PART-II

(Subjective Written Examination)

DO NOT OPEN THIS QUESTION BOOKLET UNTIL ASKED TO DO SO.

QUESTION 1 – Brief Preparation: This question requires the candidate to prepare a brief synopsis or precis of a case file not longer than 750 words. Parameters for judging this question include: (a) ability of the candidate to identify and marshal the relevant facts; (b) identification of legal issues before the High Court/Appellate Tribunal; (c) comprehensive analysis of the issues as done by the High Court in the impugned decision; (d) ratio of the impugned decision; (e) relevant grounds before the Supreme Court; (f) ability to condense information and structure the document logically; and (g) brevity.

QUESTION 2 – Preparation of a draft research memo: In this question, the candidate is required to formulate a draft reasoned memo not longer than 750-1000 words on the dispute. Parameters for judging this question include: (a) ability to use relevant legal sources; (b) use of legal language; (c) exposition of the law; (d) analysis of the facts and applicability of the law to the facts; and (e) structure of the opinion.

SEAL

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PART-II

QUESTION 1
(Brief Preparation)

QUESTION 1: Prepare a brief for the following SLP:

IN THE SUPREME COURT OF INDIA
(Order XXI Rule 3(1) (a) SC Rules, 2013)CIVIL
APPELLATE JURISDICTION
IN THE SUPREME COURT OF INDIA
(Under Article 136 of the Constitution of India)

SPECIAL LEAVE PETITION (CIVIL) NO. 12345 OF 2022
(WITH PRAYER FOR INTERIM RELIEF)

(Under Article 136 of the Constitution of India for Special Leave to Appeal, against the Impugned Judgment and Final order dated 19.01.2018 passed by the Hon'ble High Court of Punjab and Haryana at Chandigarh in RSA No.5173 of 2014)

IN THE MATTER OF:

SHANTI ...PETITIONER

VERSUS

SATYA & Others ... RESPONDENTS

WITH

I.A. No. OF 2022: AN APPLICATION FOR EXEMPTION FROM FILING THE OFFICIAL TRANSLATION OF THE ANNEXURES

PAPER BOOK

(FOR INDEX KINDLY SEE INSIDE)

ADVOCATE FOR THE PETITIONER: SATYA SUNDAR

New Delhi
Filed on: 28.06.2019

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2022
(WITH PRAYER FOR INTERIM RELIEF)

(Under Article 136 of the Constitution of India for Special Leave to Appeal, against the Impugned Judgment and Final order dated 19.01.2018 passed by the Hon'ble High Court of Punjab and Haryana at Chandigarh in RSA No.5173 of 2014)

IN THE MATTER OF:

SHANTI ...Petitioner

Versus

SATYA ... Respondent

OFFICE REPORT ON LIMITATION

1. The petition is within time.
2. The petition is barred by time and there is delay filing the same against Decree and Orders dated 19.01.2018 and petition for condonation of delay has been filed.
3. There is delay of 525 days in refilling the Petitioner and petition for condonation of 525 days in refilling has been filed.

BRANCH OFFICER

New Delhi
Dated: 28.06.2019

LISTING PROFORMA

PROFORMA FOR FIRST LISTING SECTION					XII
The case pertains to (Please tick/check the correct box)"					
	Central Act: (Title)	Specific Relief Act, 1963			
	Section:	Section 20 & 21 of Specific Relief Act, 1963			
	Central Rule: (Title):	NA			
	Rule No(s):	NA			
	State Act: (Title)	NA			
	Section:	NA			
	State Rule: (Title)	NA			
	Rule No(s):	NA			
	Impugned Interim Order: (Date)	NA			
	Impugned Final Order/Decree:(Date)	19.01.2018			
	High Court: (Name)	Punjab and Haryana at Chandigarh			
	Names of Judges:	MR. BAJAJ			
	Tribunal / Authority: (Name)	NA			
1.	Name of Matter:	✓	Civil	☐	Criminal
2.	(a) Petitioner/Appellant No. 1:	Shanti			
	(b) E-mail ID:	NA			
	(c) Mobile Phone Number:	NA			
3.	(a) Respondent No. 1:	Satya			
	(b) E-mail ID:	NA			
	(c) Mobile Phone Number:	NA			
4.	(a) Main category classification:	18			
	(b) Sub classification:	1807			
5.	Not to be listed before:	NA			
6.	(a) Similar disposed of matter with citation, if any & case detail: **No similar case is disposed of.**				
	(b) Similar pending matter with case details: **No similar case pending**				

	Criminal Matters							
	(a)	Whether accused / convict has surrendered	☐	Yes	☑	No		
	(b)	FIR No.	NA		Date:	NA		
	(c)	Police Station:	NA					
	(d)	Sentence Awarded:	NA					
	(e)	Period of sentence undergone including period of Detention/Custody Undergone: Nil						
8.	Land Acquisition Matters: NA							
	(a)	Date of Section 4 notification:	NA					
	(b)	Date of Section 6 notification:	NA					
	(c)	Date of Section 17 notification:	NA					
9.	Tax Matters: State the tax effect:		NA					
10.	Special Category: (First petitioner/appellant only)		NA					
☐	Senior citizen >65 Years	☐	SC/ST	o	Woman/child	☐	Disabled	☐ Legal
	Aid Case	☐	In custody	☐				
11.	Vehicle number (in case of Motor Accident Claim matters:					NA		

Date: 28.06.2019

(SATYA SUNDAR)
Advocate on Record for Petitioner

Place: New Delhi

Name

Registration No.

SYNOPSIS AND LIST OF DATES

It is respectfully submitted that the Ld. Civil Judge held that the execution of Agreement to Sell dated 08.08.1992 has been proved by the petitioner by substantial evidence. As such, he had also paid the total sale consideration of Rs.85,000/-.

That in case the Agreement to Sell is proved then it can also be presumed that as per contents of the agreement the possession has been transfer to the petitioner herein and as such the possession of the petitioner has also been proved by the previous judgment and decree dated 28.11.2001.

That the Hon'ble High court has held that the relief of specific performance is discretionary relief however has erred in not appreciating that the such discretion ought to be used judicially and in the present case when the petitioner had paid total sale consideration in 1992 and is in possession from the year 1992 and had constructed and merged the disputed property in his own house then the relief of specific relief has been granted in her favor.

The Petitioner by way of this special leave Petition challenges the validity, legality and propriety of the final impugned judgment and orders dated 19.01.2018 passed by the High Court for the states of Punjab & Haryana at Chandigarh in RFA No.5173 of 2014 (O&M) filed by the petitioner.

LIST OF DATES

08.08.1992	Agreement to sell dated 08.08.1992 executed in between the petitioner/plaintiff and respondent no. 1 through his Power of Attorney, Respondent No.2 for sale of one plot measuring kenal 6 maria being 6/561 share of the land comprised in Khasra No.60/1 and 61//4/2-5-6-7/1 measuring 28 Kanal 1 Marla situated at Durga Colony near Jituwala Johr in Monaco Jonpal, Tehsil and District Monaco (hereinafter referred as disputed property) for a sale consideration of Rs.85,000/ It is pertinent to mention herein that total sale consideration has been paid and possession has been transferred to the plaintiff/petitioner.
1995	During the floods one room of the suit property has been collapsed and the property has been reconstructed by the petitioner herein. However, the defendant no.2 starting harassing the petitioner and tried to interfere into the peaceful possession of the petitioner in disputed property. It is pertinent to mention herein that the petitioner had constructed the disputed property and merged in his house.
03.12.1997	Defendant/Respondent no.1 through his General Power of Attorney, Respondent no.2 sold away the disputed property to respondent no.3 by way of registered sale deed bearing no.3374 dated 03.12.1997. It is pertinent to mention herein that as the petitioner herein are in possession, the possession cannot be transferred.
17.12.1997	Petitioner filed Civil Suit No.486 of 1997 before Civil Judge (Sr. Division) Monaco against the respondent no.2 and one Om Prakash for Permanent Injunction restraining the defendants from interfering into the peaceful possession of the plaintiff/petitioner over the suit property, which now become the part of the residential house of the petitioner situated at Durga Colony, Near Jituwara Johr Monaco.

28.11.2001	Civil Suit No.486 of 1997 was decreed by Civil Judge (Sr. Division) Monaco. True copy of Judgment and decree dated 28.11.2001 passed by Ld Civil Judge (Sr. Division) Monaco in Civil Suit no 486 of 1997 is annexed as **Annexure P-1**
10.09.2002	The petitioner filed Civil Suit No.204-SP of 2002 before Additional Civil Judge (Sr. Division). Monaco for suit for Specific Performance on basis of Agreement to Sell dated 08.08.1992 and further claiming that registry dated 03.12.1997 is null and void as the petitioner is owner in possession of the disputed property.
25.11.2011	Ld. Addl. Civil Judge (Sr. Division) Monaco has partly allowed the civil suit no.204-SP of 2002 filed by the petitioner and held that the Agreement to sell dated 08.08.1992 as valid and proved document. True copy of Judgment and decree dated 25.11.2011 passed by Ld. Addl. Civil Judge(Sr. Division) Monaco in Civil Suit no.204-SP of 2002 is annexed as **Annexure P-2**
24.12.2011	Being aggrieved by the Judgment and decree dated 25.11.2011 passed by Ld. Civil Judge (Sr. Division), Monaco in Civil Suit no.204-SP of 2002, the respondent herein filed Civil Appeal No.282RBT of 2011/2014 before the Ld. District Judge, Monaco.
03.01.2012	Being aggrieved by the Judgment and decree dated 25.11.2011 passed by Ld. Civil Judge (Sr. Division), Monaco in Civil Suit no.204-SP of 2002, the petitioner herein filed Civil Appeal No.278RBT of 2012/2014 before the Ld. District Judge, Monaco.
14.11.2014	Ld. Addl. District Judge, Monaco allowed the Civil Appeal No.282 RBT of 2011/2014 filed by the respondents herein and set-aside the Judgment and decree dated 21.05.2016 passed by the Ld. Civil Judge (Sr. Division) Monaco in civil suit no.204-SP of 2012 and further dismissed the Civil Appeal No.278RBT of 2012/2014 filed by the petitioner herein. True copy of Judgment and decree dated 14.11 2014 passed by Ld. Addl. District Judge, Monaco allowed the Civil Appeal No. 278RBT of 2012/2014 filed by the respondents is annexed as **Annexure-P-3.**
03.12.2017	Being aggrieved by the Judgment and decree dated 14.11.2014 passed by Ld. Addl. District Judge, Monaco in Civil Appeal No. 278RBT of 2012/2014, the petitioners herein filed the Second Appeal bearing RSA No.5173 of 2014 (O&M) before the Hon'ble High Court of Punjab and Haryana at Chandigarh.
19.01.2018	Hon'ble High Court of Punjab and Haryana at Chandigarh dismissed the second appeal bearing RSA No.5173 of 2014 (O&M) filed by the petitioners herein.
28.06.2019	Hence, the present Special Leave Petition.

IMPUGNED JUDGMENT

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 5173 of 2014 (O&M)
Date of Decision: 19.01.2018

Shanti ... Appellant

Versus

Satya and others ... Respondents

BAJAJ, J.

Present regular second appeal has been preferred by Smt. Shanti against the judgment and decree dated 25.11.2011 passed by Additional Civil Judge (Senior Division), Monaco and against judgment and decree dated 14.11.2014 passed by Additional District Judge, Monaco.

As per the brief facts of the present case, appellant Smt. Shanti being a plaintiff filed a suit for specific performance on 10.09.2002 on the basis of the agreement to sell dated 08.08.1992 (Ex.P-1). As per appellant-plaintiff she entered into an agreement to sell to purchase land measuring 6 marlas owned by Satya/respondent-defendant No.1 through his General Power of Attorney (GPA) holder- Sant Lal/ Respondent defendant No.2 for the sale consideration of Rs.85,000/- which was received by the GPA namely Sant Lal and vacant possession of the property was handed over to the plaintiff. There was no specific date to execute the sale deed but the respondents-defendants No.1 and 2 were duty bound to execute these registered sale deeds in favour of the appellant-plaintiff. It is further alleged that appellant-plaintiff filed a civil suit seeking relief of injunction and the appellant-plaintiff is still ready and willing to execute and register the sale deed of disputed property on her own expenses. It is further stated that the sale deed dated 03.12.1997 (Ex.D-4) has been executed by respondent-defendant No.2 in favour of Smt. Krishna Devi/respondent defendant No.3 in order to grab money from the plaintiff and harass her and the said sale deed dated 03.12.1997 is not binding on the right of the plaintiff. The respondents-defendants appeared before the trial court. Respondent-defendant No.2 Sant Lal (GPA) did not prefer to contest the suit and he was proceeded against ex-parte on 25.01.2011. Respondent defendant No.1 has taken a specific stand that he is the owner in possession of the disputed property and he was having good relationship with respondent-defendant No.2 and executed GPA in his favour just to maintain the property and no right to alienate the property was ever given. Even the sale deed executed by respondent-defendant No.2 (GPA) in favour of Smt. Krishan Devi, respondent-defendant No.3 is not binding on the rights of respondent-defendant No.1. Respondent-defendant No.1 has also taken a specific stand about these two documents i.e. agreement to sell dated 08.08.1992 and sale deed dated 03.12.1997 are illegal and void and the property in dispute is a residential house and not a plot as it has been wrongly mentioned as 'plot' in agreement to sell dated 08.08.1992. Respondent-defendant No.3 have contested the present suit and stated that she is owner in possession of the suit property/residential house on the basis of registered sale deed No. 3374 dated 03.12.1997 and have further alleged that the agreement to sell dated 08.08.1992 is based on fraud and the appellant-plaintiff has got no right, title or concern whatsoever with the disputed property.

