is now entitled to enjoy the protection and care of his father, for his holistic growth and development. However, Smriti's continued participation in the growth and development of the child would be crucial. It must be recognized that Smriti has given her best to Aditya, and had him admitted in one of the best public schools in Delhi. The credit must also go to her for ensuring that the child is emotionally balanced, and has not tutored him against his father and paternal family.

14. Objection regarding racism The objection raised by Smriti regarding Perry being racist has not been established from the material on record. Perry and his family have been living in Kenya for over 85 years, and have established an extensive business in that country. There is no evidence brought on record to substantiate the allegation, except an oral submission made on behalf of Smriti. We do not feel that any importance can be given to this objection as a ground for refusing custody of the child to Perry.

15. Objection regarding excessive drinking With respect to the allegation of alcoholism and excessive drinking made by Smriti, both the Family Court and the High Court have considered this objection at length and considered the evidence led by her in this regard. She had produced R.W.2, a practicing advocate from the chambers of her Counsel, who has deposed with respect to two incidents which allegedly took place at social events in Delhi. The evidence of R.W.2 was discarded as being unreliable, by both the Family Court and the High Court, since it was not corroborated by the evidence of Smriti and her mother, who were present on both these occasions. Furthermore, since R.W.2 and his wife were colleagues of her counsel, and she herself had been an associate in the

same office, the Courts below were of the view that R.W.2 was an interested witness, and his evidence could not be relied upon, and had to be disregarded. We, therefore, reject this objection as being unsubstantiated.

16. Allegation of marital infidelity The allegation of marital infidelity made by Smriti as a ground to refuse custody to Perry, has been seriously disputed by him. The allegation is based on certain messages which Smriti submits that she stumbled upon, when Perry was visiting India in April 2012. She states that she found Perry busy sending messages from his Blackberry. When she happened to read these messages, she found that Perry had received certain romantic messages from a woman named Sonia from Mozambique. She submits that she forwarded the messages to her own email address, which were downloaded and filed before the Family Court in the Guardianship proceedings.

Perry has strongly refuted these allegations on the ground that the messages were fabricated by Smriti. It was submitted that there was not even a mention of these messages in her Police complaint filed on 05.05.2012, which was immediately after she had allegedly stumbled upon these messages. Furthermore, there is no mention of such messages/emails in the Plaint of Suit No.1604/2012 filed by Smriti on 26.05.2012 before the Delhi High Court. There is no mention of the messages allegedly exchanged by a woman named Sonia from Mozambique with Perry, or the contents of the messages. It was submitted that Smriti has given different versions in each of the proceedings, which would show that they are devoid of any truth.

The typed copies of these messages were produced for the first time in 2017 with her evidence in the Guardianship proceedings before the Family Court, which were given “Mark B”.

On a perusal of the messages in “Mark B”, we find that Perry is supposed to have received these messages from Sonia on 02.04.2012 and 04.04.2012.

In her affidavit of evidence dated July 2017, Smriti stated that Perry received these messages on 22.04.2012, which were forwarded to her email address “immediately”. These emails were dated 05.05.2012 and 06.05.2012 and exhibited as Exhibit RW1/4 Colly.

In her Evidence by way of Affidavit dated 03.07.2017, Smriti states as follows :

> “29. In April 2012 only, during his visit to Delhi, I came across certain messages on the phone of the Petitioner I came across various messages in the Blackberry phone of the Petitioner exchanged between one Ms.Sonia and him. I immediately emailed the said messages to my email account. The messages have already been marked as Mark B by P.W.1 in her evidence and I am marking the emails containing the messages as Exhibit RW 1/4 Colly. ...” (emphasis supplied) Smriti filed a certificate dated 18.09.2017 under S.65B of the Indian Evidence Act, 1872 before the Family Court, which states :

> "2. That the emails dated emails dated 05.05.2012 and 06.05.2012 contains messages received by the Petitioner.

The said emails have been collectively exhibited as Exhibit RW1/4 during my cross examination.

...

5. I confirm that the print outs of the said Emails as filed before the Hon'ble Court are identical to the Emails contained in my inbox." In the Supreme Court, it was submitted that the messages were dated 22.04.2012, which she had forwarded from the Blackberry of Perry to her cellphone in April 2012. These messages were emailed to her email ID from her cellphone in May 2012.

Perry contended that this was an entirely new version with respect to the messages, which had not been raised either before the Family Court or the High Court.

Perry challenged the authenticity of these messages, and submitted that these emails were forged and fabricated by Smriti. The emails show that they had been sent on 05.05.2012 and 06.05.2012, on which dates Perry was admittedly not in India.

Perry further submitted that the emails have been fabricated by Smriti, since she could easily have typed out the content of these messages on her own cellphone, and then emailed it to her email account.

Section 65B of the Indian Evidence Act, 1872 provides :

> "65□B. Admissibility of electronic records.—(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. (2) The conditions referred to in sub□section (1) in respect of a computer output shall be the following, namely—
>
> (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
>
> (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

....

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub□section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub□section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it." (emphasis supplied) The certificate u/S. 65B produced by Smriti merely states that the content of the emails placed on record were the same as the content of the emails on her inbox. This certificate does not certify the source of the messages allegedly received on the Blackberry of Perry, which were transferred to her cellphone. In the absence of a certificate in accordance with S.65B, with respect to the source of the messages, we cannot accept the same as being genuine or authentic.

This Court in a recent decision delivered by a bench of three Judges in Arjun Pandit Rao Khotkar v. Kailash Kushanrao Gorantyal7 held as under :

"59. We may reiterate, therefore, that the certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. (supra), and incorrectly "clarified" in Shafhi Mohammed (supra). Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor, (1876) 1 Ch.D 426, which has been followed in a number of the judgments of this Court, can also be applied. Section 65B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated

> and not otherwise. To hold otherwise would render Section 65B(4) otiose." (emphasis supplied) The Family Court rejected the allegations of marital infidelity based on the aforesaid emails. The High Court also holds that the emails were dated 05.05.2012 and 06.05.2012; on which dates, Smriti could not have had access to the Blackberry of Perry, since Perry had left India on 26.04.2012, which has been admitted by Smriti in her examination-in-chief.

In view of the aforementioned facts, and the law laid down by this Court, we are unable to place reliance on the emails with respect to the allegations of marital infidelity. We, therefore, affirm the findings of the Family Court and High Court in this regard.

17. Criminal proceedings pending against Perry The Counsel for Smriti placed great emphasis on the pendency of criminal proceedings against Perry arising out of the 7 2020 SCC OnLine SC 571.

dam burst in the Solai farms owned by him and his family. It was submitted that the pendency of criminal proceedings against him would be the most determinative factor for declining guardianship to Perry.

Perry refuted these allegations, and informed the Court that it was on account of unprecedented rainfall in May 2018 in Kenya, that several dams had burst in different parts of the country, which caused the death of some civilians living in those areas. He placed reliance on the Report of UNICEF, and documents to show that the dam burst had occurred on account of a natural calamity. It was submitted that there was no culpability on the part of Perry, nor was there any hostility from the local populace against him and his family members. This would also be evident from the fact that his grandmother who was 101 years old, was living alone in Solai Farms.

We were informed by the Counsel for Perry that he had been acquitted of all charges by the Trial Court. The Order of acquittal was however challenged before the High Court, which remanded the matter to the Trial Court for a re-trial, which is pending as on date.

We are of the view that the pendency of this case is not a valid ground to refuse custody of Aditya to his father. The criminal proceedings have arisen out of a natural disaster, and cannot be blown out of proportion to contend that he would be unfit for grant of custody of his son.

18. For the aforesaid reasons, we are of the view that it would be in the best interest of Aditya, if his custody is handed over to his father Perry Kansagra. Once Aditya shifts to Kenya, he would be required to adapt to a new environment and study in a new educational system with a different curriculum. It would be in the best interest of the minor if he is able to go to Kenya at the earliest, so that he has some time to adapt to the new environment, before the new term starts in January 2021 in the Nairobi International School.

This would, however, not imply that the mother would be kept out of the further growth, progress and company of her son. Smriti would be provided with temporary custody of the child for 50% of his annual vacations once a year, either in New Delhi or Kenya, wherever she likes. Smriti will also

be provided access to Aditya through emails, cellphone and Skype during the weekends.

19. Accordingly, we affirm the concurrent findings of the Courts below.

(a) To safeguard the rights and interest of Smriti, we have considered it necessary to direct Perry to obtain a mirror order from the concerned court in Nairobi, which would reflect the directions contained in this Judgment.

(b) Given the large number of cases arising from transnational parental abduction in inter□country marriages, the English courts have issued protective measures which take the form of undertakings, mirror orders, and safe habour orders, since there is no accepted international mechanism to achieve protective measures. Such orders are passed to safeguard the interest of the child who is in transit from one jurisdiction to another. The courts have found mirror orders to be the most effective way of achieving protective measures.

(c) The primary jurisdiction is exercised by the court where the child has been ordinarily residing for a substantial period of time, and has conducted an elaborate enquiry on the issue of custody. The court may direct the parties to obtain a "mirror order" from the court where the custody of the child is being shifted. Such an order is ancillary or auxiliary in character, and supportive of the order passed by the court which has exercised primary jurisdiction over the custody of the child. In international family law, it is necessary that jurisdiction is exercised by only one court at a time. It would avoid a situation where conflicting orders may be passed by courts in two different jurisdictions on the same issue of custody of the minor child. These orders are passed keeping in mind the principle of comity of courts and public policy. The object of a mirror order is to safeguard the interest of the minor child in transit from one jurisdiction to another, and to ensure that both parents are equally bound in each State.

The mirror order is passed to ensure that the courts of the country where the child is being shifted are aware of the arrangements which were made in the country where he had ordinarily been residing. Such an order would also safeguard the interest of the parent who is losing custody, so that the rights of visitation and temporary custody are not impaired. The judgment of the court which had exercised primary jurisdiction of the custody of the minor child is however not a matter of binding obligation to be followed by the court where the child is being transferred, which has passed the mirror order. The judgment of the court exercising primary jurisdiction would however have great persuasive value.

(d) The use of mirror orders to safeguard against child abduction was first analysed by Singer J. In re P (A Child: Mirror Orders)8. The relevant extracts from that judgment are set out hereinbelow :

> "...Though these are the facts as far as relevant of this particular case, they in turn reflect a relatively common situation made ever more common by the frequency of transnational and transcultural marriage and therefore inevitably an increased frequency of separation and breakdown in such marriages. It is nowadays by no means 8 [2000] I FLR 435.

uncommon to find families upon separation separated by frontiers or by oceans.

Contact to the non-residential parent in that parent's home country, which often according to circumstance may be a country with which the child has prior connections, may be highly desirable. Yet for it to flourish it is necessary either for there to exist (or to develop if it is lacking) a confidence mutually between the parents, or for there to be a satisfactory judicial framework that lessens anxieties and may help to produce confidence where none exists. ... As it happens, for some years now, more often of course in unreported but not infrequently in reported cases, Family Division judges and judges of the Court of Appeal have advocated in appropriate cases that the parties before them, where contact or a move to live abroad is in contemplation, should provide precisely that form of cordon sanitaire in that foreign jurisdiction which in this case the parties would seek to create here for their child.

Thus, England's judges have invited parties to go off and get mirror orders or their non-common law equivalents in Chile, Canada, Denmark, the Sudan, Bangladesh, Egypt and even in Saudi Arabia. For instance, in Re HB (Abduction: Children's Objections) [1998] 1 FLR 422, in a passage at 427H, Thorpe LJ said this:

> "... it is important not only that the parents should combine to contain the children but also that the court systems in each jurisdiction should equally act in concert. Once the primary jurisdiction is established then mirror orders in the other and the effective use of the [Hague] Convention gives the opportunity for collaborative judicial function. The Danish judge and the English judge should in any future proceedings if possible be in direct communication." ... In Re E (Abduction: Non-Convention Country) [1999] 2 FLR 642, the return of a child to the Sudan, a non-Convention country, was approved by the Court of Appeal. In the leading judgment Thorpe LJ observed that:
>
> "... the maintenance of mutual confidence within the member States is crucial to the practical operation of the [Hague] Convention. But the promotion of that confidence is probably most effectively achieved by the development of channels for judicial communication ... The further development of international collaboration to combat child abduction may well depend upon the capacity of States to respect a variety of concepts of child welfare derived from differing cultures and traditions. A recognition of this reality must inform judicial policy with regard to the return of children abducted from non-member States." ... Where the Hague Convention does not apply, mirror orders find a more prominent place. Again, the situation will be that it will be the English court inviting the parties to seek an order in the country to which the child is to return to reflect, for instance, contact provisions that have been agreed to take place in England.
>
> The third category is those cases where application is made for leave to remove permanently from England for a new life abroad. Again, mirror orders are by no means untypical or unusual. Again, it is from the foreign court that the parties will

> hope to obtain such an order, and it is from the foreign court that English judges have from time to time required as a condition that such orders should be obtained. ... The 'mirror order' jurisdiction is supportive of the foreign order. It is ancillary or auxiliary. It is, if I may term it such, adjutant. It is there as a safeguard, not to modify the foreign order but to enforce it if there is need for enforcement.
>
> ... I therefore have no difficulty at all in concluding that as a matter of common sense, of comity and indeed may I say of public policy, the High Court should have the ability to make orders such as this: that is to say orders of the sort which English judges have frequently in past years invited other courts to make."
>
> (e) The judgment of Singer J. was affirmed by a three judge bench comprising of Thorpe, Rimer and Stanley Burnton L JJ of the High Court of Justice, Court of Appeal, Civil Division In re W (Jurisdiction : Mirror Order)9. In the words of Thorpe L J., it was opined that :
>
> " ...One of the imperatives of international family law is to ensure that there is only one jurisdiction, amongst a number 9 [2014] 1 FLR 1530 : [2011] EWCA Civ 703.

of possible candidates, to exercise discretionary power at any one time. Obviously comity demands resolute restraint to avoid conflict between States. That is the realistic aim of Conventions and Regulations in this field.

