

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 05<sup>TH</sup> DAY OF APRIL, 2023

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPPASANNA

WRIT PETITION No.23969 OF 2022 (GM - FC)

**R**

**BETWEEN:**

... PETITIONER

(BY SRI RAVI B.NAIK, SR.COUNSEL FOR  
SMT.VIJETHA R.NAIK, ADVOCATE)

**AND:**

... RESPONDENT

(BY SRI SANDESH J.CHOUTA, SR.COUNSEL FOR  
SRI YESHU MISHRA AND  
SRI ANOOP HARANAHALLI, ADVOCATES)

THIS WRIT PETITION IS FILED UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE ORDER DTD 13.10.2022 PASSED BY LEARNED II ADDL. PRINCIPAL JUDGE, FAMILY COURT, BENGALURU IN G AND WC NO.288/2018 ON I.A.NO.XX, PRODUCED AT ANNEXURE-O AND ETC.,

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 27.03.2023, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

**ORDER**

The petitioner is before this Court calling in question order dated 13-10-2022 passed by the II Additional Principal Judge, Family Court, Bengaluru in G & WC No.288 of 2018 whereby the concerned Court rejects Interlocutory Application No.XX and has further sought for a direction seeking custody of minor child in equal proportion between him and his wife.

2. Heard Sri Ravi B Naik, learned senior counsel appearing for petitioner and Sri Sandesh J Chouta, learned senior counsel appearing for respondent.

3. Facts adumbrated are as follows:

The petitioner is the husband and respondent his wife. The two get married on 19-08-2005. From the wedlock a girl child is born on 04-01-2014. The child is now 9 years old. The relationship between the petitioner and the respondent/wife turns sour and the allegation is that the wife began to live separately along with the minor daughter. Owing to such dispute between the husband and the wife, the husband institutes proceedings before the Family Court in M.C.No.5570 of 2018 seeking judicial separation from the wife. The petitioner also files a petition invoking Section 12 of the Guardians and Wards Act, 1890 ('the Act' for short) before the II Additional Principal Judge, Family Court, Bengaluru in G & WC 288 of 2018 seeking an order for appointing him to be the guardian of minor child. The respondent/wife contested the matter by filing her

objections in the aforesaid proceedings before the concerned Court in G & WC No.288 of 2018.

4. In the aforesaid proceedings, the husband files an application seeking grant of interim custody of the minor daughter for three days in a week, which would commence on every Friday at 4-00 p.m. and would end on Sunday at 8-00 p.m. of the second week; grant of equal proportion of custody during all vacations and on the events of her birthday and all other reliefs *inter alia*. The wife again contests the application by filing statement of objections. The Court, on the application, passes an interim order observing that before any orders could be passed on the issue of custody, the maintenance and other expenses should be paid by the husband. Accordingly, it is claimed that the husband fulfilled the demand of the wife and the order of the Court. In terms of an order dated 22-04-2022 the concerned Court passes an order partly allowing the application filed by the petitioner and grant the husband custody of the child during second half of summer vacation of 2022.

5. This is challenged by the wife before this Court in Writ Petition No.8929 of 2022 which came to be disposed of observing that by the time the case could come up for consideration summer vacation was already over. The petitioner then files another application before the concerned Court seeking interim custody of the daughter again on every Friday from 4.00 p.m. up to 8.00 p.m. on Sunday, equal proportion of custody during all vacations and on her birthday and also to have video call conversation with his daughter everyday between 7.00 p.m. and 8.00 p.m. The concerned Court in terms of the order impugned dated 13-10-2022 allows the application in part and declares that the petitioner is entitled to visitation of the minor child in the visitation room of the Family Court during all vacation periods for three days between 1.00 p.m. and 5.00 p.m. on Court working days of vacations. It is this order that drives the petitioner/husband to this Court in the subject petition.

6. The learned senior counsel appearing for petitioner would vehemently contend that the petitioner being the father, also should have access to the daughter and he is entitled to have such

right of visitation/custody, in law. He would contend that the order of the concerned Court which denies equal proportion of custody, as sought for, is on the face of it erroneous and there is no warrant for the Court to deny the claims of the petitioner. He would seek that the application filed before the concerned Court dated 16-06-2022 be allowed in its entirety and custody of the child on equal proportion be granted to him as sought for.

