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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 26th December, 2023

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CM(M) 2151/2023

..... Petitioner

Through: Mr. Siddharth Luthra, Sr. Advocate
with Mr. Aadaish Katnani, Ms.
Pragati Srivastava, Ms. Ishita
Aggarwal & Ms. Pranya Madan,
Advocates.

versus

..... Respondent

Through: Ms. Manali Singhal, Ms. Shreya
Singhal, Mr. Deepak Singh Rawat &
Ms. Mhasi Kreditsu, Advocates with
respondent in person.

CORAM:**HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)****CM APPL. 67481/2023 (Exemption)**

1. Allowed, subject to all just exceptions.
2. The application is disposed of.

CM(M) 2151/2023

3. The present Petition under Article 227 of the Constitution of India has been filed on behalf of the petitioner to set aside the impugned Order dated 20.12.2023 passed by the learned Judge, Family Court-02, South, Saket Courts, Delhi and direct the respondent not to remove their children, namely, Aadidev and Adira (*hereinafter referred to as the "minor children"*) from the jurisdiction of this Court and India, without seeking leave of the Family Court and without filing the detailed itinerary before the learned Family Court as well as to deposit the passports of the minor children with the Family Court.



4. The facts in brief are that the petitioner/father had filed the Guardianship Petition under **Sections 7, 10 and 25 of the Guardian and Wards Act, 1890** (*hereinafter referred to as the “Act, 1890”*) seeking his appointment as the sole lawful guardian of the minor children, Aadidev aged 8 years and Adira aged 4 years as well as sought their permanent custody and also sought relief to restrict the respondent/mother from removing the children from the jurisdiction of this Court.

5. The aforesaid Guardianship Petition was accompanied with an Application under **Section 12 of the Act, 1890** seeking interim custody of the minor children and *ex parte* order for restraining the respondent/mother from removing the minor children from the jurisdiction of the Court.

6. **The learned Family Judge, Family Court *vide* impugned Order dated 20.12.2023**, while considering the prayers of the petitioner herein for grant of an *ex parte* injunction against the respondent/mother restraining her from removing the minor children from the jurisdiction of the Court, in order to ensure that the *parens patriae jurisdiction* is exercised in the most effective manner, directed the British School, where the two minor children are studying, to not give any Transfer Certificate/any other document relating to transfer to either of the parents without permission of the Court.

7. **Aggrieved by this Order, the petitioner/father, by way of this writ petition, has claimed that** there is an imminent threat of the removal of the minor children from the place of ordinary residence in Delhi, India and the learned Judge, Family Court has failed to restrain the respondent/mother from leaving the jurisdiction of India along with the minor children.

8. It is submitted that it has not been considered by the learned Judge, Family Court that the minor children, who are British Passport Holders, are



in the joint custody of the parties since their birth and they cannot be permitted to be relocated by the respondent/mother outside India only to deprive the minor children of their father.

9. Further, it is asserted that the respondent/mother has already declared her intention on numerous occasions and most recently on 18.12.2023 *via* Text message of removing the minor children outside the jurisdiction of India to spite the petitioner/father. The petitioner/father apprehends that the respondent/mother shall not return the minor children to India and that the alleged claim of “*Trip to Dubai*” is a clandestine attempt to deprive the petitioner/father of his children and vice versa.

10. This apprehension emanates from the fact that the respondent has her family in London, United Kingdom and there have been repeated threats that the minor children would be taken by the respondent/mother to United Kingdom.

11. Mr. Siddharth Luthra, learned Senior Advocate for the petitioner/father, has further contended that the respondent and the minor children are British Passport Holders. In order to defeat the claim of the petitioner for permanent custody, there is every apprehension that the respondent would relocate herself along with minor children in London, United Kingdom. The intention to relocate is manifested *via* WhatsApp Message dated 18.12.2023, wherein the respondent has conveyed that she along with minor children shall be travelling to Dubai on the pretext of an event in the family, while in fact, the respondent intends to take away the minor children out of the custody of this Court to make the entire writ petition infructuous, which cannot be permitted.

12. It is asserted that the respondent/mother is already indulging in



parental alienation and has recently stopped the minor son, Aadidev from sleeping near the petitioner's parents, on the first floor of their residence, where the parties are occupying the second floor.