... [47] Another realistic aim is to provide protective measures to safeguard children in transit from one jurisdiction to another or to ensure their return at the conclusion of a planned visit.

[48] Protective measures take the form of undertakings, mirror orders and safe harbour orders. As yet there is no accepted international, let alone universal, mechanism to achieve protective measures. Even amongst common law jurisdictions there is no common coin.

[49] In many ways the power to make mirror orders is the most effective way of achieving protective measures. What the court in the jurisdiction of the child's habitual residence has ordered is replicated in the jurisdiction transiently involved in order to ensure that the parents are equally bound in each State.

[50] The mirror order is precisely what it suggests, an order that precisely reflects the protection ordered in the primary jurisdiction. The order in the jurisdiction transiently involved is ancillary or auxiliary in character. [51] This categorisation is well established in our case law. In F v F ((minors) (custody): Foreign Order)) [1989] Fam 1, [1989] FCR 232, [1988] 3 WLR 959 Booth J directed that no access should take place in France until a mirror order was made in that jurisdiction. There are innumerable other examples of the use of mirror orders both in this jurisdiction and in other jurisdictions, most but not all States party to the 1980 Hague Abduction Convention. By way of further example I cite the case of Re HB [1998] 1 FCR 398, [1998] 1 FLR 422, [1998] Fam Law 128.

... [53] Undoubtedly the controlled movement of children across international frontiers would be a good deal safer and easier if, say, the jurisdictions of the common law world or the jurisdictions operating the 1980 Hague Convention, put in place powers to enable mirror orders to be made in response to appropriate requests.

... [55] The government's failure to provide an express power to make mirror orders presented Singer J with the dilemma. In Re P (A Child: Mirror Order) [2000] 1 FCR 350, [2000] 1 FLR 435, [2000] Fam Law 240 the pressure on the judge to find jurisdiction was considerable. The request was entirely meritorious. Accordingly Singer J observed:

> "I therefore have no difficulty at all in concluding as a matter of common sense, of comity and indeed, may I say of public policy, the High Court should have the ability to make orders such as this: that is to say orders of the sort which English judges have frequently, in past years, invited other courts to make." [56] Singer J prefaced his consideration of the submissions advanced with the following formulation:
>
> "When it makes a mirror order, which of course I would have no difficulty in doing if the child were physically present in this country today, the English judge does not consider the welfare of the child. He takes the order of the foreign court as read. Thus I can frankly say that I have not for a moment considered whether I would have provided this contact or different contact, and indeed I have not investigated the merits, nor been shown any materials beyond the order of the American court.
>
> Thus (this argument runs) in taking the jurisdiction to make such an order without consideration of the welfare principle which otherwise s 1 of the Children Act would render paramount, the English Court is exercising a power of a fundamentally different type from when it considers a domestic s 8 or inherent jurisdiction dispute and reaches welfare decisions. The 'mirror order' jurisdiction is supportive of the foreign order. It is ancillary or auxiliary. It is, if I may term it such, adjutant. It is there as a safeguard, not to modify the foreign order but to enforce it if there is need for enforcement." ... [62] For the purposes of this appeal what is valuable is Singer J's recorded analysis of the essential character of a mirror order. I would adopt all that he said on that point which is fundamental to the disposal of the present appeal..."
>
> (f) The commentary by Dicey, Morris and Collins on Conflict of Laws discusses the application of mirror orders in the context of private international law, and opines as :
>
> "...The jurisdictional rules in this clause were given an extended meaning by Singer J. in Re P (A Child : Mirror Orders). A United States court was prepared to allow a child to travel to England on condition that a "mirror order" was made by the English court to ensure the child's return. The English courts have often adopted a similar practice. The child in the instant was neither habitually resident nor present in England. Nonetheless an order was made on the basis of "common sense, comity, and public

> policy"; it was expressly limited to the period during which the child was present in England...".10 (emphasis supplied)
>
> (g) The Delhi High Court in Dr. Navtej Singh v. State of NCT of Delhi & Anr.11 directed the husband to obtain a mirror order of the directions issued by the High Court, from the Superior Court of the State of Connecticut of Norwalk, U.S.A. The judgment of the High Court was affirmed by this Court in Jasmeet Kaur v.

State (NCT of Delhi) and Anr.12

20. In view of the aforesaid discussion, we consider it just and appropriate that the custody of Aditya Vikram Kansagra is handed over by his mother Smriti Madan Kansagra, to the father Perry Kansagra, subject to the following directions, which will take effect in supersession of the Orders passed by the Courts below :

> (a) We direct Perry Kansagra to obtain a mirror order from the concerned court in Nairobi to reflect the directions contained in this judgment, within a period of 2 weeks from the date of this judgment. A copy of the Order passed by the court in Nairobi must be filed before this Court;
>
> (b) After the mirror order is filed before this Court, Perry shall deposit a sum of INR 1 Crore in the Registry of this Court, which shall be kept in an interest bearing fixed deposit account (on auto□renewal basis), for a period of two years to ensure compliance with the directions contained in this judgment.

10 The Conflict of Laws, Dicey, Morris and Collins, (15th ed.) Volume 2, Chapter 19, paragraph 19□ 050, p. 1135.

11 2018 SCC OnLine Del 7511.

12 2019 (17) SCALE 672.

If this Court is satisfied that Perry has discharged all his obligations in terms of the aforesaid directions of this Court, the aforesaid amount shall be returned with interest accrued, thereon to the respondent;

(c) Perry will apply and obtain a fresh Kenyan passport for Aditya, Smriti will provide full co□ operation, and not cause any obstruction in this behalf;

(d) Within a week of the mirror order being filed before this Court, Smriti shall provide the Birth Certificate and the Transfer Certificate from Delhi Public School, to enable Perry to secure admission of Aditya to a School in Kenya;

(e) Smriti will be at liberty to engage with Aditya on a suitable video conferencing platform for one hour over the weekends; further, Aditya is at liberty to speak to his mother as and when he desires to do so;

(f) Smriti would be provided with access and visitation rights for 50% once in a year during the annual vacations of Aditya, either in New Delhi or Kenya, wherever she likes, after due intimation to Perry;

(g) Perry will bear the cost of one trip in a year for a period of one week to Smriti and her mother to visit Aditya in Kenya during his vacations. The costs will cover the air fare and expenses for stay in Kenya;

(h) Smriti will not be entitled to take Aditya out of Nairobi, Kenya without the consent of Perry;

(i) We direct Perry and Smriti to file Undertakings before this Court, stating that they would abide and comply with the directions passed by this Court without demur, within a period of one week from the date of this judgment.

21. As an interim measure, we direct that till such time that Perry is granted full custody of the child, he will be entitled to unsupervised visitation with overnight access during weekends when he visits India, so that the studies of Aditya are not disturbed. Perry and his parents would be required to deposit their passports before the Registrar of this Court during such period of visitation. After the visitation is over, the passports shall be returned to them forthwith.

22. This appeal shall be listed before the Court after a period of four weeks to ensure compliance with the aforesaid directions, and on being satisfied that all the afore stated directions are duly complied with, the custody of Aditya Vikram Kansagra shall be handed over by his mother Smriti Kansagra to the father Perry Kansagra.

The Appeal is accordingly dismissed, with no order as to costs.

.....J. (UDAY UMESH LALIT) .....J. (INDU MALHOTRA) NEW DELHI;

OCTOBER 28, 2020 REPORTABLE IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NO. 3559 OF 2020 (ARISING OUT OF SLP (CIVIL) NO.12910_ OF 2020) (DIARY NO. 8161 OF 2020) SMRITI MADAN KANSAGRA .....APPELLANT(S) VERSUS PERRY KANSAGRA .....RESPONDENT(S) JUDGMENT HEMANT GUPTA, J.

Leave granted.

1. I have gone through the detailed judgment authored by Sister Justice Indu Malhotra, but I am unable to persuade myself to agree with the views expressed by her.

2. The present appeal is directed against an order dated 25.2.2020 of the Delhi High Court whereby the first appeal preferred by the appellant1 against an order passed by the Family Court on 12.1.2018 was dismissed.

3. The brief undisputed facts are that the marriage between the 1 Hereinafter referred to as "Smriti".

parties was solemnized on 29.7.2007 at New Delhi. A male child Aditya Vikram Kansagra2 was born out of the wedlock on 2.12.2009 at New Delhi. The parties are living separately since 26.4.2012. Smriti is an Indian citizen whereas the respondent 3 and the child have dual citizenship of Kenya and United Kingdom. The child also has been granted OCI (Oversees Citizen of India). The litigation began with Smriti filing a suit for permanent injunction 4 restraining Perry and his parents from removing the child from her custody. During the pendency of such suit, numerous orders were passed regarding visitation rights to Perry.

4. Thereafter, Perry filed a petition under Section 7 of the Guardians and Wards Act, 18605 bearing Guardianship Petition No. 53 of 2012 before the Family Court, Saket on 06.11.2012. It is the said petition which was allowed by the learned Family Court on 12.1.2018 and later affirmed by the High Court vide the Impugned Judgment dated 25.02.2020.

5. The learned counsel for the parties referred to the pleadings in other intra-party proceedings as also the documents which may not be part of the record of the Guardianship proceedings in support of their respective contentions. Since no objection was raised regarding consideration of these documents and pleadings, the same are taken into consideration, reference of which will be made 2 Hereinafter referred to as "child".

3 Hereinafter referred to as "Perry".

4 For short "Suit" [CS (OS) No. 1604 of 2012].

5 For short, the "Act".

at the relevant stage. However, reference to such pleadings and documents are only for the purpose of the present proceedings.

6. The following cases were filed before the competent courts:

> (i) CS (OS) No. 1604 of 2012 - withdrawn on 31.8.2015 in view of Guardianship petition filed by Perry, but with a direction that the interim orders passed in the suit will continue till the disposal of the application for visitation rights by the Family Court.
>
> (ii) Guardianship Petition No. 53 of 2012 – The same was decided by the Family Court on 12.1.2018 and the appeal was dismissed on 25.2.2020, which is the subject matter of challenge in the present appeal.

(iii) Divorce Petition No. HMA No. 302 of 2019 - filed by Smriti under Section 13 of the Hindu Marriage Act for dissolution of marriage on the grounds of cruelty and desertion. Perry also filed a petition for dissolution of marriage which is also pending before the Family Court.

(iv) HMA No. 3 of 2017 - filed on behalf of the child and Smriti to claim maintenance from Perry which is pending before the Family Court, Patiala House Court, New Delhi.

7. In a suit filed by Smriti before the High Court on 26.5.2012 to restrain the defendants, Perry and his parents, to illegally remove the child from the custody of Smriti, she has inter-alia stated to the following effect:

"12. ...In other words, it was their own feudal arrogance which was reinforced by the birth of a male child. The welfare and upkeep of the child itself was irrelevant for the Defendants. Defendants after the birth of Plaintiff No. 1 were of the view that Plaintiff No. 2 would look after their male progeny. In other words, the Defendants were of the view that Plaintiff No. 2 was a mere caretaker of their male heir.

13. Things changed for the Defendants after Plaintiff No. 1 was born. It is again pertinent to mention here that Defendant No. 3 did not resume conjugal relations with Plaintiff No. 2 after the birth of Plaintiff No.1 and it appeared as if she had served her purpose by giving birth to Plaintiff No. 1. Thus, there have been no conjugal relations between Plaintiff No. 2 and Defendant No. 3 since then because of the palpable desire of the Defendant No. 3 not to have conjugal relation with Plaintiff No. 2. The real reasons for the denial of conjugal relations, however, have now come to light and the Plaintiff No. 2 would give the details in the appropriate forum and hereby reserves the same.

xx xx xx

23. That the Defendant No. 3 eventually decided to come to New Delhi on 21.04.2012. As per his plans, he wanted to stay in Delhi for a period of six days and his return ticket was for 26.04.2012. In this visit the defendant no. 3 demonstrated an extremely belligerent attitude towards the Plaintiff no. 2 and would fight with her on the smallest of pretexts. Rest of the time the Defendant no. 3 would be constantly text messaging someone from his mobile. This was the feature throughout his visit and the Plaintiff no. 2 later on realized that it was related to his breach of marital fidelity. On 22.04.2012 the Defendant No. 3 after talking with his parents (Defendant no. 1 and 2) started to quarrel with the Plaintiff no. 2. He categorically told the Plaintiff no. 2 that he wanted the child to be sent back to Kenya as he no longer wanted the Plaintiff no. 2 to be taking care of "his child". The Defendant no.3 told the Plaintiff no. 2 that such was the insistence of his parents also. The Defendants were of the view that the child was essentially a Kansagra scion, a male heir and that the

> Plaintiff no. 2 had a limited role which in any event she was not discharging well. When the Plaintiff no. 2 resisted such ridiculous, feudal and wholly illegal statements of the Defendant no. 3, he abused her and said that the Plaintiff no. 2 was perhaps unaware of the vast influence that the Defendants exercised across the globe and that he would ensure that the Plaintiff no. 2's so called protection under the Indian law was breached without her bring in a position to do anything about it.

The Defendant no. 3 further threatened Plaintiff no. 2 by stating that "the Kansagras always have their way, so don't you even dream of denying what we want".