7. On the other hand, the learned senior counsel appearing for the respondent would vehemently refute the submissions and contends that the child never had a healthy atmosphere whenever she is with the husband. It is his submission that the child fears staying with the father, as the father has engaged one stranger by name Vijay, who even sleeps in the same bed with the father in order to take photographs to demonstrate that the child is in good relationship with the father. He would submit that the earlier order passed on an identical application which was partly allowed, was set aside by this Court and the petitioner challenged the said order before the Apex Court only to be dismissed. A review petition was also filed before the Apex Court seeking review of the order of

dismissal which also came to be dismissed. That having attained finality, again one more application is filed for the same relief by the petitioner. Above all, he would contend that the girl child does not want to go with the father and what the girl child needs is the mother and not the father.

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

9. The afore-narrated facts are not in dispute. The relationship between the couple flounders. The petitioner and the respondent are before the concerned Court in two proceedings – one in M.C.No.5570 of 2018 and the other in G & WC No.288 of 2018. The first of the case filed by the husband was on 15-10-2018. The Family Court granted an ex-parte interim order in favour of the husband restraining the wife from interfering with the peaceful custody of the minor child by the husband reserving liberty in the wife to seek visitation rights. It is then the wife files

application I.A.No.VI under Order 39 Rule 4 seeking vacation of the interim order dated 15-10-2018 and I.A.No.VII under Section 12 read with Section 25 of the Act seeking restoration of custody of the minor child to her. This was partly allowed by the concerned Court granting visitation rights to the wife on every alternative Saturday and Sunday with effect from 27-04-2019 and custody on every alternate Saturday and Sunday from 5.00 p.m. to 8.00 p.m.

10. The wife challenges the said order of the concerned Court dated 22-04-2019 in Writ Petition Nos. 21735 of 2019 and 22449 of 2019 to set aside the orders passed on 22-04-2019 both on I.A.Nos. VI and VII in G&WC 299 of 2018. This Court in terms of its order dated 26-03-2019 allowed writ petitions and directed the husband to hand over custody of the child to the wife by passing the following order:

*"9. In the backdrop of aforesaid well settled legal position, facts of the case in hand may be examined. In the instant case, the order has been passed by the Family Court in a perfunctory manner which suffers from the vice of non-application of mind. The Family Court has merely held whether or not the respondent has forcibly removed the child from the custody of the petitioner, it has to be considered after regular trial and at this stage, the only thing which is required to be considered is whether mother is entitled to the interim custody of the minor child. It is further been held that it is*



*just and proper to grant visitation rights and interim custody during summer, Dasara and winter vacation to an extent of 50% during second half to meet the ends of justice. The impugned order is not only cryptic but suffers from vice of non-application of mind. The well settled legal position that while deciding the issue with regard to the custody of the child, the welfare of the child is of paramount consideration, has not at all been considered by the Family Court. The child is a girl child and is aged about 5 years. Therefore, her custody is required to be granted to her mother, in view of the law laid down by the Supreme Court. However, the aforesaid aspect of the matter has not been considered by the Family Court. It is pertinent to note that while passing the impugned order, the learned Judge has nowhere narrated the compelling circumstances warranting deviation from the well settled legal proposition that the custody of the minor child should always be with the mother. No compelling circumstances is narrated while directing custody of the girl child to the father. Ordinarily, this Court would have remitted the matter to the Family Court afresh for decision in accordance with law. However, in the peculiar fact situation of the case, since the law laid down by the Supreme Court has not been taken into account by the Family Court, therefore, the order passed by the Family Court is per incuriam. Therefore, the impugned order not only suffers from jurisdictional infirmity but error apparent on the face of the record. The impugned order is therefore, quashed and set aside and the respondent is directed to handover the custody of the girl child to the petitioner who is the mother of the child.*