13. Hence, the present petition has been filed challenging the impugned Order dated 20.12.2023 passed by the learned Judge, Family Court.

14. The petitioner has thus, made the prayer that the respondent may be directed not to remove the minor children from India without seeking leave of the Family Court and without filing a detailed itinerary and direct the respondent/wife to deposit the passports of the minor children.

15. At the outset, **learned counsel on behalf of the respondent** has contended that the appropriate remedy for challenging the impugned Order dated 20.12.2023 of learned Judge, Family Court is by way of filing the Appeal under Section 19 of the Family Courts Act, 1984 (*hereinafter referred to as the "Act, 1984"*) and the Writ Petition under Article 227 of the Constitution of India is not maintainable.

16. The reliance has been placed on the decision in *Debarati Bhunia Chakraborty vs. Suman Sankar Bhunia* 2023 SCC OnLine Del 5966.

17. Mr. Siddharth Luthra, Senior Advocate, in rejoinder, has placed reliance on the judgment of the Division Bench of this Court in *Colonel Ramesh Pal Singh vs. Sughandhi Aggarwal*, 2019 SCC OnLine Del 12380 to assert that the orders passed under Section 12 of the Act, 1890 are inherently interlocutory orders and the Appeal against such orders is barred by Section 47 of the Act, 1890 and Section 19 of the Act, 1984. The reliance has also been placed on the decision in *Shah Babulal Khimji vs. Jayaben D. Kania & Anr.* AIR 1981 SC 1786.

18. Learned counsel on behalf of the respondent, on the other hand, has



vehemently argued that there is an engagement ceremony of a cousin in Dubai, which the respondent along with minor children intends to attend. It is contended by the learned counsel for the respondent that the father of the respondent has given the tickets, but the petitioner has serious opposition to the children and the respondent having a small vacation, which is completely funded by the father of the respondent. It is asserted that the petitioner himself has failed to provide the monetary support for the minor children to travel during their earlier vacation and he has now again worked out a way to prevent the minor children from going for Dubai for a short while.

19. Learned counsel on behalf of the respondent argues that it is a family function about which the petitioner and his family are well aware and some members may even attend the said function.

20. Ms. Manali Singhal, learned counsel for the respondent, further argued that the respondent had filed the Petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (*hereinafter referred to as the "D.V. Act, 2005"*), wherein the respondent herself has sought a relief that the petitioner herein restrained from taking away the minor children out of jurisdiction of this Court. She has submitted herself to the jurisdiction of this Court and the apprehensions as expressed by the petitioner/father, are completely misfounded.

21. It is also argued on behalf of the respondent that the present petition is another endeavour of the petitioner to harass the respondent and the minor children. Earlier, the respondent that the petitioner connived with the officers of the Municipal Corporation of Delhi, who visited only the second floor for sealing the same, even though the entire building, where the parties



are residing, is old and has construction of all kinds exist there. Pursuant to the Sealing Order dated 03.11.2023, the second floor of the house where the respondent is residing along with minor children, was sealed. The respondent was compelled to seek immediate relief by way of Writ Petition being W.P.(C) 14454/2023 titled *Baby Adira Jatia & Ors. vs. Union of India & Ors.*, wherein the learned Single Judge *vide* Order dated 04.11.2023 intervened and directed the MCD to immediately de-seal the second floor where the respondent along with children is residing.

22. In the end, it is submitted on behalf of the respondent that the present petition is not maintainable and is based on misfounded apprehensions which have no basis. Learned counsel on behalf of the respondent has further asserted that the respondent is willing to abide by any terms and also to submit an affidavit giving her undertaking that she along with the minor children shall return to India by 09.01.2024. Therefore, the present petition is liable to be dismissed.

23. **Submissions heard.**

24. A preliminary objection has been taken on behalf of the respondent that the impugned Order is not essentially an Interlocutory Order under Section 12 of the Act, 1890 which is not amenable to be challenged by way of a Writ. A statutory Appeal is the proper remedy and, therefore, the present petition is not maintainable.