After taking into consideration the contentions raised by the parties, following issues were framed:-

1. Whether the defendant No.2 Sant Lal son of Kishan Lal was GPA holder of defendant No.1 Satyavir in respect of the suit land?OPP
2. Whether on the basis of the said GPA defendant No.1 was empowered to execute the agreement to sell dated 08.08.1992 in respect of the suit land in favour of the plaintiff? Onus of Proof on petitioner (OPP)

3. Whether the registered sale deed dated 03.12.1997 executed by defendant No.2 Sant Lal in favour of defendant No.3 after the execution of agreement to sell dated 8.8.1992 is illegal, null and void and not binding upon the rights of the plaintiff and thus, is liable to be set aside and cancelled? OPP
4. Whether the plaintiff is entitled to the decree of specific performance of agreement to sell dated 8.8.1992? OPP
5. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? OPP
6. Whether the plaintiff has no locus standi to file the present suit? Onus of Proof on defendant (OPP)
7. Whether the plaintiff is stopped by his own act and conduct from filing the present suit? OPD
8. Whether the plaintiff has no cause of action to file the present suit? OPD
9. Whether the suit of the plaintiff is not maintainable in the present form? OPD
10. Whether the suit of the plaintiff is time barred? OPD
11. Whether the plaintiff has not come to the court with clean hands and has suppressed the material facts from the court, if so, its effect? OPD
12. Whether the suit of the plaintiff is bad for want of proper court fee? OPD
13. Relief.

After taking into consideration the evidence on record, the Additional Civil Judge (Senior Division), Monaco vide judgment and decree dated 25.11.2011 partly decreed the suit with costs against respondents-defendants No.1 and 2 and held that appellant-plaintiff is entitled to get the refund of amount of Rs.85,000/- which she had paid as sale consideration along with interest @ 6% per annum from the date of its payment, till realization. Rest of the reliefs as claimed in the suit was dismissed.

Against the judgment and decree dated 25.11.2011 passed by Additional Civil Judge, (Senior Division), Monaco appellant-plaintiff Shakuntala Devi filed the appeal. Similarly respondent-defendant No.1- Satya also filed an appeal against the judgment passed by Additional Civil Judge(Senior Division), Monaco. Additional District Judge, Monaco while taking into consideration both the appeals have held that agreement to sell dated 08.08.1992 (Ex. P-1) is a fake document as the same does not fulfil the contention of receiving the consideration amount by respondent -defendant No.1-Satya through GPA-respondent-defendant No.2-Sant Lal. Accordingly, appeal preferred by the appellant-plaintiff, Smt. Shakuntala Devi was modified and dismissed. The second appeal preferred by respondent-defendant No.1- Satya was partly allowed to the extent that he was not liable to refund of Rs.85,000/- alleged to be received as earnest money as per agreement to sell dated 08.08.1992. Against the judgment passed by the courts below the appellant-plaintiff preferred the present regular second appeal.

I have heard learned counsel appearing for the appellant-plaintiff and learned counsel appearing for respondent-defendant no.1-Satya.

It has been argued by learned counsel for the appellant that respondent-defendant No.1 duly authorized respondent-defendant No.2- Sant Lal through GPA dated 21.12.1991 (Ex.P-7) and on the basis of said GPA the agreement to sell dated 08.08.1992 (Ex.P-1) was executed in favour of the appellant-plaintiff. The sale consideration of amounting to Rs.85,000/- was received and the possession of the property was handed over to the appellant-plaintiff. It is further argued that sale deed dated 03.12.1997 (Ex.D-4) has got no effect on the right of the appellant-plaintiff and is not binding. It is argued that the sale deed dated 03.12.1997 has been executed with the sale consideration of Rs.35,000/- only whereas agreement to sell was executed on 08.08.1992 and the sale consideration was received i.e., amounting to Rs.85,000/-. During the span of 5 years there is rise in the value of the property but executing the sale deed for the consideration of Rs.35,000/- clearly indicates that it is a sham transaction.

Counsel for the appellant has relied upon the judgment titled as ***Bal Singh and others Versus Ravinder Singh and others*** reported in 2005(3) RCR (Civil). In the said case, the vendor has specifically deposed the fact of the earlier agreement to the subsequent vendee and the possession was with earlier proposed vendee. The

subsequent vendee cannot be held to be bona fide purchaser. Whereas in the present case, respo... No.2 being the GPA have executed the sale deed in favour of the respondent-defendant No.3 and since the title was clear purchaser had no knowledge of agreement to sell dated 08.08.1992. Thus, the appellant-plaintiff does not get any support from the above said judgment.

On the other hand, learned counsel for the respondent-defendant no.1-Satya has argued that while executing GPA dated 02.12.1991 (Ex. P-7) no authority was given to respondent-defendant No.2-Sant Lal to sell the property rather only authority was given to maintain the property. Thus, he has argued that agreement to sell dated 08.08.1992 and sale deed dated 03.12.1997 are liable to be set aside.

After hearing learned counsel for the parties and going through the documents on record and perusing the judgments passed by the courts below, the agreement to sell dated 08.08.1992 was executed by respondent defendant No.1 through GPA respondent-defendant No.2. Perusal of Ex. P7 i.e. GPA dated 07.12.1991 shows that the respondent-defendant No.2 was authorized to execute the sale deed and which has been executed in favour of Smt. Krishna Devi-respondent-defendant No.3.

The respondent-defendant No.1 had failed to prove on record that he had received Rs.85,000/- from appellant-plaintiff as there is neither any oral testimony nor documentary evidence on behalf of the appellant/plaintiff. The lower appellate court has rightly drawn conclusion that agreement to sell dated 08.08.1992 (Ex.P-1) is a fake document and does not fulfil the contentions of receiving the consideration amount. Moreover, in my view the relief of specific performance is discretionary in nature.

Sections 20 and 21 of Specific Relief Act, 1963 are reproduced hereunder:-

> ***20. Discretion as to decreeing specific performance.***— *(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.*
>
> *(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—*
>
> *(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or*
>
> *(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or*
>
> *(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.*
>
> *Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).*
>
> *Explanation 2.— The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.*
>
> *(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.*
>
> *(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.*

21. Power to award compensation in certain cases.—

(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation.—The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

Appellant/plaintiff entered into agreement to sell with respondent No.1 on 08.08.1992 and suit for specific performance is filed on 10.09.2002 whereas sale deed in favour of respondent/defendant No.3 was executed, qua same property, on 03.12.1997 appellant/plaintiff has failed to show her ready and willingness even it is the case of appellant/plaintiff that total sale consideration was paid.

Hon'ble Supreme Court of India in the case titled as ***B.Vijaya Bharathi versus P. Savitri and others*** reported in 2018(1) RCR(Civil)4 has held that even defendant may not be a bona fide purchaser would not come in his way of stating that the suit must be dismissed at the threshold because of lack of readiness and willingness of plaintiff which is the basic condition for grant of specific performance.

Similar view has been taken by Hon'ble Supreme Court of India in case titled as ***Mrs. Vijaya Shrivastava versus M/s Mirahul Enterprises and others*** reported in 2006(3) RCR (Civil)740 and has held that even if the contract is found to be concluded, still the court can refuse specific performance if the subsequent purchaser is found to be a bona fide purchaser for value without notice.

Thus, the agreement to sell in question was executed on 08.08.1992 and the appellant-plaintiff filed suit on 10.09.2002, after the gap of about 10 years which also creates doubt in the mind of this court that the agreement to sell dated 08.08.1992 is a fake document and is giving no right to the appellant-plaintiff for the relief of specific performance. Even otherwise, the documents placed on record by producing the electricity bill, copy of the judgment passed in civil suit titled as ***Smt. Shakuntala Devi versus Om Parkash*** does not support the claim of the appellant-plaintiff. It shows that she was never in possession of property in question.

After taking into consideration the above facts and circumstances and going through the record no interference is called for in the well reasoned judgment passed by Additional District Judge, Monaco, dated 14.11.2014. No substantial question of law arises for consideration in the present appeal. Thus, the present appeal is devoid of merits and is hereby dismissed.

(BAJAJ)

IN THE SUPREME COURT OF INDIA
[S.C.R Order XXI Rule 3 (1) (a)]

[CIVIL APPELLATE JURISDICTION]
(UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA)

SPECIAL LEAVE PETITION (C) NO. _____ OF 2019
WITH PRAYER FOR INTERIM RELIEF

BETWEEN

	POSITIONS	
	In this Court	**In the High Court**
1. Smt. Shanti	Petitioner	Appellant
Versus		
1. Satya	Respondent No.1	Contesting Respondent 1
2. Sant Lal son of Kishan Lal son of Badri	Respondent No.2	Contesting Respondent 3
2. Smt. Krishna Devi D/o Ram Bhagat	Respondent No.3	

MOST RESPECTFULLY SHOWETH

1. That the petitioner has filed instant Special Leave Petition against the final impugned judgment and order dated 19.01.2018 passed by the High Court of Punjab and Haryana at Chandigarh in RSA No.5173 of 2014 (O&M), whereby the Hon'ble Court dismissed the appeal.

2. **QUESTIONS OF LAW:**

The instant petition for Special Leave to appeal raises the following important substantial questions of law which require an authoritative pronouncement by this Hon'ble Court.

A. Whether, discretion in case of specific performance ought to be used judicially?

B. Whether, when the execution of Agreement to Sell is proved and is held that the respondent no.2 is authorized to execute the agreement in such case, such agreement can be held as fake document just because the respondent no.1 did not receive any money?

3. **DECLARATION IN TERMS OF RULE 3(2):**

That petitioner states that no other petition seeking leave to appeal has been filed by him against the final impugned judgment and order dated 19.01.2018 passed by the High Court for states of Punjab and Haryana at Chandigarh in RSA No.5173 of 2014 (O&M).

4. **DECLARATION IN TERMS OF RULE 5:**

The Annexure P-1 to P-3 produced along with the Special Leave Petition is true copy of the pleadings/documents which formed part of the records of the case in the court below against whose order the leave to appeal is sought for in this petition.

5. **GROUNDS**

Leave to appeal is sought for on following grounds:

A. Because, the Hon'ble High Court has erred in not appreciating that all the courts had held that the defendant no.2 /respondent no.2 has power/authority to execute the Agreement to Sell or sale the disputed property/

B. Because, the Hon'ble High Court has erred in not appreciating that the agreement to sell dated 08.08.1992 has been proved by the petitioner/plaintiff by examining the attesting witness and further it has been held by the Ld. Civil Judge that Agreement to Sell dated 08.08.1992 is a valid document.

C. Because the Hon'ble High Court has erred in not appreciating that the Ld. First Appellate Court has erred in holding that the Agreement to sell dated 08.08.1992 is fake document because it has no content of receiving of consideration amount by appellant/Defendant as it is not necessary because all the amount has been received by the Respondent No.2/Defendant No.2 herein.

D. Because, the Hon'ble High Court has erred in not appreciating that the petitioner is in possession of the disputed property from 08.08.1992 as the petitioner had paid the total sale consideration of Rs.85.000/- to the Respondent No.2/Defendant No.2 and hence he is entitled for decree of Specific Performance of Agreement to Sell dated 08.08.1992.

E. Because, the Hon'ble High Court has erred in not appreciating that the possession of the disputed property has been transferred and total sale consideration of Rs.85,000/- has been paid at the time of Agreement to Sell dated 08.08.1992 and only Registration of document was remained to be done and further the petitioner has also constructed the house on the disputed property and in such a case if the decree of Specific Performance was not granted then the petitioner will suffer irreparable loss.

F. Because, the Hon'ble High Court has erred in not appreciating that the market value of the disputed property had been increased many fold and even returning of money with interest will not compensate the loss of the petitioner.

G. Because the judgment and order of the Hon'ble High Court is based on surmises, contrary to the settled principle of law, perverse, misconstrued and deserves to be set-aside.

6. **GROUNDS FOR INTERIM RELIEF:**

A. That the petitioner is law abiding citizen of India and hopeful to succeed herein before this Hon'ble Court as the order passed by the Hon'ble High Court is in the teeth of this Hon'ble Court.

B. That the petitioner on the basis of the accompanying Special Leave petition has full hope and believe to succeed herein before this Hon'ble Court.

C. That the petitioner has balance of convenience and prima facie case in their favour and they will suffer irreparable loss in case they did not get any interim relief from this Hon'ble Court.

7. **MAIN PRAYER:**

It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to:

a) grant special leave to appeal against the final impugned judgment and order dated 19.01.2018 passed by the High Court for the states of Punjab and Haryana at Chandigarh in RSA No.5173 of 2014 (O&M); and

b) pass such other orders and further order / directions as are deemed just and proper in the facts and the circumstances of the present case.

8. **PRAYER FOR AD-INTERIM RELIEF:**

It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to:

a) stay the operation of final impugned judgment and order dated 19.01.2018 passed by the High Court for the states of Punjab and Haryana at Chandigarh in RSA No.5173 of 2014 (O&M); and

b) pass such other orders and further order / directions as are deemed just and proper in the facts and the circumstances of the present case.

DRAWN & FILED BY:

(SATYA SUNDAR)
ADVOCATE FOR PETITIONERS

Filed on: 28.06.2019

APPENDIX

RELEVANT PROVISIONS OF SECTION

Section 20 in The Specific Relief Act, 1963

20. Discretion as to decreeing specific performance: -

(1) The jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1. Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2. The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.