Though the Plaintiff no. 2 was very scared by all these utterances of the Defendant no. 3, she thought perhaps these ere empty threats. The Defendant no. 3 also kept a close watch on her activities. The Plaintiff no. 2 thus could not immediately register a police complaint.

xxx xxx

Prayers

In the facts and circumstances, it is most

respectfully prayed that this Hon'ble Court may graciously be pleased to:

> a) .....
>
> b) .....
>
> c) Pass a decree of permanent injunction restraining the Defendants, their agents, representatives, servants and/ or attorneys in perpetuity from meeting Plaintiff No.1 without the consent/ presence of Plaintiff No.2"

8. Perry in his written statement stated as under:

> "4. That the Plaintiff No. 2 was always adamant the Plaintiff No. 1 to be brought up in India against the wishes of the Defendants. It is submitted that the Defendants are settled in Kenya and leading their lives as per the western culture and lifestyle. The grandfather father of the Defendant No. 3 and father of the Defendant No. 1, shifted to Kenya in the year 1935. The Defendant No. 1 and 3 were raised in the western culture and are accustomed only to the western lifestyle. They are completely alien to the Indian lifestyle and culture and therefore, their one and only preference is to raise the child in a Western Culture. It is submitted that the child also has a vested right to be exposed to and get accustomed to the culture and lifestyle of his father and grandparents and this link cannot be broken at the instance of the mother to raise the child in the Indian culture....
>
> xx xx xx

> 23. That the contents of para 23 are wrong and therefore, denied. It is denied that in this visit the Defendant No. 3 demonstrated an extremely belligerent attitude towards the Plaintiff No. 2 and would fight with her on the smallest of pretexts. It is denied that rest of the time the Defendant No. 3 would be constantly test messaging someone from his mobile. It is denied that this was the feature throughout his visit and the Plaintiff No. 2 later on realized that it was related to his breach of marital fidelity and it is submitted that the allegations of the Plaintiff No. 2 are completely vexatious and has caused grave agony to the Defendant No. 3. It is submitted that the Defendant No. 3 reserves his rights to take appropriate course of legal action against the allegations of the Plaintiff No.2. It is denied that on 22.04.2012 the Defendant No. 3 after talking with his parents (Defendant No. 1 and 2) started to quarrel with the Plaintiff No. 2."

9. In the Guardianship petition, Perry had sought his appointment as the guardian of the child as well as the physical custody of the child who was almost 3 years of age when the proceedings were initiated. Perry had pleaded that the marriage between the parties was an arranged marriage and Smriti was made well-versed about his family and life style. Smriti was categorically told that she has to settle in Kenya and she was ready to give up her own law practice in New Delhi for the same. It was pleaded that Smriti's behaviour began to change for the worse after she conceived. Smriti was adamant about the delivery to take place in India. Perry and his parents allowed her to travel of her own free will. Smriti remained in India for close to a year and Perry used to visit her every month without fail. He also continued to give huge amounts of pocket money as well as her handsome salary in Kenya. It was pleaded that Smriti is a practicing lawyer and is always busy and occupied with her work. Thus, if the custody of the child is given to Perry and his family, it would be better for the upbringing of the child as both his grandparents are very fit and in a much greater condition to take care of the child. Perry pleaded as under:

> "18. That the Petitioner states that the Respondent is not a fit and proper person to take the responsibility of the child. It is submitted that the Respondent is a practicing lawyer and she is always busy and occupied with her work and there is no one in the family to take care of him. The Respondent does not have a family, as she is staying alone with her old mother. Furthermore the mother of the Respondent is not in a state to take care of the child as she is herself suffering from ill health and dependent on other people to take care of. Therefore, the child is being forced to live an isolated life in Delhi. It is submitted that if the child's custody is given to the Petitioner and his family, it would be better for the upbringing of the child as both his grandparents are very fit and in a much greater condition to take care of the child, in the manner the child could never be looked after in the Respondent's house. The child's grand parents can devote all their time to their grandson and shower him with a lot of love and affection and teach him traditional values of life.
>
> It is submitted that the Petitioner has been undertaking these visits to take care of interest of the child. The Petitioner was always concerned about the comforts of the Respondent and the child.

> The abovementioned dates clearly show that the Petitioner regularly visited the child so that the child does not feel isolated or neglected. It shows the genuine concern of the Petitioner for the paramount welfare of the child."

10. Perry pleaded that he and his parents were raised in western culture and are accustomed only to the western lifestyle and thus their preference is to raise the child also likewise. Perry further pleaded that maternal grandmother of the child is not in a state to take care of him as she herself is suffering from ill-health and is dependent on other people to take care of. Perry pleaded as under:

> "21. That the Respondent was always adamant regard- ing the child to be brought up in India against the wishes of the Petitioner and his parents. It is submitted that the Petitioner and his parents are settled in Kenya and leading their lives as per the western culture and lifestyle. The Petitioner and his parents were raised in the western culture and are accustomed only to the western-lifestyle and thus their preference is to raise the child in a Western Culture. It is submitted that the child also has a vested right to be exposed to and get accustomed to the culture and lifestyle of his father. and grandparents and this link cannot be broken at the insistence of the mother to raise the child in the Indian culture. If the contrary is being allowed, the child would fail to identify himself with the life and values of his pa- ternal family and his paramount welfare will be com- pletely devastated. The child further has a right to live in the manner in which is father lives and the same can- not be denied to the child on account of an obstinate mother. The child further has a birth right to follow the morals and values of the father and the grandparents."

11. Perry also pleaded that he noticed suicidal tendency in Smriti. She is a threat to herself and, therefore, the child cannot be safe with her. It has been stated that during one of his visits to Delhi, Perry had seen slit marks on both the wrists of Smriti. It was also pleaded that Smriti has always been very abrasive and cruel with her house help, servants, maids, drivers, nannies and such like both in India and in Kenya. Further he pleaded that Smriti has told several cousins of Perry in USA and UK that she could not cope with the child and was finding it hard to manage with him.

12. In the written statement filed on 22.5.2013, Smriti pleaded that the child was of very tender age and has stayed in India for 30 out of 40 months after his birth. Also, she averred that it was Perry's and his family's desire to raise the child as per Indian upbringing. A detailed arrangement for the same was planned and written down in a notebook by Perry whereby the child was to stay in for four months in Kenya, seven months in India and one month in UK with regular intervals. It was submitted that Perry and his family always wanted that the child to be brought up in India. Perry often told his relatives and friends in Kenya and India that the child would be staying six months in Kenya and six months in India. The Schedule of stay of the child in the year 2010 and 2011, written by Perry in his own handwriting, is reproduced hereunder:

> "2010 JAN, FEB, MAR, APR, MAY – INDIA JUN – KENYA JUN, JUL – KENYA JUL – UK AUG, SEP, OCT – KENYA (HOLIDAY) OCT – INDIA OCT, NOV, DEC – INDIA 2ND DEC A.V. – 1ST B'DAY 7 MTHS – INDIA 1 MTH – UK & HOLIDAY 4 MTHS –

KENYA JAN, FEB, MAR – INDIA MAR – KENYA MAR, APR, MAY, JUN – KENYA JUL – UK JUL, AUG – KENYA (HOLIDAY) SEP – INDIA SEP, OCT, NOV, DEC – INDIA 2ND DEC A.V. 2ND B'DAY 7 MTHS – INDIA 1 MTH – UK & HOLIDAY 4 MTHS – KENYA"

13. It was asserted that the child is involved in various outdoor and in-

door extracurricular activities. The child often goes to the park to play with his friends. He goes for horse riding and is also enrolled in art, gymnastic and dramatic classes. The child is enjoying a holistic upbringing, better than what he could have had in Kenya. It was also pleaded that Perry and the grandfather of the child are very influential and powerful business family and often misuse it to their advantage. They lead a very luxurious lifestyle and enjoy showing off their wealth and power and exerting influence. It was pleaded that Smriti happily left her job in Delhi in order to join Perry in Kenya. She averred that it was agreed that she would help Perry with legal issues of the business as and when required and a salary was also paid to her for the same. Perry and his family were looking for a daughter-in-law with strong Indian values and Indian culture so that the Indian culture could be kept alive in Kenya. It was denied that she agreed to get married to foreigner and under- stood the implications of getting married in another country and culture. The decision to marry was based on false representation and subterfuge of Perry and his family. At the time of talk of the marriage, the family projected to be very humble, loving and car- ing Indian family but later, it was noticed that Perry and his family are arrogant, rude and insensitive people who only care about money and their business. Smriti, having strong Indian values, un- derstood that the marriage is a sacred and a serious institution and thus continued to stay in Kenya and tried to build a family even af- ter not being treated well by Perry and his family.

14. The allegations that Smriti was abrasive and rough in nature with the house staff from the very beginning were denied. It was, in fact, pleaded that Perry was the one with a bad temper and often would beat the servants if they committed any mistake or stole milk from the farm. Perry and his family were happy only after they got to know that she had given birth to a male child. It was pleaded that Perry and his family told her that it would be better for her to deliver the child in Delhi and stay with her mother as there would be no one to take care of her in UK during her preg- nancy. It was only on the insistence of Perry and his family that she agreed to stay in India during her pregnancy and gave birth to the child in India. One of the pretexts that Perry had for keeping the child and Smriti in India was that the child could be brought up with traditional Indian culture and would imbibe traditional family values based on Hindu customs and ceremonies. However, it tran- spired that in reality Perry wanted to keep Smriti away from Kenya as he has gotten drawn into an affair with a woman in Mozambique called Ms. Sonia. It came to Smriti's notice in April, 2012 that he has been meeting Ms. Sonia very often during the sustenance of marriage with her. In April, 2012, Perry on his visit to New Delhi strongly shared his desire to visit an old lady friend of his, who was in poor health and had been hospitalized in Paris. On the same day, Smriti stumbled upon a loving and explicit message ex- changed between Perry and this woman.

15. It was pleaded that in view of the tender age of the child what is imperative in bringing up the child is the love of his mother and not just luxuries and big house. A child of three years of age needs

a loving and a dedicated mother to nurture him and bring him up. It was admitted that Perry and his family are in superior financial position but in the last one year, she has not even been paid a single penny towards the maintenance of the child. It was denied that Smriti's house in Defence Colony, having three bedrooms, is not big and not well equipped with utilities of life and cannot render all sorts of comfort to the child. Perry and his family are trying to tempt the child by their putative super rich status though not a single penny towards the child maintenance was paid. She averred that no amount of wealth could be a substitute for the love, affection and care which a mother can bestow on her child.

16. Smriti pleaded that, on the contrary, the luxuries in which Perry was brought up has turned him to be an arrogant person who likes to show off his money and power. Perry grew up in a boarding school to which he was sent to at the age of five years and was not brought up with traditional Hindu customs. Perry leads a profligate lifestyle which is decadent and without basic Indian morals and values which Perry is choosing to call as western culture. Thus, if the child is allowed to be brought up in Kenya, he would also grow up to be a mismatch with confused African feudal attitude, which is irreconcilable with both Indian and western values.

17. It was also pleaded that Perry hardly spent any time with the child when the child was in Kenya as he was travelling for almost 18 days in a month. It was averred that she had left her work in Delhi to move to Kenya and start her family there. Even after coming back, she has taken active and complete day to day care of the child. She is dedicating her life in bringing up the child in a holistic manner and also takes the child for various extra-curricular activities, picnics and outings regularly. It was stated that the grandparents' love and affection cannot be substituted with the mother's love, affection and care. Perry himself is proposing that the child would be taken care of by the grandparents if the custody is given to him. It was also stated that India has better education and career prospects than Kenya. Perry wanted to send the child to Pembroke Boarding School at the age of 5 for which he already got the seat booked. However, Smriti has averred that it was not in the welfare of the child. She pleaded that it is unfortunate that Perry is mainly interested in the child learning business skills from him and his father. Further, the allegation of slitting both the wrists as a trait of suicidal tendency was denied inasmuch as a person attempting to commit suicide cannot slit both the wrists at the same time. It was also pleaded that Perry and his parents are staying in separate houses in Kenya. All other allegations levelled by Perry against her were denied.

18. In rejoinder filed by Perry, the assertions made by Smriti were categorically denied. In respect of the contention of his travelling for 18 days, it was stated as under:

> "It is further submitted that the Petitioner maintains a balance between work and family. The Petitioner is at home after office hours. His working hours are between 8.00am to 4.00 pm. Though the Petitioner has to travel abroad, however, it is not that he remains abroad for over 18 days in a month. The Petitioner during his travel maintains constant touch with his family. The Petitioner is not alone to take care of the minor child of the parties, his parents are equally affectionate towards the minor child of the parties. The minor child of the parties would get the constant support and care needed for a young child."

19. Perry denied the stand of Smriti of any affair with the woman in Mozambique called Sonia. He reserved his right to take appropriate legal action against Smriti for making such slanderous allegations.

20. Smriti, in her divorce petition, had made a reference of divorce of Perry from a woman belonging to Mumbai which had taken place in the year 2006 (The Marriage was solemnized on 22.12.2000, whereas the Mutual Consent Divorce Decree is dated 9.9.2005. Such document has been produced on behalf of Perry) to assert that Perry is in the habit of neglecting his spouse. Smriti averred in the petition as under:

> "7. The Petitioner was informed that Ms. Revati took a divorce with Respondent around 2006 in a state of despair and trauma. The prelude to the present petition would amply show that the Respondent is in the habit of being neglectful towards his spouse.
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> xx xx xx
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> 61. In April, 2012 only, during the visit of the Respondent to Delhi, the Petitioner came across certain messages on the phone of the Respondent. The said messages were exchanged between one Ms. Sonia and the Respondent. The Petitioner immediately emailed the messages to herself. The Petitioner was shocked and traumatized after reading the messages which established that the Respondent was having an extra-

marital affair with a lady from Mozambique called Ms. Sonia. The Respondent would maintain that Ms. Sonia was a friend, however, when the Petitioner read the messages exchanged between the Respondent and Ms. Sonia, it became clear that the Respondent was having an extra-marital affair with this lady. It was now that the Petitioner realized that the Respondent wanted the Petitioner to spend her maximum time in India so that he could continue his affair and the schedule drawn was also predicated on the Respondent's ulterior motive of continuing his affair with Ms. Sonia, which he could pursue freely in the absence of the Petitioner.

xx xx xx

69. That it is clear that the Respondent is in no manner interested in maintaining matrimonial relationship with the Petitioner. The Respondent and his family members were only concerned about their "rights" to their male heir to their business empire.

xx xx xx

72. That the Respondent never intended to work for having a successful and happy marriage. The Respondent got married to the Petitioner for purpose of procreation and whose only utility after having given birth to a son was to obediently take care of the child."