Nature of 'Interlocutory Orders' viz. a viz., Statutory Appeals and Writ Jurisdiction:

25. **Section 19 of the Act, 1984** provides for Appeals. The relevant part of Section 19 of the Act, 1984 reads as under: -



“Section 19 —

Appeal-(1) *Save as provided in sub-section (2) and notwithstanding anything contained in the Civil Procedure Code, 1908 (5 of 1908) or in the Criminal Procedure Code, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, **not being an interlocutory order**, of a Family Court to the High Court both on facts and on law.*

(2).....

(3).....

(4).....

(5) *Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.”*

26. A bare perusal of the aforesaid provision would show that an Appeal lies both on facts and on law against every Judgment or Order “*not being an interlocutory order of the Family Court*”. Hence, to determine whether any Order or Judgment would be appealable under section 19 of the Act 1984, it would be apposite to first analyze the very nature of such “*Order*” or “*Judgment*”.

27. The Supreme Court in *Shah Babulal Khimji* (supra) explained the concept of the “*Judgment*” in relation to an “*intermediate or interlocutory Judgment*”. It was observed that “*it seems to us that the word ‘judgment’ has undoubtedly a concept of finality in a broader and not a narrower sense*”.

28. In *Shah Babulal Khimji* (supra), the Apex Court further explained that judgment can be of three kinds: -

(i) **A final judgment** — It decides all the questions or issues in controversy between the parties so far as the Trial Court is concerned is and leaves nothing to be decided.

(ii) **A preliminary judgment** — A Preliminary Decree may be by



way of an order dismissing the Suit on preliminary objection without going into the merits of the case. The Suit herein is finally decided one way or the other and there would be a judgment finally determining the cause insofar as the Trial Court is concerned. The other form of a “*preliminary judgment*” may be where the preliminary objection taken by the defendant in regard to the *maintainability* or such like objection, is decided against the defendant and the trial is directed to be continued on merits. Here also, even though the Suit is kept alive, an important aspect of the trial which affects the right of the defendant is decided and thereby construed as a “*Judgment*” appealable to a larger Bench.

(iii) **Intermediary or interlocutory judgment** — Interlocutory Orders are those orders whereby some of the steps to be taken by the parties in prosecution of the Suit may be decided which may cause some inconvenience to one party or the other, but are essentially procedural matters and do not have any trappings of finality. Such Orders are purely interlocutory and cannot be construed as “*Judgments*”, because it shall be open to the aggrieved party to make a grievance of the order in the Appeal preferred against the “*final Judgment*” of the Trial Court.

However, there may be another sub-category of these interlocutory orders, which may decide “*matters of moment*” or “*affect vital and valuable rights of the parties*” and which work serious injustice to the parties concerned. Interlocutory orders which decide “*matters of moment or affect vital and valuable rights of the parties and which work serious injustice to party concerned would be*



the intermediary orders against which an Appeal may be filed". Such orders, though interlocutory in nature, contains the attributes and characteristics of finality and must be treated as the "Judgment" within the meaning of Letters Patent.

29. Similar observations were made in the case of Shanti Kumar R. Canji vs. Home Insurance Co. of New York 1974 2 SCC 387.

30. In the case of Manish Aggarwal vs. Seema Aggarwal (2012) 192 DLT 714, while relying upon Shah Babulal Khimji (supra), it was observed that "as a measure of abundant caution we clarify that all orders as may be passed by the Family Court in exercise of its jurisdiction under Section 7 of the said Act, which have a **characteristic of an intermediate order** and not merely interlocutory order, would be amenable to the appellate jurisdiction under sub-section (1) of Section 19 of the said Act".

31. The aforementioned judgments were followed by the Coordinate Bench of this Court in Debarati Bhunia Chakraborty (supra) to conclude that from Section 19 of the Act, 1984, it is evident that an Appeal would be maintainable against any order or judgment passed by the learned Family Court, except the "interlocutory orders". However, the **interlocutory orders** which have the characteristics and trappings of finality shall be treated as the "Judgment".

32. In Debarati Bhunia Chakraborty (supra), the Petition under Article 227 of the Constitution of India was filed by the petitioner whose Application for seeking permission to relocate along with the children to United Kingdom, was dismissed by the Family Court. The learned Single Judge concluded that the impugned order took its color from Section 26 of the Act, 1890 and was appealable under Section 47(d). Even otherwise, it



had the attributes and trappings of finality and, therefore, was an appealable order under Section 19 of the Act, 1984. Hence, it declined to entertain the Writ under Article 227 of the Constitution of India.