Section 21 in The Specific Relief Act, 1963

21. Power to award compensation in certain cases.-

(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint: Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation. Explanation.-The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

IN THE COURT OF CIVIL JUDGE (SENIOR DIVISION) MONACO

Civil Suit No.486 of 1997
Date of Instt: 17.12.1997
Date of Decision: 28.11.2001

Shakuntala wife of Shri. Kewal Ram, resident of Durga Colony, Monaco, Tehsil & District Monaco

..... Plaintiff

Versus

1. Om Parkash son of Shri Rattan, resident of Village Chang, Tehsil and District Monaco.

2. Sant Lal son of Shri Kishan Lal, resident of Mandir Rangila Foundation Chowk, Charkhi Dadri, District Monaco

....Defendants

SUIT FOR PERMANENT INJUNCTION

Judgment

1. Plaintiff filed this suit for permanent injunction on the averments that she is owner in possession of residential house cum Nohra shown with red colour and by letters ABCDEF in the site plan, attached with the plaint, situated at Durga Colony. Near Jituwara Johar, Monaco. The plot, on which the residential house was constructed was purchased vide sale deed no.2932 dated 20/09/1989 and another purchased by her husband. The main door of the house exists and open towards the closed street i.e. towards Eastern side and the plaintiff has to enter her house from Northern side from North to West side there is open chowk and the plaintiff has also installed a shed for tethering the cattle. The possession of the plaintiff over the residential cum Nohra is quite peaceful, regular continuous and without interference from any corner. The defendants, who were strangers to the property in question have started threatening to take forcible possession to which they have no right. Request of the plaintiff was turned down by the defendants. Hence, the present suit has been filed.

2. Notice of the suit was given to the defendants. Defendant No.2 failed to appear and was proceeded against exparte vide order dated 4.2.1998 and defendant no.1 was proceeded against exparte vide order dated 26.02.1998.

3. In exparte evidence, the plaintiff has examined herself as PW1 and closed the evidence after tendering into evidence report Ex.P3 and site plan Ex.P4.

4. I have heard learned counsel for the plaintiff and have gone through the evidence, produced on the file very carefully.

5. Plaintiff appeared in the witness box as PW1 desposed that she and her husband purchased the plot in dispute vide registered sale deed, copy of which is Ex.P1 in the year 1989. After the purchase of the property, the plaintiff raised construction of the house towards the eastern side is the gate of the house. There is another passage in the Northern side. There is open yard from North to West, which is being used by her for tethering her cattle. Since the date of purchase and raising construction over the house, she is using the same without any interference. The defendants, who have no right are bent upon to interfere in the possession of the plaintiff. Local

Commissioner was also appointed. He submitted his report Ex.P3 and the site plan prepared by him is Ex.P4. Counsel for the plaintiff submitted that the entire evidence goes unrebutted on the file and there is no reason to disbelieve the same and the defendants be restrained from interfering into the peaceful possession of the plaintiff over the residential house and the Nohra shown with red colour and by letters ABCDEF in the site plan attached with the plaint.

6. Notice of the suit was given to the defendants, but the defendants opted not to contest the suit. It shows that they have no interest in the suit property, otherwise also, from the oral as well as documentary evidence, the plaintiff has proved her ownership and possession over the suit property. There is no reason to disbelieve the documentary evidence, led by the plaintiff, it is fully proved that the plaintiff is owner in possession of the property in dispute. The report of Local Commissioner Ex P3 and site plan Ex.P4 also reveals the possession of the plaintiff over the suit property. Hence, the effect that the defendants are restrained from interfering into the peaceful possession of the plaintiff over residential house- cum-Nohra shown in red colour by letters ABCDEF in the site plan attached and bounded as in the East. Closed street and property of others and also house of R.K. Dugal, in the west. House of Ram Sarup etc, in the North: Pucca Street and in the South Property of others situated at Durga Colony, near Jituwara Johar, Monaco, with costs. Decree sheet be prepared accordingly. File be consigned to the record room, after due compliance.

Announced in open court.
Dated: 28.11.2001

Sd/-
Civil Judge (SD) Monaco
Date. 28.11.2001

Annexure P-2

IN THE COURT OF ADDITIONAL CIVIL JUDGE (SENIOR DIVISION), MONACO

Civil Suit No. 204-SP of 2002
Date of Institution:10.9.2002
Date of decision:25.11.2011

Smt. Shanti aged about 42 years wife of Kewal Ram son of Data Ram, resident of Durga Mandir Monaco, Tehsil and District Monaco.

...Plaintiff

Versus

1. Satya son of Nihal Singh son of Shanker Singh, resident of Durga Colony, Tehsil and District Monaco.
2. Sant Lal son of Kishan Lal son of Badri Parshad, resident of Pat Ram Gate, Monaco, Tehsil and District Monaco.
3. Smt. Krishna Devi, daughter of Ram Bhagat son of Dana Ram, resident of Ranila, Tehsil and District Monaco.

...Defendants

SUIT FOR SPECIFIC PERFORMANCE

JUDGMENT

Shorn of unnecessary details, the facts of the case as alleged by the plaintiff are that the defendant No. 1 through his General Power of Attorney namely Sant Lal i.e. defendant No.2 entered into an agreement of sale of land measuring 6 marlas as fully detailed and described in the head note of the plaint (hereinafter referred to as "the disputed property" for short) with the plaintiff on dated 8.8.1992 for a sale consideration of Rs.85,000/- and received the entire sale consideration on that date from the plaintiff in presence of witnesses; that it was also agreed that the sale deed of the disputed property would be executed and registered as and when desired by the plaintiff and the defendants No.1 & 2 shall be bound to execute and get registered the same in favour of the plaintiff; that vacant possession of the disputed property was also handed over to the plaintiff and it was agreed that plaintiff shall have the right to raise the construction over there; that it was also agreed that in case defendants No.1 & 2 would refuse to execute and get registered the sale deed of the disputed property in favour of plaintiff, in that eventuality, the plaintiff shall have the right to get the same executed and registered through court; that at the time when the plaintiff entered into an agreement there were four rooms existing over the disputed property, however, during floods which came in the year, 1995 one of the rooms collapsed; that one Om Parkash in connivance with defendant No.2, Sant Lal started harassing the plaintiff, on which, the plaintiff filed a civil suit seeking relief of injunction and in that suit, defendants absented themselves; that defendant No.3 is a police personnel and the said Om Parkash was also police personnel and both of them want to Interfere in the peaceful possession of the plaintiff over the disputed property; that plaintiff was and is still ready and willing in getting executed and registered the sale deed of the disputed property at her own expenditure; that now the defendant No.1 through his General Power of Attorney i.e. defendant No.2 sold away the disputed property to the defendant No.3 by way of a registered sale deed bearing No. 3374 dated 3.12.1997 whereas said defendant No.2 was having knowledge of the fact that he cannot execute and get registered the sale deed of the disputed property in favour of defendant No.3 and as such the said sale deed has no binding effect on the rights of the plaintiff, that the defendant No. 2 in order to grab money from the plaintiff and to harass her has executed the above mentioned sale deed of the disputed property in favour of the defendant No. 3 which has no binding effect on the rights of the plaintiff. Hence, the present suit.

2. Notice of the suit was given to the defendants. Defendants No. 1 & 3 appeared and filed their separate written statements. Defendant No.2 did not prefer to contest the present suit and rather allowed himself to be proceeded against exparte vide order dated 25.1.2011. In the written statement so filed on behalf of defendant No. 1, he has taken several preliminary objections to the effect that the suit is not maintainable in the present form; that the plaintiff has no cause of action or locus standi to file the present suit; plaintiff has no locus standi to file the present suit; that the plaintiff is stopped by her own act and conduct to file the present suit; the suit of the plaintiff is time barred etc. On merits it has been asserted by the defendant No.1 that he is owner in possession of the disputed property and the answering defendant had got good relations with the defendant No.2 and for the purposes of maintenance of the disputed property, the answering defendant had made defendant No.2 as his General Attorney and no right to alienate the disputed property was ever given to the defendant No.2; that in case the defendant No.2 has executed any sale deed in favour of defendant No.3 in respect of the disputed property then the same is wrong, against law and facts and not binding on the rights of the answering defendant No.1, that answering defendant No.1 neither received any amount of the agreement of sale and nor that of the registered the sale deed and answering defendant No.1 has no knowledge of both these documents; that the agreement of sale dated 8.8.1992 executed by defendant No.2 with respect to the disputed property in favour of the plaintiff is wrong and without any basis because at the time when the alleged agreement of sale was entered into between the defendant No.1 and the plaintiff there existed a residential house at the spot and as such entering into an agreement of sale of a plot is itself wrong and against law and it is the answering defendant No.1, who is still in possession of the disputed property and the plaintiff as well as defendant No.2 in order to grab the same have executed the alleged agreement of sale dated 8.8.1992; that the defendant No.2 was having no right to alienate the disputed property to the defendant No. 3 by way of registered sale deed and as such both the registered sale deed dated 3.12.1997 as well as an agreement of sale dated 8.8.1992 are wrong, against law and facts and are not binding on the rights of the answering defendant No. 1 and are liable to be set aside.

3. Defendant No. 3 has contested the present suit by filing written statement on her behalf wherein she has taken preliminary objections almost similar to those as taken by the defendant No.1. On merits, it has been asserted by the defendant No.3 that the plaintiff under the garb of instant suit has tried to claim her ownership with respect to the disputed property whereas it is the answering defendant No.3 who is owner in possession of the same whereupon she has raised construction of her residential house; that the answering defendant No.3 is owner of the disputed property on the basis of a registered sale deed No. 3374 dated 3.12.1997 and the alleged agreement of sale dated 8.8.1992 is based on fraud; that the plaintiff has got no right, title or concern whatsoever with the disputed property and she on the basis of false and frivolous agreement of sale is claiming her possession over there. Denying the other allegations, both the defendants No.1 and 3 have prayed for dismissal of the present suit with costs, Parties were put to the following issues vide order dated 28.10.2009 so passed by the then learned Additional Civil Judge (Senior Division), Monaco:-

1. Whether the defendant No.2 Sant Lal son of Kishan Lal was GPA holder of defendant No.1 Satyavir in respect of the suit land?OPP
2. Whether on the basis of the said GPA defendant No. 2 was empowered to execute the agreement to sell dated 8.8.1992 in respect of the suit land in favour of the plaintiff? OPP
3. Whether the registered sale deed dated 3.12.1997 executed by defendant No.2 Sant Lal in favour of defendant No.3 after the execution of agreement to sell dated 8.8.1992 is illegal, null and void and not binding upon the rights of the plaintiff and thus, is liable to be set aside and cancelled? OPP
4. Whether the plaintiff is entitled to the decree of specific performance of agreement to sell dated. 8.8.1992?OPP
5. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? OPP
6. Whether the plaintiff has no locus standi to file the present suit?OPD
7. Whether the plaintiff is stopped by his own act and conduct from filing the present suit?OPD
8. Whether the plaintiff has no cause of action to file the present suit?OPD 9. Whether the suit of the plaintiff is not maintainable in the present form?OPD
10. Whether the suit of the plaintiff is time barred?OPD
11. Whether the plaintiff has not come to the court with clean hands and has suppressed the material facts from the court, if so, its effect?OPD
12. Whether the suit of the plaintiff is bad for want of proper court fee?OPD
13. Relief

ISSUES NO.1 TO 5

4. All these issues are inter-connected in such a manner that deciding them separately would be at the costs of coherence and continuity. Hence the same are being taken up together in one head.

5. In order to prove these issues, the plaintiff has examined one Jagmohan HRC as PW1 who on the basis of summoned record has proved on the file certified copies of sale deed bearing No. 3374 dated 3.12.1974 and General Power of Attorney bearing 772 dated 2.12.1991 as Ex.P1 and Ex. P2 respectively. Plaintiff has thereafter, has examined one Jagdish Chander, Record Keeper as PW2 on the basis of summoned record relating to the civil suit titled as Shakuntla Versus Om Parkash proved on the file various documents from Ex P2 to Ex P7. Plaintiff has thereafter examined one Om Parkash as PW3 who being one of the attesting witnesses of the agreement of sale dated 8.8.1992 so proved on the file as Ex.P1 has deposed about its due execution and has further deposed that on that day the defendant No.2 after having received an amount of Rs.85,000/- from the plaintiff which was whole of the sale consideration of the disputed property handed over the vacant possession of the same to the plaintiff. Plaintiff stepped into the witness box as PW3 and has reiterated whole of the facts as earlier asserted by her in the plaint so filed on her behalf.

6. In rebuttal, defendant No.1 Satya stepped into the witness box as DW1 and he has similarly reiterated whole of the facts as earlier asserted by him in the written statement so filed on his behalf. In support of his assertions, he has proved on the file various documents from Ex.D1 to Ex D3. Defendant No.3 Smt. Krishna Devi stepped into the witness box as DW3 who has also reiterated whole of the facts as earlier asserted by her in the written statement so filed on her behalf. In support of her assertions, she has proved documents Ex.D4 and Ex.D5.

7. The plaintiff by filing the present suit has sought relief of specific performance of an agreement of sale dated 8.8.1992 executed by defendant No.2 in capacity as of General Power of Attorney of the defendant No.1 with respect to the disputed property.