**10.** *Accordingly, the petitions are disposed of."*

The husband calls this order in question before the Apex Court in S.L.P.Nos. 29181-29182 of 2019. The SLPs were dismissed in *limine* in terms of the order of the Apex Court dated 27-05-2020. The petitioner then files a Review Petition No.15139 of 2020 against the order of dismissal of the SLPs which also comes to be dismissed on 29.09.2020. Thus, the order passed by the co-

ordinate Bench of this Court (*supra*) becomes final. After these orders, the petitioner files I.A.No.XVII under Section 12 of the Act again seeking the very same relief that was earlier sought and granted by the concerned Court which had been set aside by this Court. The application was filed on 21-01-2021. The family Court passes an order on 13-04-2022 to hand over custody of the minor child to the petitioner/husband on 15<sup>th</sup> and 16<sup>th</sup> of April, 2022 between 2.00 p.m. and 7.00 p.m. on account of Easter. Later on 22-04-2022 the Family Court allows I.A.No.XVII granting equal proportion of interim custody of the child during second half of summer vacation, 2022. The application so filed and the order passed read as follows:

*"APPLICATION UNDER SECTION 12 OF G & WC ACT,  
1990 r/w Section 151 of CPC.*

*That for the reasons sworn to accompanying affidavit it is respectfully prayed that this Hon'ble Court be pleased to permit the petitioner to have:*

- (a) Custody of the petitioner's minor daughter Christine Zara Salvadoray from every Friday at 4.00 p.m. and permitting him to have overnight custody of his daughter till Sunday 8 p.m.*
- (b) 50% custody of the minor daughter of the Petitioner Christine Zara Salvadoray during every Christmas, New Year,*

*Summer Vacations, Dasara Vacations and public holidays in the interest of justice and equity.*

- (c) *Complete and unrestricted communication of the petitioner with the minor child daily between 7 to 8 p.m. through video conference”*

....

....

....

"ORDER

*I.A.No.XVII filed U/Sec.12 of the G & W Act, 1890 read with 151 of CPC, is hereby allowed in part.*

*The petitioner is hereby granted with interim custody of the minor child during the 2<sup>nd</sup> half of summer vacation 2022.*

*The respondent/mother shall facilitate the petitioner in all respect to have the interim custody of the child.*

*The petitioner/father shall pick up the child from the home of respondent and shall hand over the custody of the child to the respondent at her residence soon after the completion of the period of interim custody.*

*During the interim custody of the child, the petitioner shall take utmost care of the child in all aspects.*

*If at all the child had to attend the speech therapy, the petitioner shall take the child for the same and the respondent can also accompany the petitioner at that time.*

*The petitioner shall not ill-advice the child about the respondent or her family members and the petitioner shall not criticize the respondent or her family members in the presence of the child.”*

The wife challenges the said order before this Court in Writ Petition No.8929 of 2022. By then the period i.e., the summer vacation had

spent itself and accordingly, the Court disposed of the petition as having rendered infructuous.

11. After the aforesaid proceedings, the 3<sup>rd</sup> application is filed by the petitioner/husband seeking the very same relief, a replica of I.A.No.XVII, which had been decided earlier. The application so filed on 16-06-2022 reads as follows:

*"APPLICATION UNDER SECTION 12 OF G & WC ACT, 1990  
r/w Section 151 of CPC.*

*That for the reasons sworn to accompanying affidavit, the petitioner most respectfully prays that this Hon'ble Court be pleased to direct the respondent to handover the custody of the petitioner's minor daughter Christine Zara Salvadoray on every Friday at 4.00 p.m. till Sunday 8.00 p.m., 50% of custody of his daughter during every Christmas vacations, Summer Vacations, Dasara Vacations of her school and on the events of her birthday i.e., 14<sup>th</sup> January and permit the petitioner to have video call conversation with his daughter every day between 7.00 p.m. to 8.00 p.m. when the child is in the custody of the respondent, in the interest of justice."*

The respondent/wife files objections to the application wherein certain paragraphs of the objections are germane to be noticed and they read as follows:

*"14. It is submitted that the petitioner kept sending unnecessary aggressive and harassing messages to the respondent which does not have any context with regards to the child or her*

welfare. The petitioner pretentiously insisted for Whatsapp call despite sending Zoom Links, and during Whatapp call there was always disruptions.

15. It is submitted that the petitioner has not allowed the respondent to communicate with the child as per the court timings and on 15<sup>th</sup> and 25<sup>th</sup> May 2022 the respondent was completely denied from having conversation with the minor child.

16. It is submitted that the minor child is presently aged about 8 years growing young girl and the petitioner has not ensured the proper environment of the child during this interim arrangement. No female maid has been arranged for taking care of the girl child and on the other hand the petitioner engaged a male stranger named Vijay who was permanently in the house and following the girl child when the petitioner was busy working on the laptop relating to office work. The stranger was engaged in taking pictures and videos of the minor child and the petitioner. The respondent learnt from the child that the female child was given bath by the father.