21. Smriti filed an affidavit in support of the petition for dissolution of marriage wherein it was stated to the following effect:

> "4. That the parties have been separate since 26.04.2012 and there has been no resumption of cohabitation and/or no restitution of conjugal rights between the parties since 26.04.2012."

22. The learned Family Court held that it was absurd that the Schedule prepared for merely two years conferred testamentary guardianship to Smriti over the child. Also, since the date or place of writing down of such Schedule was not pleaded or proved, the learned trial court opined that it must have been written down during the period July, 2010 to March, 2012 in Kenya. There was also no evidence that the Schedule was followed for the year 2010-

11. It was thus held that Smriti was never a guardian of the child, therefore, Perry was not required to establish any of the causes mentioned in Section 39 of the Act to succeed. In respect of welfare of the child, it was held that Smriti lives in a multistorey building in a market-place with her widowed mother and that she is currently not working. The family thus constituted of two non- working women. It was held that depriving the child of his legitimate right to inherit the aforesaid business was definitely not in his best interest. The grooming of the child under the care of Perry would be in his best interest. The child could also pick up Kiswahili language, if brought up in the atmosphere where this language is spoken or widely used. The future of the child, therefore, was held to be most secure with Perry. The learned trial court did not accept the allegation of suicidal tendencies in Smriti. In respect of the allegation of adultery by Perry, the learned trial court held that Smriti has not been able to establish adulterous liaison. It was further held that parental alienation was proved from prayer 'c' of the suit for injunction filed by Smriti and also from the Aadhaar card and the bank account opening form where name of Perry is not mentioned. The child was also admitted in the School under 'single parent category'. With the above findings, the learned Family Court allowed the petition filed by Perry by granting permanent custody to Perry and declared him as the guardian of the child.

23. The High Court dismissed the appeal filed by Smriti, inter alia, for the reason that Perry has been visiting the child every month since 2012 and had even sought extended visitation rights on numerous occasions. The fact that Perry has business interest in Kenya and United Kingdom was admitted by Smriti. The High Court held that Smriti and maternal grandmother of the child are not working and stay at home reaping rental income. Thus, Smriti would not be an ideal role model for the child. The High Court proceeded to hold that though financial superiority can never be the sole ground to grant custody but the same can always be one of the factors to be considered while ascertaining where the overall welfare of the minor lies. Perry stays in a joint family with his parents having a large house enabling the child to play around, whereas Smriti stays with her aged mother in a flat who also doesn't keep well and is unable to sit or stand for long hours as having been diagnosed with an ulcer in her left ankle. She also suffers from lumbar spondylosis with degenerative disc disease. It was also found that Smriti had at least on one occasion slit her own wrists.

24. The High Court referred to the report of the Counsellor dated 21.7.2016 and the photographs to return a finding that the child shares a close bond with Perry and grandparents. Perry had travelled from Kenya to New Delhi every month to meet the child which showed genuine love and affection towards the child. The High Court also referred to a transcript of the conversation between the child and Perry's family which showed that Smriti was feeding the child with stories regarding witches in Nairobi, Kenya and that the plane would crash in order to desist him from going there. It was noted that Perry's name was withheld from the Aadhaar Card of the child and in the admission form submitted to the school where Smriti got the child admitted as a single parent. The High Court also held that Smriti kept her interests before the interest of the child and used the interim custody of the child as a leverage for bargaining better settlement terms for herself. The High Court further held that Smriti refused the request of Perry for consulting a second doctor at the residence of Smriti herself when the child was ill by terming the request of Perry as mala fide. It was held that though Smriti may be entitled to alimony, however, using the child as a chattel to be traded for alimony or other benefits could never be in the best interests of the child. Thus, the High Court concluded that Perry was in better position to take care of the child and the best interests of the child would be protected by granting his custody to Perry.

25. Perry expressed his willingness before the High Court to file an undertaking of his mother who is an Indian citizen to ensure visitation rights to Smriti vide separate order of the same date. Perry also stated that an undertaking would be filed before the Indian Embassy at Kenya, the acknowledgment of which would be produced in token of his acceptance of the order and of his submitting to the jurisdiction of the courts in India and the consequences which may follow in case the order is not faithfully complied with.

26. During the pendency of the appeal before the High Court against the final order passed by the Family Court, Smriti moved an application under Order XLI Rules 27 and 28 of the Code of Civil Procedure, 19086 to produce additional facts and documents on record. The additional facts pertained to dam burst on 9.5.2018 in the Republic of Kenya built by the family of Perry on Solai Farms. The Republic of Kenya has registered a criminal case against Perry being CMCR No. 997 of 2018 on various offences including 48 counts of manslaughter. In the present proceedings, Smriti has referred to an order passed by the High Court of Kenya whereby revision petition against Perry under Sections 362, 363 and 365 of the Criminal Procedure Code as applicable in the said Country was allowed. The High Court has set aside the order of acquittal passed by the trial court on 3.2.2020 and ordered a retrial. It is 6 For short, the 'Code' submitted on behalf of Perry that an Appeal against such an order is pending before the Higher Court.

27. There are a number of judgments regarding custody of child wherein, foreign courts have passed orders regarding custody one way or the other. But, in the present case, there is no order of any foreign court regarding custody to either mother or father nor there are any proceedings initiated in any other country except India regarding custody of child. Therefore, custody of the child who is ordinarily resident of Delhi is to be examined only keeping in view the principles laid down under the Act read with the Hindu Minority and Guardianship Act, 1956. The judgments arising out of foreign courts are not relevant to determine the issues raised in the present proceedings.

28. In Rosy Jacob v. Jacob A. Chakramakkal7, this Court held that children are not mere chattels and nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society. 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. 7 (1973) 1 SCC 840

29. In a judgment reported as Nil Ratan Kundu & Anr. v. Abhijit Kundu8, this Court has held that it is not the negative test that the father is not unfit or disqualified to have custody of the son is relevant but the positive test that such custody would be in the welfare of the minor which is material and it is on that basis the Court should exercise the power to grant or refuse the custody of minor in favour of father, mother or any other guardian.

30. This Court in a judgment reported as Gaurav Nagpal v. Sumedha Nagpal9 considered the argument of the father that he lives in a posh locality and the house is built on nearly 3000 sq. yards whereas the respondent, a teacher, resides with her parents in a two-bed room flat. The custody of Child was given to mother though father had better financial status. This Court reviewed the law relating to custody in various countries and held as under:

> "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.
>
> xx xx xx
>
> 48. Merely because there is no defect in his personal care and his attachment for his children—which every normal parent has, he would not be granted custody.

Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. .....

8 (2008) 9 SCC 413
9 (2009) 1 SCC 42

xx xx xx

50. 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 Mausami Moitra Ganguli case [(2008) 7 SCC 673 : JT (2008) 6 SC 634] , 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 comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. 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 parens patriae jurisdiction arising in such cases.”

31. In a recent judgment in Lahari Sakhamuri v. Sobhan Kodali10, the Courts have delineated the following factors to be kept in view:

> (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.

32. Mr. Shyam Divan, learned Senior Counsel for Smriti argued that the 10 (2019) 7 SCC 311 findings of the Family Court and the High Court that the welfare of the child is in the custody of Perry is based upon factually incorrect reading of evidence and on impermissible principles of law. On the other hand, Mr. Mehta, learned counsel for Perry has supported the findings as recorded by both the courts. The arguments raised are dealt with as under: -

(I) Welfare & Best Interest Principle

(II) Whether, the Financial superiority of a parent can be the

decisive factor to handover the custody to such parent. (III) Whether, the Continued supervisory jurisdiction of Indian Courts is essential for Child’s Welfare.

33. The arguments need to be appreciated keeping in view of the fact that Perry and Smriti, both are natural guardians of the child in that order. In terms of Section 17 of the Act, the Court has to take into consideration the circumstances which are for the welfare of the minor. To determine the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor.

(I) Welfare & Best Interest Principle The welfare principle is examined in the following manner in view of the judgment of this court in Lahari Sakhamuri.

(a) Maturity and Judgment & Mental Stability

34. As per Perry, his grandfather shifted to Kenya in the year 1935 and with hard work, he established a business empire in Kenya as well as in UK. Even though, the family is settled in Kenya for about 75 years in the year 2007 but still his first preference was to marry an Indian woman which is evident from the fact of publishing an advertisement in the newspaper as also his previous marriage with a woman from Mumbai. Perry pleaded that he and his family are based in Kenya and are exposed to western culture and lifestyle. This shows that Perry and his family have not assimilated in Kenya to Kenyan culture and ethos even after living in Kenya for many years. He looked for a spouse in India, though he himself professes that he is exposed to western culture and lifestyle. This shows that the action of Perry does not match with his written stand. He comes out to be a person who is not sure whether he is Western or an Indian but in no case Kenyan.

35. Perry submitted an affidavit in evidence as Ex.PW-1/A and appeared as PW-1 as his own witness. He had also attached the photographs to show his means and affluence so as to provide all facilities and comforts to his child. He had stated that he is an Industrialist having business establishments all over the world. Perry and his child have dual citizenship of Kenya and UK and enjoys a high social status and respected all over the world. He examined his father, Mansukh Patel as PW-2. He had stated that Smriti is a practicing lawyer. She remains busy and occupied in her work and there is no one else in her family to take care of the child.

36. In cross-examination, Perry denied any matrimonial advertisement given by a Bombay based lawyer Ms. Sejal Chacha on behalf of his family seeking an alliance of a girl based in India. On the other hand, PW2 Mansukh Patel, father of Perry, admitted that Ms. Sejal Chacha is their family friend. In cross examination conducted on 6.5.2017, Perry stated, thus:

> "It is wrong to suggest that matrimonial advertisement Mark-A given in Hindustan Times, New Delhi dated 1st October, 2006 was given on my behalf or even on behalf of my family in respect of me. I have already testified that no matrimonial advertisement was given in respect of my marriage either by me or by my family or on behalf of either of us. Ms. Sejal Chacha, Advocate is our family friend and I have not been actively consulting with her on all matters. I occasionally mark a copy of my e-mail conversation with Smriti to Ms. Sejal Chacha, Advocate."

> 37. Smriti tendered her evidence by way of an affidavit Ex.RW1/A and appeared as her own witness as RW-1. She had produced the matrimonial advertisement published in Hindustan Times newspaper on 1.10.2006 as Ex.RW1/1. The contact person in the said matrimonial advertisement was Ms. Sejal Chacha. As per Smriti, this advertisement was on behalf of Perry and his family and they responded to such advertisement, which led to marriage between the parties. The said advertisement reads, thus:

> "Overseas Based. Business Tycoon. Only Son.

> 1974/5'8", B.B.F. (UK) Seeks Very Beautiful Cultured Girl.

> Contact Sejal (Advocate) (022) 26xxxx52, 0981xxxxx67.
>
> E-mail: sejal_xxxxxxx@yahoo.co.in. (Caste no bar) We are in Delhi Oct, 6, 7, 8".
>
> (Note: The complete email address and mobile number is not made part of the order so as to protect the privacy of the individual)
>
> 38. Smriti deposed that she met Perry in Hotel Inter-Continental, Barakhamba Road, New Delhi in Room No. 1415 in response to such advertisement. Ms. Sejal Chacha was present in the meeting.

She further deposed that her mother was in touch with Ms. Sejal Chacha during the alliance discussion. Perry is still in touch with Ms. Sejal Chacha as his e-mails dated 25.2.2015 (Ex.RW1/DA143) and 9.12.2016 have been marked to her as well. RW-2 Manju Madan, Smriti's mother also supported her daughter in respect of meetings with Ms. Sejal Chacha and that she was in touch with her when the alliance proposal was being discussed. Perry in his cross examination, as reproduced above, admitted that he occasionally marked a copy of his e-mail conversations with Smriti to Ms. Sejal Chacha, Advocate, though he stated that he was not actively consulting with her on all matters.

39. In this regard, Mr. Mehta relied upon a judgment in Ravinder Kumar Sharma v. State of Assam & Ors. 11 to contend that newspaper reports are merely hearsay and not proof of facts stated therein. I do not find any merit in the arguments raised. In the said case, the Appeal had arisen out of suit for damages for malicious prosecution. It was found that newspaper reports regarding Central Government decision could not be any basis for 11 (1999) 7 SCC 435 the respondents to stop action under the Assam Foodgrains (Licensing and Control) Order, 1961. It was held that the presumption of genuineness under Section 81 of the Indian Evidence Act, 187212 to newspaper reports cannot be treated as proof of the facts stated therein. However, Smriti has not relied upon the newspaper report by any correspondent or any reporter. The reliance is upon paid advertisement appearing in the classified matrimonial column of the Hindustan Times. In other words, Smriti is not relying upon any news published in the newspaper but reliance is on an advertisement on behalf of Perry or his family disclosing purpose of the advertisement and the contact person. The news published is on the basis of a report filed by a correspondent. The primary evidence in such situation would be the reporter himself. But an advertisement is not news based on a report of a newspaper reporter. It is an insertion on the basis of payment made. The fact of advertisement could be rebutted by Perry by producing Sejal as witness to depose that no such advertisement was published with her being the contact person. Still further, the stand of Perry is that his marriage with Smriti was an arranged marriage. There is no other evidence as to how the marriage was "arranged". Therefore, I find the said judgment is not applicable to the facts of the case as the talks of the matrimonial alliance were finalized on the basis of an advertisement published on behalf of Perry.