8. It is the plea of the plaintiff that the defendant No. 1 through defendant No.2 who is his general attorney entered into an agreement of sale of the disputed property with the plaintiff on dated 8.8.1992 for a sale consideration of Rs.85,000/- and received whole of the sale consideration on that very day and it was agreed between the parties that as and when plaintiff would desire she would get executed and registered the sale deed of the disputed property from the defendants No.1 or 2. However, later on defendant No.1 through his general attorney i.e. defendant No.2 sold away the disputed property to the defendant No.3 by way of registered sale deed dated 3.12.1997 without having any right, title or concern and as such the said sale deed is wrong, against law and facts and not binding on the rights of the plaintiff and is liable to be set aside and the defendant No. 1 is liable to be directed to execute and get registered the sale deed of the disputed property land in favour of the plaintiff and the defendant No.3 who on the basis of above mentioned sale deed is threatening the plaintiff for interfering into her peaceful possession over the disputed property is liable to be restrained from doing so and is further liable to be restrained from transferring or alienating the disputed property to some other.

9. On the other hand, it is the plea of the defendant No. 1 that through general power of attorney he never gave right to the defendant No. 2 regarding alienation of the disputed property rather defendant No.2 was asked to maintain the disputed property and in case defendant No.2 has entered into any agreement of sale with the plaintiff or has executed sale deed in favour of defendant No.3 with respect to the disputed property in that eventuality, the same are wrong, against law and not binding on the rights of the defendant No.1 and, moreover

the market value of the disputed property was not less than Rs.2,00,000/- whereas the same has been shown by the plaintiff to be having the value of Rs.85,000/-. The defendant No.3 while contesting the instant suit has taken the plea that she is owner in possession of the disputed property on the basis of registered sale deed dated 3.12.1997 and the agreement of sale dated 8.8.1992 is based on fraud and has no value and the plaintiff has filed the present suit in order to harass her.

10. Here in the present case, the plaintiff has sought relief of specific performance of an agreement of sale allegedly entered into by defendant No.1, through his general power of attorney i.e. defendant No. 2 with respect to the disputed property. The agreement of sale has been proved on the file of the plaintiff as Ex P1 plaintiff by the defendant No.1 through the defendant No.2 also stands proved as the defendant No.2 has put his signatures on an agreement of sale Ex.P1. Even the defendant No.2 has not contested the instant suit and allowed himself to be proceeded against exparte which shows that the said defendant is not disputing the pleas as taken by the plaintiff. The plea as taken by the defendant No.1 that he did not allow the defendant No.2, his general attorney to alienate the disputed property is without any basis because a close scrutiny of the said general attorney registered on dated 2.12.1991 with the Sub Registrar Monaco so proved on the file as Ex.P7 it clearly reveals that the defendant No.1 has given the defendant No.2 power to alienate the disputed property and only on that basis the defendant No.2 entered into an agreement of sale of the disputed property with the plaintiff and again on the basis of said power of attorney the said defendant No.2 later on executed the sale deed of the disputed property in favour of defendant No. 3 on dated 3.12.1997 so proved on the file as Ex.D4.

11. The fact of non-challenging of said agreement of sale Ex.P1 and sale deed Ex.P5 and non-cancellation of said general power of attorney ex.P7 on the part of the defendant No.1 shows that he in fact executed the general power of attorney with respect to the disputed property in favour of defendant No.2. Now coming to the fact as to whether plaintiff should be granted relief of specific performance of an agreement of sale dated 8.8.1992 so proved on the file Ex.P1 is concerned, while taking into consideration bonafides of the defendant No.3 and the fact that the disputed property already stood sold to the defendant No.3 by way of registered sale deed dated 3.12.1997, it would be unfair for the defendant No.3 to disturb her ownership with respect of the disputed property when she appeared to be bonafide purchaser of the same.

In case titled **Velyudhan Sathyadas Vs. Gobindan Dakshyani 2003/2) LIR 253** it has been held by the Hon'ble Supreme Court of India that-

> "It is clear that mere establishment of the facts that the agreement for sale had been entered into is not sufficient to grant a decree for specific performance and if the circumstances as indicated in Section 20 of the Act, exist in a particular suit the court ought to certainly exercise its discretion in favour of the defendant and give lesser or limited relief to the plaintiff as indicated in Section 21 of the Act".

In view of my above discussion as well as facts and circumstances of the case, it would be inequitable to decree the suit of the plaintiff for possession by way of specific performance of the agreement to sell Ex P1. The principles of equity, good conscience and fairness are the very foundation for the grant of the relief of specific performance. Accordingly, I am of the considered opinion that the plaintiff is only held entitled to refund of an amount of Rs.85,000/- so paid by her as of sale consideration to the defendants No.1 and 2 only alongwith interest at the rate 6% per annum from the date of payment, till final realization. Hence, all these issues stand decided accordingly.

ISSUES NO. 6 & 8

12. In view of my findings arrived at on aforesaid issues, it is held that the plaintiff has every locus standi as well as cause of action to file the present suit. Hence, these issues are decided against the defendants.

ISSUE NO.7

13. The defendants have not been able to show as to form which of the act and conduct the plaintiff is stopped from filing the present suit. Hence, this issue stands decided against the defendants.

ISSUE NO.9

14. In view of my findings arrived at on aforesaid issues, the suit is held well maintainable in its present form. Hence, the issue under consideration stands decided against the defendants.

ISSUE NO.10

15. The agreement of sale Ex.P1 was since could be acted upon at any point of time, therefore, the present suit cannot be said to be barred by limitation. Hence this issue stands decided against the defendants.

ISSUE NO.11

16. The defendants have not been able to show as to how the plaintiff has not come to the court with clean hands and what material facts have been suppressed by her. Hence, this issue stands decided against the defendants.

ISSUE NO.12

17. Since proper court fee has been affixed by the plaintiff on the plaint, therefore, suit cannot be said to be bad for want of proper court fee. Hence, this issue stands decided against the defendants.

ISSUE NO.13 (RELIEF)

18. As a sequel to my findings arrived at on various issues above, the present suit succeeds, however, the same is partly decreed with costs against the defendants No.1 & 2 only and the plaintiff is held entitled to refund of an amount of Rs.85,000/- so paid by her as of sale consideration from the said defendants along with interest at the rate of 6% per annum from the date of its payment, till final realization thereof. Rest of the reliefs as claimed for by the plaintiff stand declined to her for want of cogent evidence. Decree sheet be drawn accordingly. File be consigned to record room after due compliance.

Announced in open court Dated:
25.11.2011

Sd/-
Addl.Civil Judge (Sr.Division)
Monaco.

Annexure P-3

IN THE COURT OF ADDITIONAL DISTRICT JUDGE, MONACO.

Civil Appeal No.282 RBT of 2011/2014

Date of institution: 24.12.2011/20.02.2014.

Date of decision: 14.11.2014

Satya son of Shri Nihal Singh son of Shri Shankar Singh, resident of Durga Colony, Monaco, Tehsil and District Monaco

...Appellant-defendant No. 1

Versus

1. Smt. Shanti wife of Shri Kewal Ram son of Shri Data Ram, resident of Durga Mandir, Monaco.
2. Sant Lal son of Kishan Lal son of Badri Parshad, resident of Pat Ram Gate, Monaco, Tehsil and District Monaco.
3. Smt. Krishna Devi daughter of Ram Bhagat son of Dana Ram, resident of Ranila, Tehsil Dadri District Monaco.

Defendant no.3-respondent Civil appeal against the judgment and decree dated 25.11.2011 passed by the Court of the then Addl. Civil Judge (Senior Division), Monaco in Civil Suit no.204/SP of 2002.

Civil Appeal No.278 RBT of 2012/2014

Date of institution: 03.01 .2012/20.02.2014. Date of decision: 14.1 1 .2014

Smt. Shakuntla Devi (aged about 51 years) wife of Shri, Kewal Ram son of Shri Data Ram, resident of Durga Mandir, Monaco. Tehsil and District Monaco

...Appellant/Plaintiff

Versus

1. Satya son of Shri Nihal Singh. son of Shri Shankar Singh, resident of Durga Colony, Bhiwarii, Tehsil and District Monaco.
2. Sant Lal son of Kishan Lal son of Badri Parshad, resident of Patram Gate, Monaco, Tehsil and District Monaco.
3. Smt. Krishna Devi daughter of Ram Bhagat son of Dana Rani, resident of village Ranila, Tehsil Charkhi Dadri District Monaco.

Respondent-defendants Civil appeal against the judgment and decree dated 25.11.2011, passed by the Court of the then Addl. Civil Judge (Senior Division), Monaco in Civil Suit no.204 of 2002.

JUDGMENT:

This judgment of mine shall dispose of the above referred civil appeals, which have been preferred against the judgment dated 25.11.2011, passed by the Court of Shri Aman Deep Dewan, the then Addl. Civil Judge (Senior Division), Monaco in Civil Suit no.204/SP of 2002, vide which the suit of the respondent-plaintiff has been partly decreed. For convenience and for proper representation of the subject matter, the appellant-defendant no. 1 in the first appeal shall be referred as "appellant-defendant", the appellant-respondent in the second appeal shall be referred as "respondent-plaintiff".

2. The respondent-plaintiff filed a suit for specific performance of an agreement to sell land measuring 0 kanal 6 marla on the ground that an agreement to sell dated 08.08.1992 was entered into and she challenged the subsequent agreement to sell dated 03.12.1997 of the same property in favour of appellant-defendant No. 1 to defendant No.3 being illegal, null and void and she sought the relief of prohibitory injunction restraining the defendant no.3 from ' interfering in her possession in any manner, She submitted that the appellant defendant no. 1 was owner of the suit property and he through his power of attorney defendant no.2 had agreed to sell the suit land for a consideration of Rs.85,000/- to the respondent plaintiff and the total amount was given in the presence of witnesses on 8.8.1992 which was accepted by the appellant- defendant no. 1 and she became the owner. No date was fixed for getting the sale deed registered. It was agreed that if the respondent-plaintiff fails to execute her part of the performance, she can approach the Court for the execution of sale deed and all the expenses will be borne by the appellant-defendant No.2. The agreement was written' and signed by the witnesses and she became the owner. She further stated that there were four rooms in the property in question and in the year 1995 Monaco was flooded and one room fell down and three rooms were intact. The respondent-plaintiff has put a chappar along with three rooms and it has extended to the adjacent plot. She further stated that one Om Parkash and Sant Lal defendant No.2 in collusion with each other started harassing the respondent-plaintiff and she filed a suit against them but they proceeded ex parte. The defendant no.3 is a police official and she also threatened the respondent-plaintiff. A Local Commission was also appointed in that case and even today there are three rooms and one chappar in the property in question and she has every right to get the sale deed executed. She stated that another agreement to sell dated 03.12.1997 has been entered into by the appellant/defendant no. 1 Satya and defendant no.2 Sant Lal with defendant no,3 although they had no right to do so and they by fraud want to take away her right. She stated that she has also taken the electricity connection which is in the name of her husband.

3. In response to the suit, appellant-defendant no. 1 appeared and filed the written statement taking several legal preliminary objections and stated that the respondent-plaintiff has no right over the suit property and he had appointed defendant no.2 as his power of attorney, who was taking care of his property and if he had entered into any agreement to sell with the respondent-plaintiff, the same is illegal, He prayed that he had never received any consideration amount as stated by the respondent/plaintiff. He stated that on 8.8.1992 an agreement to sell was prepared in collusion with defendant no.2 and at that time he had constructed his house over the suit property and the agreement to sell of a plot cannot be executed. He stated that he was still in possession of the same. He stated that defendant no.2 had played fraud with him. On merits he totally denied having received consideration amount or having sold the suit property to the appellant-plaintiff. He stated that on 8.8.1992 the plot was not vacant and there were two rooms and two baithak and one gallery was constructed with a boundary wall and there was open sehan also reference of which finds in the power of attorney. He denied the agreement to sell in question and stated that the suit property was not for the value of Rs.85,000/- but of the value of at least Remaining contentions of the respondent-plaintiff were denied and prayer for dismissal of the suit was made.

4. Defendant No.2 did not appear despite publication and as such he was proceeded ex parte on 8.8.2005.

5. Defendant N.o.3 filed a separate written statement and she stated that her rights have 'been wrongly challenged and she is in possession of the suit property. She denied that the respondent-plaintiff has any right on the suit property as she has never purchased the same. The whole story has been concocted by her and had Local Commission visited the spot the respondent-plaintiff would have relied upon the same and she prayed that it is

she who has constructed her house over the suit property and the respondent-plaintiff wants to show her possession on wrong submissions and prayed for dismissal of the suit.

6. Replication was filed to the written statement filed by defendant No.3 in which it was stated that if defendant no.3 was aggrieved by any order, she could have filed a separate suit and she cannot interfere in her possession. It was stated that the suit property was purchased by the respondent plaintiff in the year 1992 and the defendant no.3 had purchased the suit property in the year 1997, hence, the claim of respondent-plaintiff is on strong footing.

7. From the pleadings of the parties, following issues were framed for trial by the Trial Court on 28.10.2009:-

1. Whether the defendant No.2 Sant Lal son of Kishan Lal was GPA holder of defendant No. 1 Satyavir in respect of the suit land?OPP
2. Whether on the basis of said GPA defendant No.2 was empowered to execute the agreement to sell dated 8.8.1992 in respect of the suit land in favour of the plaintiff?OPP
3. Whether the registered sale deed dated 3.12.1997 executed by defendant no.2 Sant Lal in favour of defendant No.3 after the execution of agreement to sell dated 8.8.1992 is illegal, null and void and not binding upon the rights of the plaintiff and thus, is liable to be set aside and cancelled? OPP
4. Whether the plaintiff is entitled to the decree of specific performance of agreement to sell dated 8.8.1992?OPP
5. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?OPP
6. Whether the plaintiff has no locus standi to file the present suit?OPD
7. Whether the plaintiff is estopped by his own act and conduct from filing the present suit?OPD
8. Whether the plaintiff has no cause of action to file the present suit?OPD
9. Whether the suit of the plaintiff is not maintainable in the present form?OPD
10. Whether the suit of the plaintiff is time barred?OPD
11. Whether the plaintiff has not come to the Court with clean hands and has suppressed the material facts from the Court, if so, its effect?OPD

8. As regard issues no. 1&2 are concerned appellant-defendant has not denied that Sant Lal defendant no.2 was not his General Power of Attorney and as per General Power of Attorney he was authorised to mortgage, lease out etc, the property in question and he could enter into an agreement to sell.