17. It is submitted that a male stranger has been permitted to sleep on the same bed where the female 9 year old girl child sleeps along with her father whereas the grandmother sleeps in another room which is of grave concern. On several occasions the child has expressed to her mother the discomfiture and anxiety both with the stranger continuously videographing/photographing her as well as sleeping on the same bed.

18. It is submitted that the minor child has expressed that she does not want to return to her father's house on this account. The respondent herein is worried about the child and the stranger's presence around the minor child and his stay in the night can only be to the detriment of the child wondering, fearing and doubting her peaceful existence.

19. It is submitted that the child has also mentioned to the respondent that the petitioner kept questioning her nonstop about the respondent and her elder daughter's timings, movement and also if the elder daughter is alone at home when the respondent goes out. This has made the

***respondent and her family anxious and uncomfortable as he seems to be stalking them and they believe this dangerous to their life and security."***

*(Emphasis added)*

The mother objects to the grant of any custody of the child to the husband contending that the petitioner has not ensured proper environment for the girl child during the interim arrangement. There is no female maid arranged to take care of the girl child and the child is handed over to the male stranger by name Vijay who is permanently in the house and following the girl child whenever the husband was busy relating to office work and the stranger is engaged to take pictures and videos of the minor child and the husband together. The girl child who was 8 years old then, on several occasions, had expressed to her mother getting anxious about a stranger continuously photographing and video graphing the child when she was sleeping on the bed. The mother cries foul that the father has not taken care of the child regarding her privacy, security or interest and has left the child at the hands of the stranger.

12. The concerned Court, on consideration of the objections so filed, passes an order declining to grant any custody, as was sought for by the petitioner and restricts the right of the petitioner/husband only for visitation. The reasons rendered that are germane read as follows:

*"20. In this case, while disposing the I.A.No.XVII, this Court has granted interim custody for the second half of the summer vacation. Even in this case, whenever application is filed by the petitioner for seeking the custody of the child on 21-12-2020 and other dates, granted the visitation rights also, i.e., at the time of December, Christmas vacations from 24-12-2020 and permitted to celebrate new year with the minor child on 1-01-2021 in between 5.00 p.m. to 8.00 p.m. Now, the advocate for the petitioner filed a similar applications seeking the similar reliefs. It is true that the order is passed in the above said I.As for the half of the summer vacation and holiday of the Christmas, including new year celebration on 1-01-2021. The said order is not granted for the Winter vacation and Dasara vacation of every year. Therefore, the petitioner has filed the present application seeking similar relief of interim custody for the Winter vacation and Dasara vacation etc.*

*21. **Now, the point before the Court is that, for avoiding repeated filing of the applications for seeking interim custody etc. in my opinion, in all the summer vacation, Dasara vacation and Winter vacation if visitation rights are granted to visit the child/children, it becomes sufficient order.** Moreover, the respondent has relied on number of citations. Though the same are aptly applicable to decide the child custody, the sum and substance and also the circumstances appearing in the said citations are different with the present case on hand. Particularly, in this case, from the date of filing of the petition till to-day, number of applications are/were filed for seeking the child custody and this Court has passed the order also. In my opinion, instead of granting child interim custody, it is better to grant visitation rights to visit the child in the visitation room of Family Court, Bengaluru during all vacation periods for the period of only three days in between 1.00 p.m. to 5.00 p.m. on working*

*days of the vacations. Both parties are directed to communicate each other regarding the dates and same shall be reported to this court. Accordingly, I answer point No.1 partly in the Affirmative."*

Based upon the aforesaid reasons, the Court passes the following order:

"ORDER

*The I.A.No.XX filed by the petitioner U/Sec.12 of G & WC Act, 1890 is hereby allowed partly.*

***It is hereby ordered that the petitioner is entitled for visitation rights of his minor child in the visitation Room of Family Court, Bengaluru during all vacation periods for the period of three days in between 1.00 p.m. and 5.00 p.m. on Court working days of the vacations.***

***Both parties are directed to communicate each other regarding the dates and same shall be reported to this Court.***

***The respondent shall facilitate custody of the minor child to exercise visitation right to the petitioner as per the aforesaid order.***