40. Perry was earlier married to a woman from Mumbai whom he 12 For short, the 'Evidence Act' divorced in the year 2005. Perry, though admitting that his marriage with Smriti was arranged, denied that any advertisement in the matrimonial column was got inserted for him. He however

deposed that Ms. Sejal Chacha, Advocate is their family friend and that he had not been actively consulting with her on all matters though occasionally he marks a copy of his e-mail conversation with Smriti to Ms. Sejal Chacha, Advocate. When Smriti appeared in examination-in-chief, she submitted the relevant page of the Hindustan Times but the same was objected to on the ground that the complete newspaper has not been produced. However, no further cross-examination was carried out on Smriti regarding the veracity of the advertisement or that matrimonial alliance between the parties was arranged in some other manner other than the newspaper advertisement published in the Hindustan Times. Also, Perry did not examine Sejal Chacha as a witness to rebut the stand of Smriti that she was the one who was in touch with Smriti and her mother before the matrimonial alliance was finalized as deposed by RW-2 Manju Madan. This only goes to show that Perry is not a truthful person.

41. The child was born on 2.12.2009 at New Delhi. As per Smriti, Perry wanted the child to be born and brought up in India. Perry admitted that he visited India every month before birth of the child and in fact thereafter as well. He has given in writing the schedule of stay of child for two years (2010 & 2011). Such writing shows that the child was to remain in India for seven months; England for one month; and Kenya for four months. He denied that the schedule Ex. PW1/R1 was written by him voluntarily. He stated that the Schedule Ex.PW1/R1 was written by him on the instructions of his wife. He admitted that the Schedule Ex.PW1/R1 runs into two pages on two sheets in the notebook.

42. It is also admitted by him that such schedule for the year 2010 and 2011 was broadly followed except that the child never went to England and stayed in India instead. I find that the stand of Perry that he has written such schedule on the dictation of Smriti to say the least is preposterous. Perry, a successful businessman and of more than 33 years of age, is not a child to whom the schedule of stay of the child could be dictated. The stand of Smriti is that it was a voluntary schedule written by Perry so as to imbibe Indian values and culture in the child. The fact that it was the voluntary decision of Perry to let the child in India for two years after his birth is also corroborated by the fact that in the application form to seek UK Passport, the residential address of Smriti alone was given. Still further, Perry has not produced any email or any other evidence except his bald statement objecting to the stay and bringing up of child in India. Perry is proved to be consenting of Smriti and child staying in Delhi at least till 26.4.2012. The triggering factor appears to be the messages in the mobile of Perry which Smriti found out on 22.4.2012. Therefore, it cannot be said to be an act of abandonment of matrimonial home by Smriti.

43. It is admitted from the evidence on record that the first birthday of the child was celebrated in Hotel Claridges, New Delhi on 2.12.2010, which was attended to by Perry. The child was admitted in Toddler's Train Play School in September, 2011 by both parents. The second birthday was celebrated in Defence Colony Club, New Delhi on 2.12.2011, which was again attended by Perry. Thus, at no stage, Perry ever insisted upon the child not to stay in India which fact is apparent from his conduct from the time Smriti came to India till 26.4.2012, when Perry left India.

44. It is thereafter that the child was admitted in Delhi Public School, Mathura Road in 2013, wherein Smriti had got the child admitted to the school as a 'single parent'. Later, while obtaining

Aadhaar card, again, Perry's name was not mentioned. The Courts below have found such aspect to be acts of parental alienation by Smriti. Even though Perry's name was not mentioned in the admission form while seeking admission of the child to the school or in the Aadhaar card, the fact remains that Perry continued to avail visitation rights all throughout. It cannot be even remotely inferred that Perry or his parents were alienated from the child in any manner in view of the Counsellor's report dated 21.7.2016. Also, it is Perry who did not continue with Mediation. Similarly, the stand against visitations to Perry was in Court to convey her concerns. There is no instance where Smriti violated any direction of the Court granting visitation rights to Perry.

45. As per Perry, he had booked return tickets for the child and Smriti for 6.6.2012 but before that date, Smriti had filed suit for injunction on 26.5.2012 wherein a restraint order was granted on 28.5.2012. In that suit itself, Smriti had averred about the marital infidelity. Smriti had invoked the jurisdiction of the Court on the allegations that Perry had threatened to take the child forcibly away from her. Smriti had lodged a police complaint on 5.5.2012 that she has received a phone call from UK number of Perry on 5.5.2012 at 5:12 pm and later at 5:25 pm. She felt intimidated by his tone as he had used violent language and asked her to send the child to Kenya immediately. Perry had denied such allegations but the fact remains that the dispute had arisen between the parties, thus Smriti could be justified in invoking the jurisdiction of the Court to protect the custody of the child with her.

46. The allegation of Smriti that Perry is racist has to be examined in view of this background that even though Perry is a 3 rd generation resident of Kenya, he is still not looking for a matrimonial alliance with a local woman. If he has a western lifestyle as professed by him, then he should be looking for matrimonial alliance from the western world. Maybe he believes that Indian women are gullible who can be allured with the glamour of money which he has made. Many in India believe that the grass is greener on the other side of India. The mansions and the other possessions are shown to women to attract them to marry. At least two of Indian women have fallen trap to the web of this rich Non-Resident Indian. It is this trap which led the woman from Mumbai and also Smriti to fall in the web of Perry. It appears that the only purpose of marrying an Indian woman is to use her for procreation. This observation gets supports from the statement of Smriti that from the day she conceived, the reaction of the family changed. Although they were happy with the birth of the child as an heir apparent but the position of Smriti was that of a caretaker of the child and not that of a wife who, according to Indian customs, entitled to share life jointly with her husband. She was used only to procreate child for Kansagra family.

47. The allegation of slitting of wrists by Smriti was denied by her in evidence when she deposed that they were old scars. The Court have disbelieved such part of statement. During the course of hearing, Smriti has filed notes for arguments wherein, it has been stated that the scar on the left hand was the result of an injury when she was around 11-12 years old in or around the year 1987. The accident occurred at her home in Shimla when she accidentally banged into a wooden door with a glass pane. The injury had to be treated with about 7-8 stitches. The scar occurred many years before marriage and appears to be visible in one of the wedding photographs, the copy of which is attached with the Notes for Arguments submitted by her. She stated that the faint scar on the right hand was the result of a glass bangle breaking, which also happened many years before marriage.

She is not even able to recall the incident which caused the injury as it is a very faint scar and barely visible. However, the photograph does not show the scar. Perry has not asserted the date, time or place of so-called attempt to suicide nor has he examined any Psychologist or a Doctor to determine the period of injury so received.

48. Therefore, I find that the plea to discredit Smriti was raised without any legal or medical evidence. In fact, the Family Court discarded the theory of suicidal tendencies and the evidence of self-inflicting injury but the High Court reversed those findings without any good or reasonable ground. The parties are in Court since 2012 and in almost 8 years of litigation there has been never any incident or allegation of self-harm or harm to the child on Smriti's part.

49. Smriti also averred that Perry travels for 18 days in a month outside Kenya. In response to such assertion, Perry in the written statement has evasively denied the same however it has not been disclosed as to for how many days he actually travels. In terms of Order VIII Rule 3 of CPC, it shall not be sufficient for the defendant to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth. Reference will be made to the judgment of this Court in Badat and Co. Bombay v. East India Trading Co.13, wherein, this Court considered the provisions of Order VIII, Rule 3, Rule 4 and Rule 5 of the Code and held as under:

"11. xx xx xx These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing 13 AIR 1964 SC 538 from its non-compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary……"

50. A perusal of the evasive reply in the replication filed by him, which is part of pleadings in terms of Order VIII Rule 9 of the Code, shall be treated as admission.

51. Perry was asked to produce his Passport for the period 2009-2012 in his cross-examination. It was stated that his old Passport was taken by the Authorities at the time of renewal of Passport in the year 2015. He denied the suggestion that the details of his visits as indicated in Para 31 of his affidavit were unreliable. He stated that it was wrong to suggest that he spent time in attending his business activities in Mumbai and Rajkot on his visits to India. It was admitted by him that he along with Smriti and child came to India on 10.3.2012. He stayed for 9-10 days whereas Smriti and the child remained in India with return tickets booked for 6.6.2012. He has disclosed his working hours on a working day but the dates of travel have been withheld from the Court. Perry did not produce the best evidence and submitted that the passport has been taken by the Authorities while issuing the new passport. It has to be noted that even after renewal of the passport, the old passport is returned to the holder as the passport is a valuable document, having travel permissions etc. The days of travel outside Kenya was within his knowledge alone, therefore, in terms of Section 106 of the Evidence Act, the onus was on Perry to disclose his dates of travel in a month to rebut the stand of Smriti. It is reasonable to infer that Perry needs to travel abroad quite frequently.

52. Perry having not cross-examined Smriti on the aspect of matrimonial advertisement published; slitting of wrists by Smriti and of his travels for more than 18 days in month or even the explicit messages received by Perry on his mobile, shall be deemed to be accepted by him. This Court in a Judgment reported as Arvind Singh v. State of Maharashtra14 referred to rule of evidence that it is absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness if not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged. This Court held as under:

> "57. The House of Lords in a judgment reported as Browne v. Dunn, (1894) VI The Reports (67) HL, considered the principles of appreciation of evidence. Lord Chancellor Herschell, held that it is absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness if not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged. It was held as under:
>
> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the 14 2020 SCC OnLine SC 400 proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in crossexamination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has bene complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-

examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling." xx xx xx

63. Thus, the prosecution is required to bring home the guilt beyond reasonable doubt. It is open to an accused to raise such reasonable doubt by cross-examination of the prosecution witnesses to discredit such witness in respect of truthfulness and veracity. However, where the statement of prosecution witnesses cannot be doubted on the basis of the touchstone of truthfulness, contradictions and inconsistencies, and the accused wants to assert any particular fact which cannot

be made out from the prosecution evidence, it is incumbent upon the accused to cross examine the relevant witnesses to that extent. The witness, in order to impeach the truthfulness of his statement, must be cross-examined to seek any explanation in respect of a version, which accused wants to rely upon rather to raise an argument at the trial or appellate stage to infer a fact when the opportunity given was not availed of as part of fair play while appreciating the statement of the witnesses. Thus, we hold that a party intending to bring evidence to impeach or contradict the testimony of a witness must give an opportunity to explain or answer when the witness is in the witness box" .

(Emphasis supplied)

53. The rule of evidence in criminal trial is beyond reasonable doubt to convict an accused but in civil cases is to prove a fact. The Rule of evidence is much stricter in Criminal trial that the onus of proof in Civil Cases. In the present case, attention of Perry was drawn to various aspects mentioned earlier but he had not cross examined Smriti on these material aspects leading to admission of facts as deposed by Smriti.

54. A reading of the plaint of the Guardianship petition shows that Perry relies upon availability of his parents in Kenya to take care of the child and, on the other hand, stress on the physical condition of Smriti's mother to look after the child. I find that the entire basis to seek appointment as guardian of the child is the availability of his parents in Kenya and the physical condition of Smriti's mother. The entire basis is incorrect as in the presence of parents of the child, the grandparents are not the determining factor to appoint a guardian. The question of where does the welfare of the child lie thus narrows down to the mother who has stopped practicing law to nurture child as against the father who travels quite substantially every month. In the absence of the father, the child will be in the custody of nannies, maids and servants. The grandparents would not be able to take care of the growing needs of a young child. All things being equal, the presence of grandparents can tilt in balance but where a mother who is available 24/7 for guiding, caring and nurturing a growing child as against a father who needs to travel outside his normal place of stay frequently, I find that the mother is more suitable in whose hands the welfare of the child is secured.

55. It is made clear that I am not commenting upon the allegations of cruelty or lack of conjugal rights as it is a matter of trial in the matrimonial proceedings to avoid any prejudice to the rights of the parties in the said case.

56. The argument of Mr. Mehta that the child is about to enter into his teens, therefore, he will be more comfortable with the father, is based upon assumptions. The requirement of a growing child can be better understood by the mother who has the opportunity to have supervision over the child at all times and in this case from his birth. Further, the conduct of Perry and his parents is inclined towards pampering the child inasmuch as an iPhone was given to the child when he was of six years of age. Perry and/ or his parents have pampered the child by giving him 4-5 iPads. It is unrebutted testimony led by Smriti. She has also deposed that child had once broken one newly purchased iPad but Perry bought another iPad for the child immediately without any counselling to value the things purchased. These are instances which suggests pampering the child. From the controlled and supervised household of the mother, if the custody is given to the father, the sudden exposure to the

materialistic things have the potency to derail the studies and well- being of the growing child.

57. It is also to be considered that Perry is facing a charge of manslaughter on 48 counts. Though Perry was acquitted by the first Court but the High Court has set aside the order of acquittal and ordered re-trial. The matter, as argued by Perry, is currently pending before the Superior Court. Maybe, Perry and his family are involved in philanthropic work in Kenya but the threat of criminal prosecution is writ large over Perry. In these circumstances, putting the child to the trauma of trial in Kenya would not be in his best interests and will have adverse psychological impact on him. Sharing a bond with the father for some time where the father and grandfather occasionally visit and pamper the child is different than staying in a wholly new environment as it is a difficult transformation for the child of a young age with new fellow students and teachers.

58. Perry has relied upon the recordings made by him on 7.1.2015 and 8.1.2015 prior to filing of his affidavit Ex. PW-1 on 23.1.2015. Perry had also produced transcripts wherein the child purportedly stated that Smriti has told him that there are witches in Kenya. However, the said transcripts were not put to Smriti or her mother when they appeared as witnesses. Smriti was not confronted either with the CDs or the transcripts to elucidate response from Smriti.