9. In order to prove other main issues Om Parkash was examined as PW 1 by the respondent-plaintiff and he proved the agreement to sell dated 8.8.1992 Ex.P1 which was entered into by Sant Lal Power of Attorney of Satya with Shakuntla of house measuring 200 square yards for a consideration of Rs.851000/-. As per his testimony, total consideration amount was paid and the possession was also delivered. He had a signed as a witness to the same.

10. PW2 Samunder Singh is the other witness of the agreement to sell dated 8.8.1992 and he also reiterated the same version as given by PWI Om Parkash and proved the agreement to sell.

11. PW3 Jagdish Chander Record Keeper has brought the record pertaining to the case titled "Shakuntla vs Om Parkash which was decided on 28.11.2001 by the Court of Smt Vivek Bharti the then Civil Judge (Senior Division), Monaco and proved the decree-sheet Ex.P2 and judgment Ex.P3, report of Local Commission as Ex.P5, notice as Ex.P6, site plan as Ex.P7.

12. PW4 Shakuntla again marked as PW3 has tendered her affidavit Ex.PW3/A and she reiterated the version given in the plaint and closed the evidence.

13. The appellant-defendant no. 1 on the other hand tendered appeared himself as DWI and stated that he gave power of attorney to defendant no.2 only for maintenance of his house and he never authorized him to sell the same and he was given a notice Ex.DW1 vide which the power of attorney was cancelled. He proved the receipt and registered envelop Ex.D2 & Ex.D3 in this respect and stated that he was no more his power of attorney. The other contentions were submitted by him in his affidavit Ex.DW1/A. He stated that it is he who has raised construction over the property and closed the evidence.

14. Defendant No.3 examined herself and tendered affidavit Ex.DW2/A wherein she stated that she had purchased the property which was a damaged house on 3.12.1997 for consideration of Rs.35,000/- and the same was registered. She stated that the property was of 30X60 (200 square yards) was having two rooms, two baithak, one open sehan with boundary wall was purchased by her and due to flood in Monaco the property was damaged and now the same is in dilapidated condition. She has rented out the premises to Ran Singh who is doing the business of Milk selling and tethering his cattle. She in lieu of rent used to take 2 liters milk per day from him. She also closed her evidence. No other witness was examined.

15. Aggrieved by this impugned judgment and decree, the parties have appeared and preferred the above said appeals.

16. Arguments were advanced by the counsel for the parties.

17. Challenging the said impugned judgment and decree, two appeals have been filed. One appeal has been filed by appellant-defendant No. 1 Satya, who is stated to be owner of the suit property and one appeal has been filed by appellant-respondent Shakuntla, who is alleging to be owner of the suit property as per agreement to sell dated 8.8.1992.

18. The learned counsel for appellant-defendant no. 1 prayed that the learned trial court has wrongly directed him to refund Rs.85,000/- which was received as sale consideration from respondent-plaintiff Shakuntla and the findings of the learned trial Court are vague, indefinite and the same are not sustainable as the possession of the house in dispute was never delivered to the respondent-plaintiff and he had constructed his house much prior to the year 1992. It is his C.P.A defendant no.2 who had allegedly sold the property in question without any authority in favour of the respondent-plaintiff but the same is fake and fictitious and without any consideration and is sham transaction which do not confer any right or title upon the respondent-plaintiff or defendant no.3. The property in question has been earlier shown to have been sold to the respondent/plaintiff by defendant no.2 in the year 1992 and then again it was allegedly sold to defendant no.3 by defendant no.2 for a consideration of Rs.85,000/- and Rs.35,000/- respectively which is highly improbable as with the passage of time the price of the property and land has increased manifolds and once in the agreement to sell dated 8.8.1992 the possession has been shown to be delivered .to respondent-plaintiff, defendant no.2 cannot further deliver the possession to defendant no.3 and both the agreement to sell i.e. Ex.P1 and sale deed Ex.D1 were never brought to the notice of the appellant-defendant no. 1 nor any sale consideration was given to him by the respondent-plaintiff nor by defendant no.3. The learned trial Court has erred in holding the defendant no.3 to be a bonafide purchaser and the suit has been wrongly decreed against the appellant-defendant no. 1 simply on the ground that he did not challenge the agreement to sell executed by defendant no.2 in favour of respondent/plaintiff and the sale deed executed in favour of defendant no.3.

19. It was submitted that when the defendant no.2 was never authorised to sell the property 'and the appellant-defendant no. 1 was not aware of the agreement, there was no occasion with him to challenge the agreement to sell and sale deed Ex.D1 and stated that he is not liable to make any payment to the respondent-plaintiff and defendant no.3 and prayed for acceptance of appeal.

20. The learned counsel for respondent-plaintiff on the other hand prayed that the learned Trial Court has up held the agreement in question which is in favour of the respondent-plaintiff but has denied the claim of specific performance of agreement to self whereas the sale deed in favour of defendant no.3 has been upheld which is patently Wrong. It was stated that the plea of bonafide purchaser with consideration and without notice of the earlier agreement is always binding upon the purchaser and the defendant no.3 has not taken the plea of bonafide purchaser in the whole of the written statement and the learned trial court wrongly reached to the conclusion

that she is bonafide purchaser. The agreement is stated to be proper by defendant no.3 in her written statement but she has nowhere stated that she made enquiry before purchasing the suit property. The sale deed Ex.D1 was stated to be not binding upon the rights of the respondent-plaintiff and it was prayed that legally when once the agreement has been proved the onus shifted upon the other party that the same was without consideration and without notice and it was prayed that the suit of the respondent-plaintiff was liable to be decreed.

21. The learned counsel for the respondent-plaintiff while placing reliance on the case law reported as Baj Singh and others Vs. Ravinder Singh and others 1988 HRR 463, Jogender Singh and others Vs. Nidhan Singh and others 1996 PLJ 307, Balbir Singh vs Manjit Kaur and another 2013(1) RCR 740, Shanti vs. Surta and others 1973 AIR P&H 387, Bhagat Singh and others Vs Jaswant Singh AIR 1966 SC 1861 and Darshan Singh vs Santok Singh 1997 (2) RCR 577 prayed that he was always ready and willing to perform his part of contract and it was she who was entitled for relief of specific performance of contract and the suit has not been properly decreed in favour of the respondent-plaintiff.

22. After hearing the learned counsel for the parties and after going through the case file carefully, it is observed that an application for additional evidence was moved by the respondent-plaintiff wherein she prayed for tendering the electricity bills of the property in question to prove that it was she who was residing in the suit property. The next point is the contents of power of attorney issued in favour of defendant no.2 Ex.P7. As per this document a power of attorney was executed by appellant-defendant no. 1 in favour of defendant no.2 with regard to the property in dispute. As per power of attorney a house has been constructed on the property in dispute and it was mentioned in the power of attorney that the property in dispute was in litigation in several cases and since appellant-defendant was not capable to take care of the property he appointed defendant no.2 as his power of attorney. As per power of attorney Ex.P7 he was entitled to mortgage, gift, transfer and lease the property to any one. In pursuance of the said power of. attorney defendant no.2 is stated to have sold the property to respondent-plaintiff vide agreement to sell dated 8.8.1992 which is agreement Ex.P1 and thereafter he allegedly again sold the property to defendant no.3 vide sale deed Ex.D4. The agreement to sell was for a consideration of Rs.85,000/- and is dated 8.8.1992 and the same has been witnessed by the witnesses. There is judgment placed on the record by the respondent-plaintiff that she filed a suit for permanent injunction against one Om Parkash and defendant No.2 that they should not interfere in her possession over a residential house which was constructed and purchased vide sale deed dated 20.9.1989 but the property in that case is not the same property and even the date of purchase of the property is different on which the property in question was agreed to be purchased by her. She has placed on record several electricity bills Ex.P8 to Ex.P20 which are in the name of her husband Kawal Kirtha in which there is no address mentioned of the property on Ex.P8 to Ex.P16 and the bill is also on minimum basis. She has also tried to prove the report of Local Commission, but the property in question in the earlier civil suit filed by her is a different suit property as the same has been purchased in the year 1989. She has pleaded that she is entitled for specific performance of agreement dated 8.8.1992 but her whole case is based on presumption and the documents she relied upon again and again are not reliable.

23. It is further observed that the agreement to sell/sale deed in favour of defendant no.3 is only for Rs.35,000/- and the same is a registered document. Although it is highly improbable that earlier the property was sold for a consideration of Rs.85,000/- to the respondent/plaintiff and then it was sold to defendant No.3 for a consideration of Rs.35,000/-. The defendant no.2 was duly authorised to sell the property as per power of attorney which has been later on cancelled.

24. The document Ex.P1. does not have any receipt vide which it is proved that the payment was received by appellant-defendant from respondent-plaintiff and the amount was paid and the document was registered in the presence of the witnesses. Authenticity of Ex.D4 is more than the authenticity of document Ex.P1. The question of bonafide purchaser of defendant no.3 does not arise as the first agreement to sell Ex.P1 is a fake document, giving no right to the respondent/plaintiff. She has tried to show her possession over the property by producing electricity bills, copy of judgment passed in Civil Suit titled Smt. Shakuntla Vs Om Parkash and others. But all these documents do not support her claim that the property is in her possession and it is she who had constructed the house. As per Ex.P1, she has purchased a house but she has stated that the house was damaged in the flood in the year 1995. The Local Commission has examined the suit property in the year 1998 but he has not stated that

the property in question is in a dilapidated condition and there was Atta Chaki also in the property in question with one room and a store. The buffaloes were also present in the property in question. Thus neither her oral testimony nor documentary evidence proved her case. It is also not proved that the appellant-defendant has received Rs.85,000/- from her, hence, he is not liable to repay the same.

25. It seems to be a collusion between the respondent-plaintiff and defendant No.2 who want to extract money from appellant-defendant No. 1. Mere examination of witnesses to the agreement to sell does not make the sale binding on appellant-defendant No. 1.

26. In view of above discussion, it is observed that although defendant no,2 was empowered to enter into agreement, but the impugned agreement to sell dated 8.8.1992 is a fake document which does not fulfill the contents of receiving the consideration amount by appellant-defendant through his General Power of Attorney. If any amount has been received by General Power of Attorney defendant no.2 it is he who is liable to return the same to the respondent-plaintiff as the agreement to sell dated 8.8.1992 is a fake document, which is not supported by any oral or documentary evidence to prove the claim of the respondent-plaintiff and the sale deed in favour of defendant no.3 dated 3.12.1997 has been executed and registered and possession has been delivered to her and the same is legal and valid and biding upon the appellant- defendant No. 1 and the respondent-plaintiff has no right over the suit property. The defendant No.3 had no grievance against appellant-defendant No. 1, hence, she has not filed any suit nor she is required to prove that she is a bonafide purchaser as agreement to sell Ex.P1 is a fake document. In view of these observations, the respondent-plaintiff is not entitled for decree of specific performance of agreement to sell dated 8.8,1992 and also not entitled for recovery of Rs.85,000/- from appellant-defendant No. 1 nor entitled to any relief of permanent injunction as claimed by her. Accordingly, these issues are disposed of.

27. In view of above findings, it is observed that although document Ex.P1 has been signed by defendant No.2 but there is no receipt of receiving of on the document except only as mentioned in the document and the finding of the learned trial Court that respondent/plaintiff is entitled for a sum of Rs.85,000/- from appellant-defendant no. 1 is set aside she is held entitled to recover the same from defendant no.2. Accordingly appeal filed by respondent-plaintiff Shakuntla is modified and dismissed.

28. The appeal filed by appellant-defendant no. 1 that the agreement to sell with respondent no.3 is liable to be set aside is not accepted as there is an agreement to sell and registered sale deed with regard to the suit property and the consideration amount has also been received by the Power of attorney, who was duly authorised to sell the property of appellant-defendant no. 1 at the time of the sale deed Ex.D4. Accordingly, the appeal of appellant-defendant no. 1 is partly accepted and he is not liable to refund Rs.85,000/- with interest to the respondent/plaintiff. However, relief claimed that agreement to sell sale deed with defendant no.3 is invalid and the same is dismissed. Accordingly, Appeal No.1 of appellant-defendant No. 1 Satya is partly allowed with costs and Appeal No. II of appellant-plaintiff Shakuntla is partly allowed with costs, Decree sheet be prepared accordingly. Trial Court record along with copy of this judgment be sent to the learned trial Court immediately. A copy of judgment be placed on connected appeal file. File of the appeal be consigned to the record room, after due compliance.

Announced in open Court.

Additional District Judge,

Dated: 14.11.2014

Monaco.