33. In the case of Prashant Prakash Sahni vs. Devika Mehra 2020 SCC OnLine Del 2111, the Appeal was preferred against an Order *vide* which the Family Court had allowed the application of the respondent/mother to travel to the United Kingdom with a younger child, to be with her elder child, who was studying in United Kingdom. The Division Bench of this Court opined that since it was only an “*interlocutory order*”, the Appeal was not maintainable being barred by Section 19 of the Act 1984 and was thus, amenable to Writ jurisdiction.

34. Mr. Siddharth Luthra, learned Senior Advocate for the petitioner, had placed reliance on the case of Colonel Ramesh Pal Singh (*supra*), wherein it was observed that any order made under Section 12 of the Act, 1890 is not appealable under the Act, 1984 and hence, the only remedy available with the petitioner was to seek recourse to Article 227 of the Constitution of India and thus, the Writ Petition would be maintainable.

35. However, it emerges that the Division Bench of this Court in the case of Dr. Geetanjali Aggarwal vs. Dr. Manoj Aggarwal MAT.APP.(F.C.) 126/2019, *vide* Order dated 22.10.2021, observed that the orders under Section 12 of the Act, 1890, granting/refusing visitation/interim custody can do much harm to the minor child and such orders cannot be termed as procedural or left to be considered at the time of final judgment since it may cause irretrievable damage, both to the parties or to the minor child. It was, therefore, observed that the decision of Colonel Ramesh Pal Singh (*supra*) needs reconsideration and thereby was referred to a larger Bench.



Analysis and Observations

36. Be that as it may, fundamental test for determining whether an appeal or writ is maintainable against an Order it needs to be examined if an order is an “*interlocutory order*” or an “*intermediate order*”. It emerges that if the impugned order is determining the “*matters of moment having attributes of finality*” then the Appeal under Section 19 of the Act 1984, challenging the same, would be maintainable. However, if the Order is merely procedural in nature or is not determinative of any issues between the parties, then it shall be amenable to the Writ jurisdiction under Article 227 of the Constitution of India.

37. It may be observed that from the authorities discussed above, mere nomenclature of any order, whether as “*interlocutory or intermediate*”, would not determine the remedy available against the Order as the same would be dependent upon the nature and attributes of the impugned Order. A natural corollary to the above is that there may be a category of ‘*interlocutory orders*’ deciding matters of moment between the parties, having an impact on the vital rights of the parties and having the trappings of finality. Such ‘*interlocutory orders*’, which are not purely interlocutory or procedural in nature, would be appealable under section 19 of the Act 1984.

38. However, the ‘*interlocutory orders*’ which do not impinge upon the substantive rights of the parties and are either procedural or temporary or does not decide any important aspect of trial between the parties or does not have the trappings of a final judgment, would be amenable to Writ jurisdiction under Article 227 of the Constitution of India.

39. In the light of these fundamental principles, the impugned Order dated 20.12.2023 may now be considered. The impugned Order dated 20.12.2023



reads as under: -

“

20.12.2023 at 03:30 PM

Present: Sh. Rishabh Dahiya, Ld. Proxy counsel for the Petitioner.

Ld. Senior counsel for the petitioner, Ms. Geeta Luthra had yesterday pressed for ex-parte injunction that the respondent be restrained from removing the children from the jurisdiction of the court as she had submitted that the respondent/mother as well as both the children are British passport holders and the petitioner apprehends that the respondent might take the children outside India. She had relied upon the following judgments: -

- 1. Kumar V. Jahgirdar Vs. Chetana K. Ramatheertha Supreme Court – Appeal No. 2863 of 2001.***
- 2. Prateek Gupta Vs. Shilpi Gupta 2017 SCC OnLine SC 1421.***
- 3. Binita Malik Vs. Amardeep Malik Delhi District Court (Addl District Judge).***
- 4. Catherine Vs Suresh Kumar (Manu/KE/0659/2010).***

Heard. Perused the petition as well as the citations filed.