59. I find that creation of recording is nothing but an attempt to create evidence using child of almost six years of age. One recording is dated 7.1.2015 (Ex.PW1/5) which has a heading "India Visitation DVD no. 09 Video clip no. 328, Date: 07 Jan 2015, Time: 17:33" and another recording is dated 8.1.2015 which has a heading "India Visitation DVD no. 09 Video clip no. 330, Date: 08 Jan 2015, Time:

> 15:31". It only shows that the recording on the DVDs was only to fabricate the evidence against Smriti. It shows that Perry can stoop so low so as to create evidence by using an innocent child of six years. It appears that the first DVD is 9 th video clip recorded on 7.1.2015. Maybe, the other earlier 8 video clips were not helpful to Perry. Similarly, video clip no. 330 recorded on 8.1.2015 also shows that there were intervening video clips as well which have been withheld from the Court. Such production of the evidence to say the least shows the mental state of mind of Perry which disentitles him from the guardianship of the child. Still further, Smriti has not been confronted with such recordings so as to give any opportunity to explain the utterances of the child.

60. Another argument was raised by Mr. Mehta that the child is staying in India only on account of pending court cases. I do not find that any benefit can be granted to Perry on account of time gap due to pending court cases. The fact is that the child has grown in the last eight years during the pendency of the proceedings. The child is at such a stage in life where he will soon undergo his psychological changes. Though, ideally both the parents should nurture the child, but the next best solution is the exclusive custody with Smriti and liberal visitation rights to Perry.

61. Another factor which cannot be lost sight of that there is nothing which prohibits Perry from marrying again. If that is to happen, the child would be left to be brought up by the house help or

grandparents or by step-mother as against Smriti who is bringing up the child in India. Smriti is possessed of substantial means as is required from an upper middle-class family. Perry may be super rich but keeping in view his professional commitments and his adventurous background, I find that custody of the child should remain with Smriti. The child should be given liberty to choose his destination after he comes out of age. Since, it was Perry who has invoked the jurisdiction of the Family Court to seek his appointment as the guardian, the onus of proof that the welfare of minor rests with him is on him. I find that Perry has failed to discharge such onus.

62. I find that Smriti has no disability so as to take custody from her.

She is well educated, was a practicing Advocate who left her law practice to nurture her child. Therefore, she has the maturity and sense of judgment. She has mental stability as even though the parties are at loggerheads, the child has a cordial relation with Perry. Therefore, I find that there is no valid plausible reason to take custody of Child from Smriti to hand over to Perry as a chattel.

(b) Ability to provide access to Schools

63. Delhi Public School is one of the prestigious schools in National Capital Region. The child is studying in the said school since 2013. I have no doubt that there are good schools in Kenya as well however the education of the child in Delhi Public School cannot be said to be in any way inferior to the education in Kenya. At times, we tend to believe that other countries are better in every sphere as compared to India, though it is true. Therefore, shifting of child at this stage of life would be counter-productive to the growth of child.

64. Mr. Mehta raised an argument that the child was not regular in School for the years 2015-16 and 2016-17. The child was 4-5 years of age back then. It was not any high academic session which the child was deprived of. The absence of the child from the school for some days at such a young age is wholly inconsequential as it is basically a play time for the children and not a time for serious studies.

(c) Moral Character

65. There is no allegation or evidence against Smriti regarding her character whereas there is evidence of relationship of Perry with another woman. There is allegation of liaison with other woman during the subsistence of marriage. Perry was confronted with the subject matter of the seven messages (Mark B) but he denied the same. The five SMSs were received by Perry on 2.4.2012 and another two on 4.4.2012. The copies of such messages confronted to Perry has the mobile number of Perry and of Sonia. Admittedly, the parties came to India on 10.3.2012. Perry left India after some days and again came back on 21.4.2012. It is then, as alleged by Smriti, that she stumbled upon these explicit messages on the Blackberry phone with Vodafone as a service provider of Perry which she forwarded to her mobile on 22.4.2012. Smriti has produced such messages forwarded to her mobile phone on the same day between 1:52 am to 1:56 am on 22.4.2012. It was then forwarded to her e-mail account on 5.5.2012 and 6.5.2012. The date format is MMDDYYYY. It has not been disputed that the mobile number mentioned in such messages and e-mails from which the messages

were received and/ or forwarded is used by Perry.

66. Perry denied the suggestion that in April, 2012, he showed no interest in talking to or interacting with his wife and child and was busy in chatting/texting on phone throughout. He denied the suggestion that he was having extramarital affair with Sonia. He stated that it was wrong to suggest that he had denied any conjugal relations with his wife since 2010. He denied the suggestion that in April, 2012, his wife came across text messages between him and Sonia and also denied that the text messages contained in seven sheets (Mark-B) relate to him. He stated that he did not know anyone by the name Sonia from Mozambique.

67. Perry has denied any connection with Ms. Sonia. In the suggestions given to Smriti, the veracity of messages which were forwarded to an e-mail account of Smriti has not been disputed. Once the messages were in the mobile of Smriti, the print-out could be taken by sending the same on an e-mail or by taking screenshots and then by sending it to e-mail or directly from a compatible printer. Maybe, some people are not user friendly to take screenshots and then to take print-out but Smriti adopted the second alternative of sending the messages on her e-mail ID which she did on 5.5.2012 and 6.5.2012. The extract from one of the printouts of e-mail reads as under:

> "Fw: ****** Smriti Madan Kansagra <smriti.....@hotmail.com> 5/6/2012 5:05 AM
> To: smritixxxx@hotmail.com <smritixxxx@hotmail.com>
>
> --------SMS From: +91981xxxx433 Received: 22 Apr 2012 01:52 Subject: Morning ****** ********** Sent on my BlackBerry® from Vodafone" (Note: The complete email address, mobile number and the message is not made part of the order so as to protect the privacy of the parties.)

68. Such messages forwarded to her email account are supported by an affidavit of Smriti under Section 65B of the Evidence Act. Though, it was argued by Mr. Mehta that the affidavit is not proper in terms of requirement of Section 65B of the Evidence Act but the fact remains that the transfer of messages was firstly made to the mobile device of Smriti and later to her e-mail. Such affidavit satisfies the requirement of law as has been held by this Court in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal15 decided on 14.7.2020.

"65. It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a 'responsible official position' in relation to the operation of the relevant device, as also the person who may otherwise be in the 'management of relevant activities' spoken of in Sub-section (4) of Section 65B. Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, Section 65B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the "best of his knowledge and belief" (Obviously, the word "and" between knowledge and belief in Section 65B(4) must be read as "or", as a person cannot testify to the best of his knowledge and belief at the same time)".

69. The messages sent to Perry may not be proved by Smriti to be from Sonia, a woman from Mozambique. But in terms of Section 106 of the Evidence Act, the fact whether such messages were

received by Perry or not in his mobile phone, was within his means of knowledge. Thus, the burden of disproving such fact was upon Perry. He failed to rebut the evidence led by Smriti. The necessary consequence is that the e-mails showing explicit sexual talks between Perry and another woman were duly proved. The fact that such messages were found in the mobile used by Perry are indicative of his adventures outside marriage. 15 2020 SCC Online SC 571

70. I find that both the Courts have misread such printouts to hold that they are not proved as Perry was not in India in the month of May, 2012. The Courts overlooked the fact that the messages were forwarded by Smriti to her mobile on 22.4.2012 when admittedly Perry was staying with Smriti at her house in Defence Colony. He left India only on 26.4.2012. The messages were sent from the Indian mobile number used by Perry. Perry has not given any explanation how the messages came to be delivered to his phone. The denial of knowing Ms. Sonia is of no consequence as it was for him to explain how the messages were in his mobile. Therefore, I have no hesitation to hold that the conduct of Perry in April, 2012 in reference to the exchange of messages with a woman are enough to create bitterness in the relationship of the parties.

71. I do not find any merit in the argument raised by Mr. Mehta that Smriti has been taking contradictory stand about these messages. It is argued that no reference was made to these messages in the police complaint made on 5.5.2012 or in the suit for injunction filed on 26.5.2012. Even in her Affidavit in evidence dated 3.7.2017, she has deposed that Perry has received these messages on 22.4.2012, which she immediately forwarded to her email account. In the written submissions submitted before this Court, it was submitted that the messages were dated 22.4.2012, which were emailed to her account in May 2012. It is also argued that the Certificate under Section 65B of the Evidence Act is not proper as she has only averred that messages are the same as the content of her Inbox of email account.

72. I do not find any merit in the arguments raised that Smriti has not mentioned about these messages in the police complaint filed by her. The police complaint was regarding the alleged threats stated to be given by Perry to take Child from her custody. The messages were not expected to part of such information. Secondly, in the Plaint (Para 23), she has made reference to messages though without further details. The subject matter of suit was injunction regarding custody of child and not the inter-se marital disputes. The requirement of Order VI, Rule 2 of the Code is to give “material facts” on which party relies for his claim. In the Suit for injunction, the detailed mention of these messages was not warranted. Firstly, it was suit for injunction for limited relief against forcible custody of Child and not divorce petition, or maintenance application or custody proceedings. Further, her affidavit in evidence submitted on 3.7.2017 is not being read correctly. She had stated that in the month of April, 2012, when Perry was visiting Delhi, she came across certain messages, which she immediately emailed to her email account. There is no cross examination on the veracity of the messages, as mentioned in earlier paras of this order. Still further, she has not stated that the messages were dated 22.4.2012. The entire statement has to be read. The word “immediately” is an act of forwarding the messages to her email account and not in the context of receipt of the messages. The written submissions submitted is not an evidence on oath, prepared by the Advocates engaged by her. The written submission cannot be used to contract a statement made on oath. I do not find any merit in the argument that Certificate on affidavit given is not proper. The fact is that

she had limited access to mobile of Perry only to forward the messages to her email account. She cannot be expected to do impossible thing, to verify the contents of messages on the mobile of Perry. This Court in Arjun Panditrao Khotkar held that Section 65B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the best of his knowledge or belief.

73. Still further, Perry has not produced any of his house staff either from Kenya or India or his cousin in USA or UK who could depose about the behaviour or conduct of Smriti. Perry has levelled unsubstantiated allegations against Smriti.

74. It may be further stated that it is categorical statement of Smriti that there was no restitution of conjugal relationship since the year 2010. Such fact was sought to be rebutted by Mr. Mehta, learned counsel appearing on behalf of Perry, on the basis of an affidavit filed in support of the petition for dissolution of marriage wherein she has sworn that the parties have been living separately since 26.4.2012 and there has been no resumption of cohabitation and/or conjugal rights since 26.4.2012. Such argument of Mr. Mehta was rebutted by Mr. Shyam Divan, learned senior counsel appearing on behalf of Smriti on the ground that such affidavit was in support of the petition of dissolution of marriage. Smriti has categorically stated in the petition about absence of conjugal relationship since 2010 after the birth of the child and the fact that Perry never intended to work in order to have a successful and happy married life. Perry got married to her for the purpose of procreation and her utility after giving birth to child was to only take care of him. The stand of Smriti cannot be brushed aside, though in the present proceedings such stand need not be examined as the primary question before us is as to where the welfare of the child lies.

(d) Ability to provide continuing involvement in the community

75. Smriti has left her active law practice to nurture her child. She has relatives in Delhi and also in many other cities. She is continuously involved in providing healthy and holistic upbringing of the child. Though Perry has been regularly visiting India every month to visit the child, but that does not entitle him to the guardianship of the child as he is not a truthful person. He has the audacity to deny the marriage proposed initially through a matrimonial advertisement. He has not led evidence in respect of sexually explicit messages received by him from another woman. He has been found to pamper child which has the potential of derailing the education and further upbringing in the crucial years of teens.

(e) Relationship with the child and Parental alienation

76. When the matter was pending in appeal before the High Court against an interim order of the Family Court in Guardianship proceedings, the Court appointed Ms. Sadhana Ramachandran as a Mediator by its order dated 6.5.2016. The Child was produced before the Court on 11.5.2016 after he had interaction with the learned Mediator and Ms. Swati Shah, Child Counsellor. The Court in its order observed as under:

> "4. We also note that the child was comfortable in his interaction with his father and grandparents in court. The child has expressed happiness at his visitations with his

father and grandparents. He unreservedly stated that he looks forward to the same. Master Aditya Vikram Kansagra is also able to identify other relatives in Kenya and enthusiastically refers to his experiences in that country. It is apparent that the child has bonded well with them.

5. We must note that the child is at the same time deeply attached to his mother and Nani. His bearing and personality clearly bear the stamp of the fine upbringing being given to him by the appellant and her mother. "

77. Ms. Swati Shah, the Counsellor who interacted with the child when he was 7 years old, gave report on 21.7.2016. She reported as under:

"Aditya, son of Perry and Smriti is almost seven years old. He studies in the second standard at one of the reputed schools in Delhi. Two sessions were held in the children's room of the Mediation Centre to interact with Aditya. For the first impression, he appeared to be smart, intelligent kid who hesitated a bit while talking. He held good eye contact. His eye-hand co-ordination seemed age appropriate. He often repeated words while completing his sentences. He also looked somewhat more mature for his age. He seemed familiar with the words like 'visitation', 'court', 'visa', etc. I also happened to meet his parents Perry and Smriti for a brief while during the first session.

Aditya stays with his mother in Delhi while his father travels from Kenya once every month to visit him. While speaking of his parents, Aditya showed lot of closeness and affinity for his father which was surprising for a child who lives with his mother and spends very little time with father only during visitations. Father seems to be the person he idolises. He also talked affectionately of his Dada in particular and Dadi (paternal grandparents). He talked about the house in Kenya which he might be knowing only through pictures seen during visitation as he was very young when Smriti returned to India along with him.

Various questions were asked to know more about Aditya's leanings towards his father and whether his expressions of love and affinity were genuine. Aditya is ready to go to Kenya. He also mentioned that if he can't go to Kenya now, he would do so when he grows up a bit. He talked about staying in England for further education which is Papa would provide for. His affect and bond with his father seemed genuine and not something that appears tutored or forced in some manner.

Aditya seems comfortable with his mother and Nani (maternal grandmother) as well. In my second session with Aditya, he talked about his recent vacation in Kashmir along with his mother and how he went fishing there. When asked that if he goes to Kenya and doesn't like it there or misses his mother what could be done, he answered that he would come back to Delhi. However, he is not uncomfortable at the idea of making a trip to Kenya. When asked about acquiring a toy game or a skill (playing

darts) his talk was all father-centric. According to Smriti, his scholastic progress is satisfactory at the moment. However, he may face difficulties in higher grades as it was observed that his general ability to spell and calculate seems somewhat weak.