CIVIL APPELLATE JURISDICTION

INTERLOCUTORY APPLICATION NO. OF 2020
IN
SPECIAL LEAVE PETITION (C) NO. OF 2020

IN THE MATTER OF:

Smt. Shanti ..... Petitioner

Versus

Satya and Others ..... Respondents

APPLICATION FOR CONDONATION OF DELAY IN RE-FILING SLP

MOST RESPECTFULLY SHOWETH:

1. That the petitioners have filing instant Special Leave Petition against the final impugned judgment and order dated 19.01.2018 passed by the High Court of Punjab and Haryana at Chandigarh in RSA No.5173 of 2014(O&M).
2. That the facts stated in the Special Leave Petitions be treated as part and parcel of this application and are not being repeated herein for the sake of brevity.
3. That it is respectfully submitted that the present Appeal was filed on 28.06.2019 and the Registry of the Hon'ble Court returned the filed on 29.06.2019 after pointing various defects.
4. Thereafter, the undersigned has informed the client as he need some material instructions in the present matter however the client in the present matter did not informed the present advocate neither did not have any further instructions to proceed with the matter
5. That the aforesaid matter was listed before this Hon'ble Court and this Hon'ble court granted 4 weeks as a last chance to cure the defects and after that, the undersigned got the defects cured in the matter by his new clerk and is re-filling the present Criminal.
6. That the delay in re-filing the special leave petition is due to the aforesaid reasons and the delay is neither deliberate nor intentional.
7. That the present application is moved bonafide and in the interest of justice for condonation of delay. If the delay in re- filing is not condoned then the petitioner will suffer irreparable loss and injuries which cannot be compensated in terms of money.

PRAYER

In the premises, it is most humbly and respectfully prayed that this Hon'ble Court may graciously be pleased to:

a) condone the delay of 525 days in re-filing the present SLP against the final impugned judgment and order dated 19.01.2018 passed by the High Court of Punjab and Haryana at Chandigarh in RSA No.5173 of 2014 (O&M).

b) pass such further or other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

Filed by

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Advocate for the Petitioners

Filed on: 17.02.2020

PART-II

QUESTION 2
(Preparation of a Draft Research Memo)

QUESTION 2:

Mr. Mohan Kumar and Ms Kavita Kumar were married according to Hindu rites and customs, in the city of Mumbai, Maharashtra, in the year 2012. Thereafter, they began residing together in their matrimonial home in the city of Pune, Maharashtra.

Mr Mohan was a Software professional, and worked for KTL Solutions Private Limited, and earned INR 95,000 per month. Ms Kavita was a mathematics teacher in a private school in Pune, and earned INR 50,000/- per month.

On 5th of May, 2014, a girl child, by the name of Ruchi (henceforth 'the child'), was born to them. In January 2017, the relationship of Mr Mohan and Ms Kavita deteriorated to a point that it became untenable for them to cohabit. Ms Kavita left the matrimonial home and began residing in Vashi, Navi Mumbai, Maharashtra, where she took up a job in a private coaching centre. The parties decided to opt for divorce by mutual consent, and the same was finalized in December 2018.

Since Ruchi (the child) had a learning disability, she went to a school that was equipped to provide necessary accommodations to help her thrive. So as not to disturb her school schedule and other activities, the child continued to reside with Mr Mohan at Pune. Ms Kavita had joint custody of the child during weekends and vacations. This arrangement was also reflected in the consent terms between the parties, which became a part of the decree of Divorce dated 10th December 2018.

Mr Gopal Kumar and Ms. Deepti Kumar, the parents of Mr Mohan Kumar, were also residing with him in Pune, and had been helping take care of the child.

In September 2019, Ms Kavita married one Mr Ajay, who had two children from his previous marriage. Ruchi (the child) developed a close and affectionate relationship with Mr Ajay and his children, as she often interacted with them on her visits to her mother Ms Kavita.

On 20th of December 2021, a few days before the child was slated to visit Ms Kavita for the winter vacations, Mr Mohan (the father) met with a car accident and passed away. In view of the immediate aftermath and arrangements following the death of her father, the child continued to remain with Mr Gopal and Ms. Deepti Kumar (the grandparents) and did not go on the slated visit to Ms Kavita.

On 20th of February, 2022 Ms Kavita requested that the child come and live with her in Vashi stating that it would be in the fitness of things that the child continued to remain with the surviving parent. She also stated that she had secured admission for the child in a prestigious school in Vashi.

The grandparents declined this offer. They said that the child was in shock after the death of her father, and an immediate removal from familiar surroundings, her grandparents, and the school would not be in the interest of the child. They however offered that Ms Kavita could speak to the child daily on Whatsapp video calls, and that she could come and visit the child in Pune every week.

Ms Kavita came to Pune on 25th of February 2022, and met the child. She, thereafter expressed a desire to take the child out to see a movie, and undertook to drop the child back to the grandparents' home after the movie at around 6 pm.

At around 7 pm, when Ms Kavita and the child had not returned, the grandparents grew worried, and tried reaching the mobile phone of Ms Kavita, which was switched off. After waiting till 9 pm, they grew more uneasy, and went to the mall in question where Ms Kavita and the child were to watch the movie. They also made enquiries in various stores in the mall and other adjoining areas. The next morning, i.e. 26th of February 2022, they lodged a complaint at the P.S Kothrud, Pune. On the evening of 26.2.2022 they learnt (through some relatives) that the

mother and child were in Ms Kavita and Mr Ajay's home at Vashi. Repeated calls to the phones of Ms Kavita and Mr Ajay were to no avail, nor were they allowed inside the home by Ms Kavita when they came to Vashi.

The grandparents approach you to understand the law on custody of minors and the legal remedies available to them. They are only interested in expeditiously regaining custody of the child, who they have learnt is extremely emotionally distressed at being separated from them and from her friends in school. They do not want to prosecute Ms Kavita or register a criminal complaint against her. Prepare a brief research memo, detailing the remedies available to Ms Deepti and Mr Gopal, using the following resources:

1) The Hindu Minority And Guardianship Act, 1956, (Whole Statute)
2) The Guardians And Wards Act, 1890 (Entire Chapter III (Duties, Rights and Liabilities of Guardians))
3) Nil Ratan Kundu v. Abhijit Kundu reported in (2008) 9 SCC 413 (Extracts Enclosed)
4) Rajeswari Chandrasekar Ganesh v. State Of Tamil Nadu And Other reported in 2022 SCC Online SC 885 (Extracts Enclosed)
5) Tejaswini Gaud And Ors V. Shekhar Jagdish Prasad Tewari And Ors. reported in (2019)7SCC42 (Extract Enclosed)
6) Anjali Kapoor v. Rajiv Baijal, reported in (2009) 7 SCC 322 (Extract enclosed)

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THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

ARRANGEMENT OF SECTIONS

SECTIONS

THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

ACT NO. 32 OF 1956

[*25th August*, 1956.]

An Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus.

BE it enacted by Parliament in the Seventh Year of the Republic of India as follows:—

1. Short title and extent.—(*1*) This Act may be called the Hindu Minority and Guardianship Act, 1956.

(*2*) It extends to the whole of India and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. Act to be supplemental to Act 8 of 1890.—The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890 (8 of 1890).

3. Application of Act.—(*1*) This Act applies,—

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is a Buddhist, Jain or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jains, or Sikhs by religion, as the case may be:—

(i) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion;

(ii) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jain or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(iii) any person who is convert or re-convert to the Hindu, Buddhist, Jain or Sikh religion.

([1]) Notwithstanding anything contained in sub-section (*1*) nothing contained in this Act shall apply to the members of any scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

2

[(*2A*) Notwithstanding anything contained in sub-section (*1*), nothing contained in this Act shall apply to the Renoncants of the Union Territory of Pondicherry.]

(*3*) The expression "Hindu", in any provision of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

4. Definitions.—In this Act,—

(a) "minor" means a person who has not completed the age of eighteen years;

(b) "guardian" means a person having the care of the person of a minor or of his property or of both his person and property, and includes—

(i) a natural guardian,

[1]. Ins. by Act 26 of 1968, s. 3(*1*) and the Schedule (w.e.f. 24-5-1968).

(ii) a guardian appointed by the will of the minor's father or mother,

(iii) a guardian appointed or declared by a court, and

(iv) a person empowered to act as such by or under any enactment relating to any Court of wards.

(c) "natural guardian" means any of the guardians mentioned in section 6.

5. **Over-riding effect of Act.**—Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act Shall cease to have effect with respect to any matter for which provision is made in this Act.

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

6. **Natural guardians of a Hindu minor.**—The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.—In this section, the expressions "father" and "mother" do not include a step-father and a step-mother.

7. **Natural guardianship of adopted son.**—The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

8. **Powers of natural guardian.**—(*1*) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,—

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (*1*) or sub-section (*2*), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in subsection (*2*) except in case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining the permission of the court under sub-section (*2*) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular—

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;

(b) the court shall observe the procedure and have the powers specified in sub-sections (*2*), (*3*) and (*4*) of section 31 of that Act; and

(c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the Acts mentioned in sub-section (*2*) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section, "Court" means the city civil court or a district court or a court empowered under section 4A of the Guardians and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

9. **Testamentary guardians and their powers.**—(*1*) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(2) An appointment made under sub-section (*1*) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian.

(3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may; by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

(5) The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

(6) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.

10. **Incapacity of minor to act as guardian of property.**—A minor shall be incompetent to act as guardian of the property of any minor.

11. ***De facto* guardian not to deal with minor's property.**—After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor.

12. **Guardian not to be appointed for minors undivided interest in joint family property.**— Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest:

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

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.

THE GUARDIANS AND WARDS ACT, 1890

CHAPTER III

DUTIES, RIGHTS AND LIABILITIES OF GUARDIANS

Guardian of the person

24. Duties of guardian of the person.—A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.

25. Title of guardian to custody of ward.—(*1*) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

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

26. Removal of ward from jurisdiction.—(*1*) A guardian of the person appointed or declared by the Court unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove *the* ward from the limits of its jurisdiction except for such purposes as may be prescribed.

(*2*) The leave granted by the Court under sub-section (*1*) may be special or general, and may be defined by the order granting it.

RELEVANT EXTRACTS FROM CASE LAWS:

***Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413**

"3. To understand the controversy in the appeal, it is appropriate if we narrate the relevant facts of the case:

The appellants herein, (*i*) Nil Ratan Kundu and (*ii*) Smt Kabita Kundu are maternal grandfather and grandmother respectively of minor Antariksh, father and mother of deceased Mithu Kundu and father-in-law and mother-in-law of Abhijit Kundu, the respondent herein. It is the case of the appellants that they had a daughter, named Mithu whom they gave in marriage to Abhijit Kundu on 8-8-1995. The marriage was performed according to Hindu rites and ceremonies. Sufficient amount of dowry, by way of money, ornaments and other articles, was given to the respondent.

4. According to the allegation of the appellants, however, the respondent and his mother were not satisfied with the dowry and they started torturing Mithu for bringing more money from the appellants. On 18-11-1999, a male child, Antariksh was born from the said wedlock. The appellants thought that after the birth of a son, torture on Mithu would be stopped. Unfortunately, however, it did not so happen. Mithu was totally neglected and the harassment continued. She became seriously sick. Coming to know about the ill health of Mithu, the appellants brought her to their house and got her admitted in a nursing home for medical treatment. On being cured, she returned to her matrimonial home, but the demand of dowry persisted and the physical and mental cruelty did not stop.

5. In the night of 9-4-2004, as alleged by the appellants, Mithu was brutally assaulted by the respondent and his mother and was brought to a hospital where she was declared dead. Immediately on the next day i.e. on 10-4-2004, Appellant 1 lodged first information report (FIR) against the respondent and his mother at Baranagar Police Station which was registered as Case No. 90 for offences punishable under Sections 498-A and 304 of the Penal Code, 1860 (IPC). The respondent was arrested by the police in that case.

6. On 18-4-2004, custody of Antariksh was handed over to the appellants. Antariksh was found in sick condition from the residence of the respondent. At that time, he was only of five years. It was his maternal grandfather, Appellant 1 who maintained the child with utmost love and affection. He was admitted to St. Xavier's Collegiate School, Kolkata which is a well-known and well-reputed school in the State of West Bengal.

7. After due investigation of the case, on 31-5-2005, the police submitted a charge-sheet against the respondent and his mother and the criminal case is pending. After the respondent was enlarged on bail, he filed an application under the Guardians and Wards Act, 1890 (hereinafter referred to as "the 1890 Act") praying for custody of Antariksh.

8. A reply was filed by the appellants to the said application strongly objecting to the prayer made by the respondent. It was expressly stated in the reply that custody of child Antariksh was given to them when he was found in ailing condition in the house of the respondent. The respondent and his mother had killed their daughter and a criminal case was pending and custody of Antariksh may not be given to the respondent father.

9. The trial court, after considering the evidence on record, allowed the application and held that the respondent was the father and natural guardian of Antariksh and the present and future of Antariksh would be better secured in the custody of the respondent. Accordingly, it passed an order that custody of Antariksh be "*immediately*" given to the father.

10. Being aggrieved by the said order, the appellants approached the High Court. But the High Court also, by the order impugned in the present appeal, dismissed the appeal holding that the trial court was right in ordering custody to be given to the father and the said order did not suffer from infirmity. The Division Bench of the High Court, therefore, directed the appellants to hand over the child, Antariksh in the custody of his father with visitation rights to the appellants. The said order is challenged by the appellants, maternal grandparents of Antariksh in this Court.

42. In *Rosy Jacob* v. *Jacob A. Chakramakkal* [(1973) 1 SCC 840] , this Court held that the object and purpose of the 1890 Act is not merely physical custody of the minor but due protection of the rights of the ward's health,

maintenance and education. The *power* and *duty* of the court under the Act is the welfare of the minor. In considering the question of welfare of a minor, due regard has of course to be given to the right of the father as natural guardian, but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship. The Court further observed that 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. The Court also observed that children are not mere chattels, nor are they toys for their parents. The absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions, must yield to the consideration of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of society and 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 the welfare of the minor children and the rights of their respective parents over them.