***Later on, the petitioner shall return back the minor child to the custody of the respondent after exercising his visitation rights without fail.***

*Both the parties are directed to maintain peace and harmony during exercising the visitation rights.*

*The petitioner shall take all safety measures during visitation and he shall not take the child in the absence of mother of the ward."*

(Emphasis supplied)



The Court allows the application in part, holds that the husband is entitled to visitation between 1.00 p.m. and 5.00 p.m. in the visitation room of the Family Court and has imposed certain conditions thereupon. In the light of the afore-narrated facts, glaring enough they are, I do not find any warrant to interfere with the order of the concerned Court which takes away the custody and grants visitation to the husband between 1.00 p.m. to 5.00 p.m. in the visitation room imposing certain conditions.

13. The petitioner has himself appended several photographs to the petition seeking to demonstrate that the girl child/daughter has a good relation with the father to buttress his claim for custody of the child. Those photographs apparently are clicked by a stranger which the wife narrates in detail the manner in which the photographs are taken. It is a fact that there is nobody to take care of the child when the father is not around and the child is handed over to a male stranger by name Vijay who is also alleged to have been sleeping in the same bed while the father and the daughter would sleep only to take photographs. The mother narrates that on several occasions the child had expressed her

anguish getting too anxious about a stranger continuously photographing and videographing the child. If these facts are noticed, it becomes unmistakably clear that the father has not created a congenial atmosphere to the girl child, who is now 9 years old, he cannot therefore be heard to contend that he has a right to claim custody of the child, despite the afore-noted glaring facts. The girl child, in her best interest, prefers to be with her mother and psychologically it is presumed that bond between the child and mother is the finest. In cases of this nature, where the parents are wrangling on their egos, wound is inflicted on the child. The Apex Court has cautioned such parents in the case of **RAJESWARI CHANDRASEKAR GANESH**<sup>1</sup>. It would be apt to quote the paragraphs, which read as follows:-

**"120. Before we close this matter, we would like to convey to the parties that their two minor children are watching them very closely. Showing the children that their parents can respect each other and resolve the conflict respectfully will give them a good foundation for the conflict that may, God forbid, arise in their own lives. The parties should try to do their best to remain relaxed and focused. It is critical to maintain boundaries between the adult problems and children. It is of utmost interest to protect the innocence of children and allow them to remain children. They must not be burdened by any adult problem. Minor children do not have the coping skills or**

---

<sup>1</sup> (2022) SCC Online SC 885

***the intellectual ability to understand any issues like the financial constraints, adult relationship issues or their parents unhappiness.***

***121. We find the observations made by the Delhi High Court, in the case of K.G. v. State of Delhi, dated 16.11.2017 in Writ Petition (Criminal) No. 374/2017 and Criminal Miscellaneous Application No. 2007/2017, quite commendable, that the best welfare of the child, normally, would lie in living with both his/her parents in a happy, loving and caring environment, where the parents contribute to the upbringing of the child in all spheres of life, and the child receives emotional, social, physical and material support - to name a few. In a disturbed marriage, unfortunately, there is bound to be impairment of some of the inputs which are, ideally, essential for the best interest of the child."***

*(Emphasis supplied)*

The Apex Court observes that the minor children are watching the parents closely. Showing the children that their parents can respect each other and resolve the conflict with respect will give such children, a good foundation. The parties – husband and wife should try to do their best to remain relaxed and focused. It is critical to maintain boundaries between the adult problems and children and it is of utmost interest to protect the innocence of children and allow them to remain children.

14. Even in the case at hand, for the last five years the husband and the wife have been in constant squabble. The minor

girl child has been watching parents right from her tender age of 4 years. The minor child does not have the coping skills or the intellectual ability to understand the issues between the adult relationship or the parents unhappiness. The parents have to contribute to the upbringing of the child on all emotions, be it social, physical, mental or material support *inter alia*. In a disturbed marriage, there is bound to be impairment. Therefore, in the best interest of the girl child, in the case at hand and owing to the facts as narrated hereinabove, I do not find any warrant to interfere with the order passed by the concerned Court in declining to grant custody and permitting grant of visitation rights only.

15. In the result, the petition lacking in merits stands dismissed.

bkp  
CT: MJ

**Sd/-  
JUDGE**