In matrimonial disputes, when custodial issues arise, young children generally show affinity and inclination towards the parent to whom their custody belongs and they live with. Aditya surprisingly shows more affection towards Perry and his demeanour sounds genuine.

While adopting holistic approach to the child's growth, it may be considered to allot more time to Perry during further visitations and then extend it to overnight visitation.

If Aditya's interaction with his father increases with longer visitations the progress in their relationship could be gauged after a couple of months. That could pave the way for negotiations between his parents."

78. Ms. Sadhana Ramachandran, the Mediator in her report dated 3.11.2016 submitted as under:

"However, on 31.10.2016, the undersigned received an e-mail from the Respondent, Mr. Perry Kansagra requesting her to close the mediation proceedings. The said e-mail is annexed herewith. The undersigned informed the Appellant of the said communication.

xx xx xx The undersigned believes that the entire credit for Aditya being happy and balanced at home and in school goes to both his parents Smriti Madan and Perry Kansagra, who have made very possible effort to ensure that even in the trying circumstances that the child is in, he loves both his parents and his maternal grand mother and paternal grand parents."

79. The child counsellor as well as the Mediator have credited Smriti for the upbringing of the child even though there is discord in the matrimonial life. The credit has to go to Smriti who has brought up the child in a balanced way without feeding any ill will against Perry.

80. Mr. Mehta argued that the report of the Counsellor alone can be read in view of the intra-parties' judgment of this Court in Perry Kansagra v. Madan Kansagra16 and that the Report of the Mediator submitted to the Court cannot be taken into consideration. I find that the Mediator's report, to the extent that it 16 2019 SCC Online SC 211 reported that the mediation proceedings were dropped on the basis of an email from Perry, is relevant and can be taken into consideration. I find that child is attached to both parents.

Therefore, there is no compelling reason to alter the existing arrangement. He has his entire life to learn business skills or the entrepreneurship. He will develop these aspects in life in the later part of his education and not while he is studying in a school.

81. Arguments on behalf of Perry are that filing of a suit for injunction on the basis of incessant fights between the parties, allegation of adultery on the part of Perry which Smriti discovered in April, 2012 and the alleged threat given by Perry that he will remove the child from Smriti in India are baseless. It was also argued that instances of adulterous relationship were neither mentioned in the suit filed on 26.5.2012 nor in the police complaint made on 5.5.2012. It was argued that filing of suit was mala fide and that Smriti's abandonment of her maternal home, removal of child from Kenya and from the custody of Perry must be held against her. It was further submitted that Perry is more suitable and a better guardian keeping in view the bond shared between him and his son, future prospects of the child, living conditions and surroundings in Kenya and overall personality development of child. It was also argued that Smriti was unfit to retain custody because of parental alienation supported by school records, Aadhaar Card, transcript (Ex.PW1/5), filing of suit, obstruction to visitations and no genuine concern for child which may not be good influence over child.

82. I do not find any merit in the arguments raised by Mr. Mehta that Smriti has alienated Perry from the child. The filing of suit on the basis of alleged threats of taking of child from her custody cannot be said to be a case of parental alienation as Smriti has invoked the jurisdiction of the Court which is lawfully vested in her. Much ado has been made in respect of prayer (c) in a suit for injunction filed by her. The prayer is only in respect of unsupervised meeting of Perry and his parents with the child. It has also come on record that Perry and his parents were granted visitation rights during the pendency of the suit. Therefore, filing of such a suit cannot be said to be considered as instance of parental alienation. The allegation of adventurism on the part of Perry with another woman during the subsistence of marriage has not been rebutted by Perry in any substantive manner. Perry denied knowing this woman from Mozambique but apart from denial, he has not explained how such explicit messages arrived in his mobile. The argument that Smriti has not disclosed the instances of such messages in her suit for injunction or in the report to the Police on 5.5.2012 is without any substance. The report to the Police was against threatened abduction of the child by Perry. It was not in respect of conduct of Perry as against Smriti as his wife. Therefore, such instances were not warranted to be mentioned in the Police report. Similarly, the suit was also against threatened forceable custody of the Child by Perry. It was disclosed in the plaint itself that Perry would be constantly text messaging someone from his mobile which she realised later on that it was related to his breach of marital fidelity.

Therefore, the suit cannot be held to be mala fide. Smriti had a reasonable belief on the basis of conduct of Perry which compelled her to invoke the jurisdiction of the competent Court, therefore, invocation of jurisdiction of a competent Court cannot be treated to be an adverse circumstance against her.

83. It was argued that Perry was the one indulging in parental alienation which was detrimental to the welfare and development of the child and the time he spent during visitation as he constantly

showed the photographs and videos of the houses in Kenya, the farm in Solai and by giving expensive gifts to him. Smriti deposed as under:

> "69. That the Petitioner and his family are not making any efforts to bond with the child but are trying to buy the child's love with expensive and highly inappropriate gifts for the child. The Petitioner has bought the child a cell phone and handed it to him during one of the visitations. The child is of a young and impressionable age and therefore the use of cell phones at such a young age is not in the best interest of the child. Therefore the act of the Petitioner to give a cell phone to the child was contrary to the welfare and interest of the child. The Petitioner without informing me or consulting me, forcibly put a cell phone in the hand of the child and immediately tried to leave. I had to stop the Petitioner and inform him about my objection with the child who is merely 6 years of age to use a cell phone. However the Petitioner paid no heed to my concern and left.
>
> 70. The Petitioner has also bought the child multiple (four - five) iPads. On a visitation, the Petitioner and his parent had taken the child at the time was six (5) to a mall. They went into an electronics shop where the Petitioner bought an iPad for the child. Just as they were exiting the shop, the child dropped the iPad and it broke.

The Petitioner simply threw away the broken iPad and bought another one for the child immediately, without admonishing the child or trying to explain the importance of money and how to be careful with objects. Instead of making this incident a learning opportunity, the Petitioner completely neglected his responsibilities as a parent."

84. Admittedly, no cross-examination has been conducted on Smriti regarding her statement contained in paras 69 and 70, as reproduced above. Mr. Mehta argued that no such pleading was raised and therefore such evidence was beyond the pleadings. Smriti had filed the written statement in the year 2013, when the child was three years of age. The incidents referred above are of the time when the child was 6 years of age. They being subsequent events could very well be taken into consideration. Even if it was a new fact, Perry had to cross examine the witness and seek his re-examination, if he wanted to rebut the evidence given by Smriti. Therefore, such evidence led by Smriti cannot be ignored, which shows that the child of six years was pampered.

85. In fact, the recorded version of unproved conversation with the child shows the vicious mind of Perry to prompt child to say negative things about Smriti. Smriti has not been confronted with the recorded version or the transcript nor such recorded version is said to be proved by furnishing a certificate as required under Section 65B of the Evidence Act. Had Perry confronted Smriti with recorded version, Perry could be asked as to why selective recordings have been produced and not all the recordings made by him which is evident from the title and recordings made on 7.1.2015 and 8.1.2015. Another argument raised by Mr. Mehta is that the child is watching his mother and grandmother surviving on rental income, therefore, the child is not learning that working is necessary to live a life. I do not find any merit in the said argument. Upbringing of a child warrants full time attention. Perry may engage nannies and maids but that will not be comparable to mother's

contribution in upbringing of the child. The mother is well educated, a law graduate and had been practicing law. Therefore, merely on the strength of financial superiority, Perry cannot denounce the effort of Smriti in upbringing of the child. Smriti is categorical that the conjugal relationship has come to an end after her separation as the sole intention of Perry was to use Smriti to procreate child for him. His lack of respect for his spouse earlier led to the separation with a woman from Mumbai. The said trait has manifested again now as against Smriti.

86. Mr. Mehta has argued that the basis of parental alienation is in prayer (c) in the suit for injunction filed by Smriti is that she applied for admission to Delhi Public School under 'single parent category', the child's Aadhaar card does not mention Perry's name and that the child has spoken against Perry and Kenya in a transcript of conversation (Ex.PW1/F) in January, 2015. I find that the instances of parental alienation alleged by Perry are wholly untenable. The instances such as admission of child in Delhi Public School without the name of Perry, Aadhaar Card without Perry's name are not the acts of parental alienation. Parental alienation is to be assessed in respect of rights of visitation and custody to a parent. The admission of child to a School or issuance of Aadhaar Card with a single parent name may not be proper but such acts cannot be said to be parental alienation.

87. The prayer (c), as reproduced in Para 7 above, in the suit for injunction is that the child should not be removed to pass a decree for permanent injunction restraining Perry and his parents, agents and representatives from meeting the child "without consent/presence" of Smriti. The invocation of jurisdiction and claim of relief in a suit does not amount to alienation of the father. Firstly, the prayer is not absolute but only to the extent that the defendants should not meet the child without the consent and presence of Smriti. Smriti has therefore not claimed absolute right over the child in such proceedings but only foreseeable custody of the child. Secondly, invocation of the jurisdiction of the Court for vindication of one's right will not amount to alienation of the father wherein Perry has exercised rights of visitation including unsupervised visitation rights.

88. In fact, the High Court, vide order dated 31.5.2018, granted interim custody of the child to Perry for a week i.e. from 9.6.2018 to 15.6.2018. The Counsellor's report also gave credit to Smriti that in spite of having an exclusive custody over the child, she has not tutored child against Perry or grandparents. Thus, Perry has failed to prove any parental alienation by Smriti. In fact, Perry himself has come out to be a person who is not truthful, uses his money to pamper the child and poison him against Smriti. (II) Whether Financial Superiority can be the decisive factor to handover the custody to a parent

89. Though, Perry is possessed of much more financial capacity than Smriti but Smriti is living in Defence Colony having one floor to herself and another with her mother. Defence Colony is one of the good localities in Delhi. Maybe, it is not comparable to the Farm House of Perry in Kenya of 13 bedrooms as mentioned by him but, keeping in view the Indian standards of living, the Child is being very well taken care of. The rental income accruing to the mother of Smriti is of more than Rs. 20 lakhs, as admitted by Perry himself, whereas even after paying Rs.7 lakhs (approx.) as monthly installment of the loan taken from the Bank, Smriti has sufficient means available to take care of herself and the child. It is not comparable to the status of Perry in Kenya in any manner, which she

is entitled to as wife of Perry. However, such assessment is subject to the rights of the parties in the pending maintenance proceedings.

90. Mr. Divan had raised an argument that Perry's financial superiority cannot be a decisive factor to hand over the custody to him. The Family Court held that Smriti lives in a flat in a multi-storied building, the ground floor of her house is a commercial establishment and upper floor is used for residence. Factually, the statement of Smriti is that she is residing on one floor of a house in Defence Colony whereas her mother is residing on a separate floor in the same building. Smriti has deposed that there are six bedrooms, two drawing rooms, two dining rooms, six bathrooms and the entire terrace. This kind of accommodation which is available is sufficient for three people. There was no cross- examination conducted by Perry on this part of testimony of Smriti. Perry is contributing Rs. 1,00,000/- per month as maintenance towards the child only from February, 2016 and has not given any maintenance to Smriti and the child since 2012 till February, 2016. This Court in a judgment reported as Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu & Anr.17 held as under:

> "8. Some of these circumstances mentioned by the learned Judge are not beside the point but, their comparative assessment is difficult to accept as made. For example, the "traumatic experience of a conviction on a criminal charge" is not a factor in favour of the father, especially when his conduct following immediately upon his release on probation shows that the experience has not chastened him. On the whole, we are unable to agree that the welfare of the boy requires that he should live with his father or with the grandparents. The father is a man without a character who offered solicitation to the commission of his wife's murder. The wife obtained an order of probation for him but, he abused her magnanimity by running away with the boy soon after the probationary period was over. Even in that act, he displayed a singular lack of respect for law by obtaining a duplicate passport for the boy on an untrue representation that the original passport was lost. The original passport was, to his knowledge, in the keeping of his wife. In this background, we do not regard the affluence of the husband's parents to be a circumstance of such overwhelming importance as to tilt the balance in favour of the father on the question of what is truly for the welfare of the minor. At any rate, we 17 (1984) 3 SCC 698 are unable to agree that it will be less for the welfare of the minor if he lived with his mother. He was whisked away from her and the question is whether, there are any circumstances to support the view that the new environment in which he is wrongfully brought is more conducive to his welfare. He is about 8 years of age and the loving care of the mother ought not to be denied to him. The father is made of coarse stuff. The mother earns an income of £100 a week, which is certainly not large by English standards, but is not so low as not to enable her to take reasonable care of the boy."

91. In Gaurav Nagpal; Surinder Kaur Sandhu; and, Dhanwanti Joshi v. Madhav Unte18, it was held that financial superiority of one parent cannot be the criteria for the change of custody from one parent to the other. Therefore, though Perry has more financial resources with him, but that alone would not entitle him to have physical custody of the child.

(III) Continued Supervisory Jurisdiction of Indian Courts is essential for Aditya's Welfare

92. Mr. Divan has vehemently argued that this Court exercises parens patriae jurisdiction over the children who reside within the local limits of the jurisdiction of this Court. It was argued that the continuing supervisory jurisdiction is a necessary concomitant of this Court. The jurisdiction of the Family Court at Delhi was invoked by Perry for the reason that the child is an ordinary resident in Delhi. The jurisdiction of Courts in India over the child continues even after an order of appointment of guardian. Sections 26, 39(h), 43 and 44 of the Act ensure that the Court continues to have supervisory jurisdiction over the ward even after 18 (1998) 1 SCC 112 passing of the orders.