.....

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 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.

....

54. The approach of both the courts is not in accordance with law and consistent with the view taken by this Court in several cases. For instance, both the courts noted that the appellants (maternal grandparents) are giving "all love and affection" to Antariksh, but that does not mean that Antariksh will not get similar love and affection from his father. It was also observed that the appellants no doubt got Antariksh admitted to a well-reputed school (St. Xavier's Collegiate School, Kolkata), but it could not be said that the father will not take personal care of his son. Both the courts also emphasised that the father has the right to get custody of Antariksh and he has not invoked any disqualification provided by the 1956 Act.

55. We are unable to appreciate the approach of the courts below. This Court in a catena of decisions has held that the controlling consideration governing the custody of children is the welfare of children and not the right of their parents.

57. In our opinion, in such cases, it is not the "negative test" that the father is not "unfit" or disqualified to have custody of his son/daughter that 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 that the court should exercise the power to grant or refuse custody of a minor in favour of the father, the mother or any other guardian.

58. Though this Court in *Rosy Jacob* [(1973) 1 SCC 840] held that children are not mere chattels nor toys, the trial court directed handing over custody of Antariksh "*immediately*" by removing him from the custody of his maternal grandparents. Similarly, the High Court, which had stayed the order of the trial court during the pendency of appeal, ordered handing over Antariksh to his father *within twenty-four hours positively*. We may only state that a child is not "*property*" or "*commodity*". To repeat, issues relating to custody of minors and tender-aged children have to be handled with love, affection, sentiments and by applying human touch to the problem.

66. In our considered opinion, the court was not right. Apart from the statutory provision in the form of sub-section (3) of Section 17 of the 1890 Act, such examination also helps the court in performing onerous duty, in exercising discretionary jurisdiction and in deciding the delicate issue of custody of a tender-aged child. Moreover, the final decision rests with the court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. *Normally*, therefore, in custody cases, wishes of the minor should be ascertained by the court before deciding as to whom the custody should be given.

.....

71. In the instant case, on overall consideration we are convinced that the courts below were not right or justified in granting custody of minor Antariksh to Abhijit, the respondent herein without applying relevant and well-settled principle of welfare of the child as the paramount consideration. The trial court ought to have ascertained the wishes of Antariksh as to with whom he wanted to stay.

72. We have called Antariksh in our chamber. To us, he appeared to be quite intelligent. When we asked him whether he wanted to go to his father and to stay with him, he unequivocally refused to go with him or to stay with him. He also stated that he was very happy with his maternal grandparents and would like to continue to stay with them. We are, therefore, of the considered view that it would not be proper on the facts and in the circumstances to give custody of Antariksh to his father, the respondent herein.

73. For the foregoing reasons, the appeal deserves to be allowed and is accordingly allowed. The application filed by the respondent, Abhijit for custody of his son, Antariksh, is ordered to be dismissed. In view of the facts and circumstances of the case, however, there shall be no order as to costs."

Rajeswari Chandrasekar Ganesh Versus State of Tamil Nadu and Other

2022 SCC OnLine SC 885

"principles of law governing the rights of the parties:

71. The Guardians and Wards Act, 1890, was primarily enacted to consolidate the various Acts then in force keeping in view the personal law of diverse communities in India. It, however, did not encroach upon the jurisdiction of the Courts of Wards and did not take away any powers vested in the High Courts or the Supreme Court. A 'minor' under the Act has been defined as a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority. A 'guardian' has been defined as a person having the care of the person of a minor or of his property or of both his person and property. Section 6 of the Act provides that no provision in the Act shall be construed to take away or derogate from any power to appoint a guardian of a minor's person or property, or both, which is valid by the law to which the minor is subject. Section 7 gives power to the Court that if it is satisfied that it is for the welfare of a minor that an order should be made, it may make an order appointing a guardian of his person or property, or both, or declaring a person to be such a guardian. Section 8 lays down that no order under Section 7 will be made except on the application of the person desirous of being, or claiming to be, the guardian of the minor or any relative or friend of the minor or the Collector of the district in which the minor ordinarily resides or in which he has property or the Collector having authority with respect to the class to which the minor belongs. Section 9 deals with the territorial jurisdiction of the court. Section 10 lays down the manner in which an application is to be made and what is to be stated in the application. Section 11 provides for the procedure on admission of such an application. Section 12 gives power to the court to make interlocutory order for production of a minor and interim protection of his person and property. Section 17 enjoins upon the court to have due regard to the personal law of the minor and specially take note of the circumstances which point towards the welfare of the minor in either appointing a guardian or declaring a guardian. If the minor is old enough to form an intelligent preference, the court may be justified to consider that preference also in coming to the final conclusion. Further, no person can be appointed as a guardian against his own will.

72. The Hindu Minority and Guardianship Act, 1956 was enacted as a law complementary to the Guardians and Wards Act, 1890. This defines a 'minor' to be a person who has not completed the age of eighteen years. 'Guardian' has been defined as a person having the care of the person of a minor or of his property or of both his person and property and includes - (i) a natural guardian, (ii) a guardian appointed by the will of the minor's father or mother, (iii) a guardian appointed or declared by a Court, and (vi) a person empowered to act as such by or under any enactment relating to any court of wards. 'Natural guardian', according to this Act, means any of the guardians mentioned in Section 6. Section 6 says that the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in the joint family property) are - (a) in the case of a boy or an unmarried girl, the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Section 8 lays down that the natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate but the guardian can, in no case, bind the minor by a personal covenant. Sub-section (5) of Section 8 lays down that the Guardians and Wards Act, 1890, shall apply in certain circumstances. Section 13 of the Act lays down that in the appointment or declaration of any person as guardian of Hindu minor by a Court, the welfare of the minor shall be the paramount consideration. Indeed sub-section (2) of Section 13 lays down that no person shall be entitled to the guardianship by virtue of the provisions of the 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 section is complementary to Section 17 of the Guardians and Wards Act, 1890 which lays down that in appointing or declaring the guardian of a minor the Court shall 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.

73. A mere reading of the provisions of the two Acts referred to above makes it obvious that the welfare of the minor predominates to such an extent that the legal rights of the persons claiming to be the guardians or claiming to be entitled to the custody will play a very insignificant role in the determination by the court.

74. Ms. Arora does not really contest the above proposition. What she contends is that the father being the natural guardian of his two minor children, the custody of the father cannot be termed as illegal or unlawful restraint on the minor. In that context no writ of Habeas Corpus can issue. Her contention is that before a writ of Habeas Corpus can issue, it has to be shown that there is either unlawful detention or custody or there is imminent or serious danger to the person detained, particularly if he or she is minor.

Writ of habeas corpus:

75. In a petition seeking a writ of Habeas Corpus in a matter relating to a claim for custody of a child, the principal issue which should be taken into consideration is as to whether from the facts of the case, it can be stated that the custody of the child is illegal.

...

79. The exercise of the extraordinary jurisdiction for issuance of a writ of Habeas Corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a *prima facie* case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant becomes entitled to the writ as of right.

80. The object and scope of a writ of Habeas Corpus in the context of a claim relating to the custody of a minor child fell for the consideration of this Court in *Nithya Anand Raghavan* (supra) and it was held that the principal duty of the court in such matters should be to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.

81. Taking a similar view in the case of *Syed Saleemuddin* v. *Dr. Rukhsana*, (2001) 5 SCC 247, it was held by this Court that in a Habeas Corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be

unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. It was stated thus:

> *"11...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration for the court..."*

82. The question of maintainability of a Habeas Corpus petition under Article 226 of the Constitution of India for the custody of a minor was examined by this Court in *Tejaswini Gaud* v. *Shekhar Jagdish Prasad Tewari*, (2019) 7 SCC 42, and it was held that the petition would be maintainable where the detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of Habeas Corpus can be availed in exceptional cases where the ordinary remedy provided by the law is either unavailable or ineffective...

83. In the case of *Anjali Kapoor* v. *Rajiv Baijal*, (2009) 7 SCC 322, where the custody of a minor child was being claimed by the father being the natural parent from the maternal grandmother, the mother having died in child birth, it was held that taking proper care and attention in upbringing of the child is an important factor for granting custody of child, and on facts, the child having been brought up by the grandmother since her infancy and having developed emotional bonding, the custody of the child was allowed to be retained by the maternal grandmother. While considering the competing rights of natural guardianships vis-a-vis the welfare of the child, the test for consideration by the Court was held to be; what would best serve the welfare and interest of the child. Referring to the earlier decisions in *Sumedha Nagpal* v. *State of Delhi*, (2000) 9 SCC 745; *Rosy Jacob* v. *Jacob A. Chakramakkal*, (1973) 1 SCC 840; *Elizabeth Dinshaw* v. *Arvand M. Dinshaw*, (supra) and *Muthuswami Chettiar* v. *K.M. Chinna Muthuswami Moopanar*, AIR 1935 Mad 195, it was also held that the welfare of child prevails over the legal rights of the parties while deciding the custody of minor child. The observations made in the judgment in this regard are as follows:

> *"14. The question for our consideration is, whether in the present scenario would it be proper to direct the appellant to hand over the custody of the minor child Anagh to the respondent.*
>
> *15. Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. (See* Sumedha Nagpal *v.* State of Delhi." *(2000) 9 SCC 745 (SCC p. 747, paras 2 & 5).*

84. In *Rosy Jacob* v. *Jacob A. Chakramakkal* (supra), this Court has observed that:

> *"7...the principle on which the court should decide the fitness of the guardian mainly depends on two factors : (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors."*

85. This Court considering the welfare of the child also stated that : (SCC p. 855, para 15)

> *"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...."*

86. In *Elizabeth Dinshaw* (supra), this Court has observed that whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

...

89. The question as to what would be the dominating factors while examining the welfare of a child was considered in *Walker* v. *Walker & Harrison*, 1981 New Ze Recent Law 257 and it was observed that while the material considerations have their place, they are secondary matters. More important are stability and security,

loving and understanding care and guidance, and warm and compassionate relationships which are essential for the development of the child's character, personality and talents. It was stated as follows:

> *"Welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."*

90. In the context of consideration of an application by a parent seeking custody of a child through the medium of a Habeas Corpus proceeding, it has been stated in *American Jurisprudence*, 2nd Edn. Vol. 39 as follows:

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

91. Thus, it is well established that in issuing the writ of Habeas Corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as *parens patriae*, for the protection of its minor ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as *parens patriae*, has in promoting the best interests of the child.

92. The general principle governing the award of custody of a minor is succinctly stated in the following words in *Halsbury's Laws of England*, Fourth Edition, Vol. 24, Article 511 at page 217:

> *"... Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father.""*

***Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari*, (2019) 7 SCC 42**

"2. Brief facts of the case are that marriage of Respondent 1 was solemnised with Zelam on 28-5-2006. During the fifth month of her pregnancy i.e. in May 2017, Zelam was detected with breast cancer. Respondent 1 and Zelam were blessed with a girl child named Shikha on 14-8-2017. While Zelam was undergoing treatment, child Shikha was with her father Respondent 1 till November 2017.

3. Unfortunately, on 29-11-2017, Respondent 1 was suddenly hospitalised and he was diagnosed with Tuberculosis Meningitis and Pulmonary Tuberculosis. While he was undergoing treatment, Appellant 1 Tejaswini Gaud — one of the two sisters of Zelam and Appellant 4 Dr Pradeep Gaud who is the husband of Tejaswini, took Zelam along with Shikha to their residence at Mahim, Mumbai for continuation of the treatment. Later, in June 2018, Zelam was shifted to her paternal home along with Shikha in Pune i.e. residence of Appellant 3 Samir Pardeshi, brother of Zelam. In July 2018, they were again shifted to the house of Appellant 1 in Mumbai.

4. On 17-10-2018, Zelam succumbed to her illness. Child Shikha continued to be in the custody of the appellants in Pune at the residence of Appellant 3 till 17-11-2018. Respondent 1 father was denied the custody of child and on 17-11-2018, he gave a complaint to Dattawadi Police Station, Pune. Thereafter, Respondent 1 father approached the High Court by filing a writ petition seeking custody of minor child Shikha. Respondent 1 father is a postgraduate in Management and is working as a Principal Consultant with Wipro Limited.

5. The High Court held that Respondent 1 father, the only surviving parent of the child is entitled to the custody of the child and the child needs love, care and affection of the father. The High Court took into account that Respondent 1 was hospitalised for a serious ailment and in those circumstances, the appellants have looked after the child and in the interest and welfare of the child, it is just and proper that the custody of the child is handed over back to the first respondent. However, the High Court observed that the efforts put in by the appellants in taking care of the child has to be recognised and so the High Court granted Appellants 2 and 3 access to the child.

6. The appellants contend that the writ of habeas corpus cannot be issued when efficacious alternative remedy is available to Respondent 1 under the Hindu Minority and Guardianship Act, 1956. It was submitted that the child was handed over to the appellants by the ailing mother of the child who has expressed her wish that they should take care of the child and therefore, it is not a fit case for issuance of writ of habeas corpus which is issued only in cases of illegal detention. It is also their contention that the question of custody of the minor child is to be decided not on consideration of the legal rights of the parties; but on the sole and predominant criterion of what would best serve the interest and welfare of the minor and, as such, the appellants who are taking care of the child since more than a year, they alone would be entitled to have the custody of the child in preference to Respondent 1 father of the child.