During the course of submissions, Ld. Counsel for the petitioner has stated that both the children are studying in 'The British School' at Chanakyapuri, New Delhi. In view of the nature of allegations levelled in the petition and the reliefs sought, in order to ensure that the parens patriae jurisdiction is exercised in the most effective manner at the same time also dealing with the concerns of the petitioner, the relief is granted:-

- 1. The British School – wherein the children of the parties are studying, is directed not to give any transfer certificate/any other document relating to transfer of the school to either of the parents without the permission of the court.***

Ahlmad is directed to sent a copy of this order to 'The



British School' through the official channel.

Copy of this order be given dasti to the petitioner, as prayed for.

The petitioner is also directed to communicate the order to the respondent within 24 hours and a compliance of court thereof be filed in this court.

Issue notice of the petition to the respondent on taking steps through all modes within 10 days for 07.02.2004.

(Shunali Gupta)

Judge-02/Family Courts

District South, Saket New Delhi 20.12.2023”

40. To appreciate the impugned Order dated 20.12.2023, one may refer to the relief that has been sought in the Guardianship Petition which reads as under:-

“a) Pass an order to appoint and declare the Petitioner herein to be the sole lawful guardian and permanent custodian of the minor children, namely Master Aadidev Jatia and Miss Adira Jatia under the provisions of the Guardian and Wards Act, 1890;

b) Pass an order restricting the Respondent from removing the child from the jurisdiction of this Hon'ble Court”.

41. The first relief sought by the petitioner is to be declared/appoint him as guardian and be granted permanent custody of the minor children. The second relief is to restrain the respondent from removing the children from the jurisdiction of this Court.

42. The aforementioned impugned Order does not decide any of the reliefs that are claimed. The only observation that can be of some relevance in the impugned Order is that the “*Transfer Certificate*” or any other document for transfer of the school of the minor children, be not issued by



the British School to either parent. Applying the afore-discussed parameters, this Order cannot be termed as an intermediate order having the trappings of a final judgment on any issue between the parties. **So being the case, this Order is not challengeable under Section 19 of the Act, 1984, and the only remedy to assail the same would be by way of a Writ Petition under Article 227 of the Constitution of India.**

43. Learned Senior Advocate for the petitioner, is not aggrieved by the impugned Order directing the British School not to give the Transfer Certificate, but it is claimed that the petitioner's actual apprehension is of the respondent being in process of relocating herself with the minor children in London, United Kingdom, being the British Passport Holders, which has not been addressed by the Family Court.

44. Pertinently, the respondent has admitted that the tickets have been bought for herself and the children to travel to Dubai from 30.12.2023 to 09.01.2024 only to attend the engagement ceremony of a cousin for which the petitioner has also been invited. The engagement ceremony is well within the knowledge of the petitioner as he has also been invited for the function.

45. Whether the permission should be granted or not, essentially should have been first agitated before the Family Court. However, considering that the vacations have already commenced from 23.12.2023 and there may be none available and the entire purpose of filing the present petition may get frustrated if the parties are directed to go back to the Family Court, this Court in its discretion has taken up the matter.

46. It is pertinent to observe that the respondent herself had intimated the petitioner about her intending to travel to Dubai *via* Whatsapp Message



dated 18.12.2023. Merely because the minor children are the British Passport Holders, cannot be considered as any reason for the petitioner to harbor such apprehension.

47. Furthermore, as has been submitted on behalf of the respondent that the respondent herself has invoked and submitted herself to the jurisdiction of this Court in Delhi by filing the Petition under Section 12 of the D.V. Act, 2005, wherein the respondent herself has sought a relief that the petitioner herein be restrained from taking away the minor children out of jurisdiction of this Court. The apprehension of the petitioner does not have any basis.

48. Also, the respondent has submitted that in order to prove her *bona fide*, she is willing to be bound by any terms and conditions that may be imposed on her and is also willing to submit an undertaking by way of an affidavit that she shall return with the minor children to India on 09.01.2024.

Conclusion

49. **In these circumstances, it is held to be in the interest and welfare of the minor children, to allow the respondent along with minor children to travel to Dubai from 30.12.2023 to 09.01.2024, subject to an undertaking by way of an affidavit, being filed in this Court today itself.**

50. Any observations made here are not an expression on the merits of the case and the parties are at liberty to agitate their respective rights before the concerned Family Court.

51. Accordingly, the present petition is disposed of in the above terms.

**NEENA BANSAL KRISHNA
(VACATION JUDGE)**

DECEMBER 26, 2023/S.Sharma/Jn