93. Mr. Mehta relied on Section 26 of the Act to contend that the jurisdiction of this Court would continue even after the ward is away from the territorial limits of this Court. He relied upon a judgment of this Court in Jasmeet Kaur v. State (NCT of Delhi) & Anr.19 that he is willing to have an order from the Kenyan Court to ensure that Perry remains bound by the orders of this Court which can be executed, if need be, by the Kenyan Court. It was also stated that the argument raised by Smriti that child is well settled in India and the apprehension that the Courts in India will lose jurisdiction are unfounded and baseless. The contention regarding the incident of dam burst was said to be irrelevant in the present matter since there is an appeal pending before the Higher Court of Kenya. Also, the allegations of alcoholism and racism were denied by Perry.

94. I do not find any merit in the said argument raised by Mr. Mehta.

Section 26 of the Act puts a restriction on the rights of a guardian to not remove the ward from the limits of the jurisdiction without leave of the Court except for such purposes as may be prescribed. In terms of Section 4(5) of the Act, the District Court is having jurisdiction to entertain an application under the Act. The Jurisdiction of the Court within the meaning of Section 26 of the Act is the territorial jurisdiction of Court. It does not mean extra- territorial jurisdiction beyond the physical boundaries of India. The 19 2019 (17) Scale 672 Court can permit the movement of Child within India and not beyond. Similarly, a guardian appointed by the Court can be removed under Section 39(h) of the Act, if the guardian ceases to reside within the local limits of the jurisdiction of the Court. Section 44 contemplates penalty for removal of ward from the jurisdiction of the Court i.e. Delhi. The Court can grant permission only within the territorial limits to which the Act is applicable. Therefore, a guardian appointed by the Family Court under the Act cannot remove the ward from the jurisdiction of Delhi Family Court. The Family Court could permit the removal of the ward from the limits of its jurisdiction but within country as the Family Court would become incompetent to ensure compliance of its directions once the child is removed from the boundaries of the country.

95. The judgment in Jasmeet Kaur arises out of very different facts.

In that case, both the parents were US citizens. The father had filed a writ of Habeas Corpus for production of his children who were said to be illegally abducted by the mother from his custody in USA before the Court along with their US passports. Such petition was allowed by the High Court and the mother was directed to return to US along with the two minor children within a period of 3

weeks. It was observed that the parties had abandoned their domicile of origin i.e. India and set up their matrimonial home in US. Therefore, when the mother decided not to return to US, it was held that she acted in her self-interest and not in the best interest of the children. The High Court held that the children have a right to be brought up by both the parents as a family is in U.S.

96. The father had instituted custody proceedings before US County Court as well wherein an ex-parte interim order granting temporary custody of both the children to the father was passed with supervised visitation rights of the mother. Thereafter, the Court passed a final order directing the mother to return to US with the minor children and granted sole legal and physical custody of both the children to the father with supervised visitation rights to the mother.

97. The mother also had filed a petition under the Act for permanent and sole custody of her children in India. In such petition, the father filed an application seeking rejection of the plaint under Order VII Rule 11 CPC. The Family Court allowed the application and dismissed the guardianship petition. Such order was affirmed by the High Court in appeal. Still aggrieved, the mother had filed an appeal before this Court. This Court set aside the order passed under Order VII Rule 11 CPC. The case was remitted to the Family Court to be decided on merits. Thereafter on remand, Family Court held that Indian Courts would not have jurisdiction to entertain petition under the Act. The Family Court held that paramount interest of the children would lie in the shared parenting by parties in US and the mother was not entitled to the sole custody of the children. The Family Court also held that the Indian Courts would lack jurisdiction to entertain the guardianship petition. The first appeal was dismissed by the High Court as well on the same ground. Further, since there was an order of competent US Court, the High Court directed the father to submit an affidavit of undertaking to comply with the directions by the Superior Court of Stanford. The mother finally agreed to return to US with the minor children in agreement to the directions issued by this Court. The said judgment would not be applicable to the facts of the present case as there is no order of competent Foreign Court in respect of custody of minor.

98. It may be noticed that India and Kenya are not signatory to the Convention on Civil Aspects on International Child Abduction, 1980. This Court in Nithya Anand Raghavan v. State (NCT of Delhi) & Anr.20, considering such aspect, held that as regards the non- Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration. There can be summary jurisdiction in the interests of the child or an elaborate inquiry as welfare of the child is of paramount consideration. This Court held as under:

> "40 ...Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned 20 (2017) 8 SCC 454 exposition."

99. The judgment of this Court in Sri Nilanjan Bhattacharya v. The State of Karnataka & Ors.21 arises out of a Habeas Corpus petition filed by the appellant in respect of 3½ years old child. The Superior Court of New Jersey, Hudson County, Chancery Division, USA has passed an order in favour of the appellant for custody and for return of the minor child. Later, the Court granted legal and temporary custody of the child to the appellant. The appellant was aggrieved by the following two conditions imposed by the High Court while allowing the child to take back to USA. The conditions were as follows:

> "(a) That the minor child shall be repatriated only after a certificate being issued by the Officer of the rank of District Health Office of Bengaluru in certifying that this Country is free of COVID - 19 pandemic and it is safe for the travel of minor child to USA;
>
> (b) Simultaneously the petitioner herein shall also secure a certificate from the concerned Medical authority at USA in certifying that the condition in USA, particularly in the region where the petitioner is residing is congenial for shifting the residence of minor child – Master Adhrit Bhattacharya in compliance of the order passed by the Court of New Jersey;"

100. This Court examined the issue having regard to parens patriae having jurisdiction of this Court not restricted to the two conditions imposed. This Court held that the mother has not shown any particular inclination to retain the child in India. The Court came to the conclusion that the welfare of the child will be best served in 21 Civil Appeal No. 3284 of 2020 decided on 23.9.2020 US as the child was born in US and was citizen of US by birth. The father has taken the responsibility for shared parenting when the child was in US. It was further held that the child was remained in India for a short period and it would not be contrary to his interest to allow the father to take him back.

101. I find that the said judgment is of no help to the arguments raised by Mr. Mehta. In the present case, the child was born in India. The child is a citizen of both the countries on account of dual citizenship of Kenya and England of Perry. The child has stayed in India as per the arrangements arrived at between the parties at least till 26.4.2012. Thereafter, Perry has been granted visitation rights which he has availed. The report of the Counsellor, the Mediator and the order of the High Court show that the child is equally comfortable with both the parents.

102. This issue is to find out the welfare of the Child in parens patriae jurisdiction of this Court. The question required to be examined is whether this Court should permit the child to be out of its supervisory jurisdiction so as to be a mute spectator to the possibility of defiance of the order of this Court. I am of the opinion that welfare of the Child would be to stay in India with his mother who has brought up the child for last 11 years. The Child is intelligent but not mature enough to take decisions by himself. Even, the law recognizes that the child of less than 18 years is incapable of representing himself. Therefore, any opinion of the child is not determinative of the final custody of the child but this Court as parens patriae is duty bound to assess the entire situation to return a finding whether the welfare of the child will be with the mother with visitation rights to the father or custody with the father with visitation rights to the mother. If the child is moved to Kenya, there is

no way that this Court can enforce the orders to get the child back to India, even if it so desires.

103. It was argued that, on 28.9.2020, when the hearing of the present appeal was deferred for 30.9.2020, a day in between i.e. on 29.9.2020, Perry had obtained a certificate from the Office of the President of Kenya, Ministry of Interior and Coordination of National Government. The certificate was that Perry continues to be very popular with all the people of Solai and there is absolutely no threat at all to the family. The influence which Perry exercises in Kenya is made out from the said certificate which was produced in a day's time after the hearing closed on 28.9.2020 and the remaining arguments were to be heard on 30.9.2020. Such good character certificate is not really relevant in the proceedings pending before the Court regarding cases of manslaughter against him. Considering such influence that Perry has in Kenya, Smriti will not be able to face Perry and his family in any litigation whatsoever in the event Perry choses to defy the orders of the Court. Smriti is categorical, which I have no reason to doubt that she will not be in position to take course to her legal remedies in Kenya on account of logistic issues as well as the financial and political power of Perry and his family. The Courts in India will not have jurisdiction over Perry and the Child, both being Citizens of Kenya and United Kingdom, once they are out from the territorial limits of India. Any remedy in Kenya or United Kingdom is not an easy solution for Smriti. There is nothing on record to show how the orders of this Court can be enforced by the Kenyan Courts in the event Perry refuses to comply with the directions of this Court at a subsequent stage.

104. Further, Mr. Mehta relied upon judgments of this Court reported as Elizabeth Dinshaw (Mrs) v. Arvand M. Dinshaw & Anr.22, Vivek Singh v. Romani Singh23 and Kalpana Mehta & Ors. v. Union of India & Ors. 24 in support of his arguments that the order passed by High Court does not warrant any interference.

105. In Elizabeth Dinshaw's case, the appellant (mother) was a citizen of the United States of America, whereas the respondent (father) was an Indian. The parties married in a State of Michigan. The Michigan Court passed an order at the instance of the mother dissolving the marriage and also giving custody and control of the minor child of the parties until he reaches the age of 18 years or until the further orders of that Court. The father was given visitation rights. In violation of the visitation rights, the father picked up the child from the school and secretly left the United States of America for India after selling his immovable property. Since there was a violation of the order passed by the Michigan Court, the mother filed a writ of Habeas Corpus in India. This Court 22 (1987) 1 SCC 42 23 (2017) 3 SCC 231 24 (2018) 7 SCC 1 ordered that it will be in the best interests and welfare of the child that he should go back to the United States of America and continue his education under the custody and guardianship of the mother to whom the custody and guardianship is entrusted by the competent court in that country.

106. As mentioned earlier, the cases wherein, the foreign courts have passed an order of visitation rights or custody stand on different footing as the present is a case where there is no proceeding before any other Court other than the Family Court, Delhi. Therefore, the said judgment does not provide any assistance to the arguments raised.

107. In Vivek Singh's case, the mother has invoked the jurisdiction under the Act for the custody and appointment of the guardian of the minor daughter. The Principal Judge, Family Court found that the father is a fit person to retain the custody of the child and therefore dismissed the petition. The High Court allowed the appeal and handed over the custody of the child to the mother, inter alia, for the reason that the girl child was less than five years of age at the relevant time, and the mother was better suited to take care of the child. The custody of the child continued with the father, during the pendency of the appeal, in view of the interim order passed by the High Court. However, visitation rights were granted to the mother by way of an interim arrangement. This Court held as under:

> "13. Second justification behind the "welfare" principle is the public interest that stand served with the optimal growth of the children. It is well recognised that children are the supreme asset of the nation. Rightful place of the child in the sizeable fabric has been recognised in many international covenants, which are adopted in this country as well. Child-centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation. ... xx xx xx
>
> 15. It hardly needs to be emphasised that a proper education encompassing skill development, recreation and cultural activities has a positive impact on the child.

The children are the most important human resources whose development has a direct impact on the development of the nation, for the child of today with suitable health, sound education and constructive environment is the productive key member of the society. The present of the child links to the future of the nation, and while the children are the treasures of their parents, they are the assets who will be responsible for governing the nation. The tools of education, environment, skill and health shape the child thereby moulding the nation with the child equipped to play his part in the different spheres aiding the public and contributing to economic progression. The growth and advancement of the child with the personal interest is accompanied by a significant public interest, which arises because of the crucial role they play in nation building."

108. This Court found that though the child is staying with the father since she was 21 months old, but the father has not said anything about the positive traits of the mother. The matrimonial discord between the two parties would have been understood by the child, as given by the father. Psychologists termed it as "The Parental Alienation Syndrome". This Court has granted custody of the child to the mother for at least one year so that level playing field is granted to both the parents. However, in the present case, the report of the Child Counsellor and/or the Mediator as well as the order of the Court do not suggest that there is any "Parental Alienation Syndrome" against Perry.

109. In the present case, the child has grown up in India in the last 11 years. At this age, the child would be exposed to physical and psychological harm, if he is shifted to Kenya amongst fellow students and teachers but without any friends. He would be taken care of by nannies, maids with libera pampering by the grandparents and the father. Therefore, I do not find any merit in the arguments raised by Mr. Mehta.

110. The High Court vide a separate short order dated 25.2.2020 gave visitation right to Smriti to talk to the child over audio calls/video calls for at least 10 minutes every day at a mutually agreed time which is least disruptive to the schooling and other activities of the child. It was also ordered that Smriti shall be entitled to freely exchange e-mails, letters and other correspondences with the child without any hinderance by Perry or his family. Smriti was given right to visit the child during summer and winter vacations on the dates to be mutually agreed upon but she shall not be entitled to take the child out of Nairobi, Kenya. Perry was to bear the cost of her return air tickets for travel from India once a year and accommodation for seven days. Perry was also directed to file an undertaking before the High Court once the order has attained finality that the order of the Family Court and the directions given by the High Court would be complied with. It is an illusory order not capable of enforcement in any manner, in the event Perry refuses to comply with the order. I do not think that this Court should pass an order which leads to irreversible situation.

111. I find that the order of the High Court granting visitation rights for one week is a farce. Perry has been coming to India quite frequently and has unsupervised visitation rights over the child as well. Therefore, instead, it will be in the interest of justice, if Perry is given unsupervised visitation rights in India or abroad for a month during summer or winter holidays either in parts or consecutively. The travel documents of the child will be retained by Smriti so that child is not removed from the jurisdiction of this Court, if the Child is with Perry in India.

112. In the event Perry decides to Holiday in any other country than India, Perry shall make arrangements for the travelling and stay of Smriti on the agreed destination. The travel documents of the child shall be kept in safe custody in Indian Embassy or in the event, Indian Embassy or its Consulate Office is not available, with the local Police which can be taken back only at the time of travelling back of Child to India.

113. In view of the above, the appeal is allowed. The orders passed by the Family Court and the High Court are set aside with grant of visitation rights to Perry. However, liberty is given to the parties to seek further orders, as may be required from time to time, from the Family Court, New Delhi.

.....J. (HEMANT GUPTA) NEW DELHI;

OCTOBER 28, 2020.