7. The learned counsel appearing for the appellants submitted that though the first respondent father is a natural guardian of the minor child Shikha and has a preferential right to claim the custody of the minor child, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party, in this case, the father. It was further submitted that Section 6 of the Hindu Minority and Guardianship Act, 1956 cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child and the welfare of the minor child has to be the sole consideration.....

8. Per contra, the learned counsel appearing for the first respondent has submitted that in view of Section 6 of the Hindu Minority and Guardianship Act, 1956, father has the paramount right to the custody of the children and he cannot be deprived of the custody of the minor child unless it is shown that he is unfit to be her guardian. The learned counsel submitted that in view of his illness and the illness of the mother Zelam, mother and child happened to be in Mumbai and Pune and considering the welfare of the child, she had to be handed over to the first respondent. It was further submitted that father being a natural guardian as per the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956, the appellants have no legal right for the custody of the infant and the High Court rightly ordered the custody of the child to Respondent 1.....

10. The question falling for consideration is whether in the writ of habeas corpus filed by Respondent 1 seeking custody of the minor child from the appellants, the High Court was right in ordering that the custody of minor child be handed over to Respondent 1 father. Further question falling for consideration is whether handing over of the custody of the child to Respondent 1 father is not conducive to the interest and welfare of the minor child.

11. Section 6 of the Hindu Minority and Guardianship Act, 1956 enacts as to who can be said to be a natural guardian. As per Section 6 of the Act, natural guardian of a Hindu minor in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property) is the father, in the case of a boy or an unmarried girl and after him, the mother. Father continues to be a natural guardian, unless he has ceased to be a Hindu or renounced the world. Section 13 of the Act deals with the welfare of a minor. Section 13 stipulates that in the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration. Section 13(2) stipulates that no person shall be entitled to the guardianship by virtue of the provisions of the Act if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

12. The learned counsel for the appellants submitted that the law is well settled that in deciding the question of custody of minor, the welfare of the minor is of paramount importance and that the custody of the minor child by the appellants cannot be said to be illegal or improper detention so as to entertain the habeas corpus which is an extraordinary remedy and the High Court erred in ordering the custody of the minor child be handed over to the first respondent father. Placing reliance on *Veena Kapoor* [*Veena Kapoor* v. *Varinder Kumar Kapoor*, (1981) 3 SCC 92 : 1981 SCC (Cri) 650] and *Sarita Sharma* [*Sarita Sharma* v. *Sushil Sharma*, (2000) 3 SCC 14 : 2000 SCC (Cri) 568] and few other cases, the learned counsel for the appellants contended that the welfare of children requires a full and thorough inquiry and therefore, the High Court should instead of allowing the habeas corpus petition, should have directed the respondent to initiate appropriate proceedings in the civil court. The learned counsel further contended that though the father being a natural guardian has a preferential right to the custody of the minor child, keeping in view the welfare of the child and the facts and circumstances of the case, custody of the child by the appellants cannot be said to be illegal or improper detention so as to justify invoking extraordinary remedy by filing of the habeas corpus petition.

13. Countering this contention, the learned counsel for Respondent 1 submitted that in the given facts of the case, the High Court has the extraordinary power to exercise the jurisdiction under Article 226 of the Constitution of India and the High Court was right in allowing the habeas corpus petition. The learned counsel has placed reliance on *Gohar Begam* [*Gohar Begam* v. *Suggi*, AIR 1960 SC 93 : 1960 Cri LJ 164] and *Manju Malini Seshachalam* [*Manju Malini Seshachalam* v. *Vijay Thirugnanam*, 2018 SCC OnLine Kar 621 : (2018) 4 AIR Kant R 166] . Contention of Respondent 1 is that as per Section 6 of the Hindu Minority and Guardianship Act, Respondent 1, being the father, is the natural guardian and the appellants have no authority to retain the custody of the child and the refusal to hand over the custody amounts to illegal detention of the child and therefore, the writ of habeas corpus was the proper remedy available to him to seek redressal.

14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

...

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

...

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties

to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

...

21. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India.

...

Welfare of the minor child is the paramount consideration

26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

...

32. In the case at hand, the father is the only natural guardian alive and has neither abandoned nor neglected the child. Only due to the peculiar circumstances of the case, the child was taken care of by the appellants. Therefore, the cases cited by the appellants are distinguishable on facts and cannot be applied to deny the custody of the child to the father.

33. The child Shikha went into the custody of the appellants in strange and unfortunate situation. Appellants 1 and 2 are the sisters of deceased Zelam. Appellant 4 is the husband of Appellant 1. All three of them reside at Mahim, Mumbai. Appellant 3 is the married brother of Zelam who resides in Pune. During the fifth month of her pregnancy, Zelam was diagnosed with stage 3/4 breast cancer. Zelam gave birth to child Shikha on 14-8-2017. On 29-11-2017, Respondent 1 collapsed with convulsions due to illness. Upon his collapse, he was rushed to hospital where he was diagnosed with Tuberculosis Meningitis and Pulmonary Tuberculosis. He was kept on ventilator for nearly eight days, during which period, appellants took care of Zelam and the child. The first respondent had to undergo treatment in different hospitals for a prolonged period. From 29-11-2017 to June 2018, Zelam and Shikha stayed at the residence of the appellants in Mumbai. During this period, Zelam underwent mastectomy surgery. Zelam later relapsed into cancer and decided to get treatment from a doctor in Pune and therefore, shifted to Appellant 3's house at Pune with Shikha and Zelam passed away on 17-10-2018. After recovering from his illness, the respondent visited Pune to seek custody of the child. But when they refused to hand over the custody, the father was constrained to file the writ petition seeking custody of the child. The child Shikha thus went to the custody of the appellants in unavoidable conditions. Only the circumstances involving his health prevented the father from taking care of the child. Under Section 6 of the Act, the father is the natural guardian and he is entitled to the custody of the child and the appellants have no legal right to the custody of the child. 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.

34. As observed in *Rosy Jacob* [*Rosy Jacob* v. *Jacob A. Chakramakkal*, (1973) 1 SCC 840] earlier, the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well being of the guardian, child's ordinary comfort, contentment, health, education, etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.

35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.

36. The appellants submit that handing over of the child to the first respondent would adversely affect her and that the custody can be handed over after a few years. The child is only 1½ years old and the child was with the father for about four months after her birth. If no custody is granted to the first respondent, the Court would be depriving both the child and the father of each other's love and affection to which they are entitled. As the child is in tender age i.e. 1½ years, her choice cannot be ascertained at this stage. With the passage of time, she might develop more bonding with the appellants and after some time, she may be reluctant to go to her father in which case, the first respondent might be completely deprived of her child's love and affection. Keeping in view the welfare of the child and the right of the father to have her custody and after consideration of all the facts and circumstances of the case, we find that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent.

37. Taking away the child from the custody of the appellants and handing over the custody of the child to the first respondent might cause some problem initially; but, in our view, that will be neutralised with the passage of time. However, till the child is settled down in the atmosphere of the first respondent father's house, Appellants 2 and 3 shall have access to the child initially for a period of three months for the entire day i.e. 8.00 a.m. to 6.00 p.m. at the residence of the first respondent. The first respondent shall ensure the comfort of Appellants 2 and 3 during such time of their stay in his house. After three months, Appellants 2 and 3 shall visit the child at the first respondent's house from 10.00 a.m. to 4.00 p.m. on Saturdays and Sundays. After the child completes four years, Appellants 2 and 3 are permitted to take the child on every Saturday and Sunday from the residence of the father from 11.00 a.m. to 5.00 p.m. and shall hand over the custody of the child back to the first respondent father before 5.00 p.m. For any further modification of the visitation rights, either parties are at liberty to approach the High Court.

38. The impugned judgment of the High Court dated 6-2-2019 in *Shekhar Jagdish Prasad Tewari* v. *State of Maharashtra* [*Shekhar Jagdish Prasad Tewari* v. *State of Maharashtra*, 2019 SCC OnLine Bom 214] is affirmed subject to the above directions and observations. The appellants shall hand over the custody of the child to the first respondent father on 10-5-2019 at 10.00 a.m. at the residence of the first respondent. Keeping in view the interest of the child, both parties shall cooperate with each other in complying with the directions of the Court. This appeal is accordingly disposed of."

***Anjali Kapoor v. Rajiv Baijal*, (2009) 7 SCC 322**

"2. The facts of the case in brief are: the respondent, Rajiv Baijal had got married to the appellant's daughter, Meghana on 16-1-1998 and lived together in Pune (Maharashtra). Smt Meghana went to Indore to the appellant's residence for delivery of the child. She was admitted in Noble Hospital, Indore and gave birth to a female child on 20-5-2001, but she did not survive to see the newborn baby. As the child was born premature, she was kept in an incubator in the hospital for nearly 45 days. After discharge from the hospital, the infant was brought to the residence of the appellant, and she was named Anagh. Adding to the agony, just in a span of two months, the appellant lost her husband also on 29-7-2001.

3. The respondent herein filed an application under the Guardian and Wards Act, 1890 before the Family Court, inter alia asserting that being the father of the child Anagh, he is her natural guardian and therefore, entitled to the custody of the child. In support of the claim made, the respondent had asserted before the Family Court

that Anagh was not properly looked after by the appellant and it was perilous for the child to continue in the custody of the appellant.

7. The Family Court, Indore in its order dated 18-3-2004 has observed that it cannot be concluded that the respondent although has borrowed money from several persons, will not be in a position to bring up her daughter and bear her educational expenses. The Court has also taken note of the fact that the child Anagh is taken care of by the appellant's brother-in-law, who has two grown-up children, and therefore, it cannot be said that the respondent will not be in a position to take care of the welfare of the child. Therefore, giving priority to the welfare of the minor child, it is advisable to give custody of minor child Anagh to the respondent, where she will be looked after well by the respondent and his family members.

8. Aggrieved by the said order, the appellant had carried the matter to the High Court by filing Miscellaneous Appeal No. 750 of 2004. The High Court in its judgment has held that there are no compelling reasons on the basis whereof the custody of the child should be denied to her respondent father. The respondent has been making efforts right from the infancy of the child for guardianship of the child which was strongly resisted by his mother-in-law. The Court has also taken note of the fact that the appellant has lost her husband and has, therefore, suffered a great financial set back. Therefore, for better upbringing and welfare of the child her custody should be entrusted to her father. Aggrieved by the said judgment, the appellant is before us.

15. Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. [See *Sumedha Nagpal* v. *State of Delhi* [(2000) 9 SCC 745 : 2001 SCC (Cri) 698] (SCC p. 747, paras 2 & 5).]

22. Bearing these factors in mind, we proceed to consider as to who is fit and proper to be the guardian of the minor child Anagh in the facts and circumstances of the present case. In this case, the appellant is taking care of Anagh, since her birth when she had to go through intensive care in the hospital till today. The photographs produced by her along with the petition, which is not disputed by the other side would clearly demonstrate the amount of care, affection and the love that the grandmother has for the child having lost her only daughter in tragic circumstances. She wants to see her daughter's image in her grandchild. She has bestowed her attention throughout for the welfare of reminiscent of her only daughter, that is the minor child which is being dragged from one end to another on the so-called perception of judicial precedents and the language employed by the legislatures on the right of natural guardian for the custody of minor child.

23. Anagh is staying with the appellant's family and is also studying in one of the reputed schools in Indore. It must be stated that the appellant has taken proper care and attention in upbringing of the child, which is one of the important factors to be considered for the welfare of the child. Anagh is with the appellant right from her childhood which has resulted into a strong emotional bonding between the two and the appellant being a woman herself can very well understand the needs of the child. It also appears that the appellant, even after her husband's demise, is financially sound as she runs her own independent business.

26. Ordinarily, under the Guardian and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute and the courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the appellant grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the appellant to retain the custody of the child.

27. In view of the above discussion, we allow this appeal and set aside the impugned order. We permit the appellant to have the custody of the child till she attains the age of majority. No order as to costs."

Space for Rough Work

Space for Rough Work

Space for Rough Work

Space for Rough Work

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1. Please do not open this Question Booklet until asked to do so.
2. **Do not leave the Examination Hall until the test is over and permitted by the Invigilator.**
3. Fill up the necessary information in the space provided on the cover of Question Booklet and the Answer Booklet before commencement of the test.
4. Please check for completeness of the Question Booklet immediately after opening.
5. **The duration of the test is 3½ hours (including reading time of 30 minutes). There are 2 questions.**
6. Answers are to be written on the Answer Booklet containing 16 pages which is provided separately. No additional sheets will be provided to answer the questions.
7. Use only **Blue/Black Ball Point Pen** for writing the answer.
8. **Each question carries 150 marks. (150×2 = Total 300 marks)**
9. Rough work, if any, is to be done on the Question Booklet only. No separate sheet will be provided/used for rough work.
10. **Calculator, Mobile and other electronic devices etc., are not permitted inside the Examination Hall.**
11. Candidates seeking, receiving and/or giving assistance from / to other candidates during the test will be disqualified.
12. Candidate is allowed to take the Question Booklet after completion of the test.
13. Appropriate civil/criminal proceedings will be instituted against the candidate taking or attempting to take this Question Booklet or part of it outside the Examination Hall before completion of examination.
14. The right to exclude any question(s) from final evaluation rests with the testing authority.
15. Do not seek clarification on any item in the Question Booklet from the Test Invigilator. Use your best judgment.

SEAL

ANSWER BOOKLET SHOULD BE HANDED OVER TO THE INVIGILATOR ON COMPLETION OF THE TEST.