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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 19.01.2023.
Date of decision: 03.02.2023.

\+ CM(M) 655/2022, CM APPL. 30320/2022 (stay), CM APPL. 42224/2022 (disposal) & CM APPL. 42606/2022 (change in date)

AAKRITI KAPOOR ..... Petitioner

Through: Ms. Malavika Rajkotia with Ms.Akriti Tyagi, Adv. with petitioner in person.

Versus

ABHINAV AGARWAL ..... Respondent

Through: Ms.Geeta Luthra, Sr.Adv. with Mr.Manas Agarwal, Ms.Kamakshi Gupta, Advs. and Ms. Kavya Agrawal, Adv.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J

JUDGMENT

1. The present petition under Article 227 of the Constitution of India, preferred by the mother of a five and a half years old girl child, seeks to assail the order dated 27.05.2022 passed by the learned Family Court in MISC No. 29/2020. Vide the impugned order, the learned Family Court, while deferring disposal of the applications filed by both sides seeking modification of visitation rights, has adjourned the matter with a direction to the parties to lead evidence.

2. The brief factual matrix as emerging from the record is that the parties entered into a wedlock on 04.02.2013 as per Hindu rites and ceremonies.

Soon after their marriage, disputes arose between them; consequently the petitioner, in a state of pregnancy, moved back to her parental house where she was blessed with a baby girl Anaisha on 09.03.2017. After the birth of the child, even though the petitioner, at the request of the respondent, returned to her matrimonial home, the parties could not resolve their disputes and she on 01.10.2017, once again left for her parental home. The petitioner and the minor child are since then, living at the petitioner's parental home.

3. As the parties were not able to reconcile their differences, they entered into a settlement on 12.11.2018 as per which, they not only agreed to seek divorce by mutual consent but also agreed that the permanent custody of the minor child would remain with the petitioner. As per the terms of this settlement, the respondent was entitled to visit the minor child on the first Sunday of every month for five hours, which arrangement was to continue for six months. On 27.11.2018, the parties, filed their respective first motion petitions on the terms as mentioned in settlement agreement dated 12.11.2018, which motion was allowed by the learned Family Court. However, before filing the second motion, the parties on 25.05.2019, entered into another settlement agreement thereby modifying the visitation rights earlier agreed upon between the parties. As per the terms of this modified agreement, the respondent was, besides the existing visitation rights of five hours on the first Sunday of every month, granted overnight visitation rights. The respondent was accordingly entitled to pick up the child from the petitioner's residence in the evening on every fourth Saturday of the month and drop her back on Sunday evening. He was further granted exclusive custody of the child for five days in the summer vacations and for three days

in the winter vacations besides three hours exclusive custody on the festival of Diwali as well as on the birthday of the child. As per this settlement, it was further agreed between the parties that the petitioner would not be entitled to take the child outside the country without the leave of the Court.

4. Based on the terms of this modified settlement, the parties filed their second motion petitions under Section 13-B(2) of the Hindu Marriage Act, which came to be allowed by the learned Family Court on 20.07.2019, thereby dissolving their marriage. The respondent then got remarried in January, 2020, which fact the petitioner claims, was not brought to her knowledge for a long time even though the child was regularly visiting him as per the settlement agreement. In March, 2020, when the pandemic of Covid-19 set in, the petitioner requested the respondent to postpone the physical visits of the child till the lock down restrictions eased and requested him to instead interact with the child over video calls, which suggestion was not acceptable to him. However, once the situation of the pandemic improved, the physical visitations of the child resumed as per the settlement agreement.

5. During one of these visits, after the respondent picked up the child from the petitioner's residence on 05.07.2020, he got her tested for Covid-19 on the premise that she had developed symptoms of Covid. The child was, however, found negative. Feeling aggrieved by the child being unnecessarily tested, the petitioner, on 27.08.2020, moved an application under Section 26 of the Hindu Marriage Act seeking modification of the agreed visitation rights and prayed that the respondent be directed to interact with the minor child only through video calls. However, as the number of cases of Covid in the city increased, the petitioner did not permit the respondent to meet the

child physically.

6. Resultantly, in October, 2020, the respondent filed an execution petition No. 20/2020 seeking enforcement of his visitation rights. Vide its order dated 05.12.2020, the learned Family Court, after observing that physical meetings would not be conducive on account of the Covid-19 pandemic, directed the respondent to interact with the minor child only through video calls. This order was challenged by the respondent before this Court by way of CM (M) 641/2020, wherein this Court, with the consent of the parties, modified the visitation rights and directed the respondent to pick up the minor child from the petitioner's residence at 11 AM on every first and fourth Saturday subject to the condition that the family members of the respondent, who were likely to come in contact with the minor child, would be tested for Covid-19 before every such visitation. The physical visitations, thereafter, took place regularly for some time but on account of the subsequent increase in the number of cases and the respondent getting infected with Covid, the petitioner again requested the respondent to speak to the minor child over video calls.

7. In April 2021, the petitioner also remarried and her husband Dr. Ritesh Kanotra is a resident of Phoenix, Arizona, USA. Consequently, the petitioner, being desirous of relocating to USA along with her daughter, filed an application before the learned Family Court on 09.06.2021 seeking modification of the existing arrangement of visitation rights. The application was opposed by the respondent on the ground that petitioner's intent to relocate to USA was an attempt to deprive the respondent of the visitation rights and overnight stay granted to him by way of the settlement agreement. It was averred by the respondent that the visitation rights were granted to

him to ensure development of a bond between the minor child and him and that the curtailment of the visitation rights would have a negative impact on his relation with the child. Simultaneously, the respondent also moved an application seeking custody of the child on the ground that her relocation to USA with the petitioner would not be in her welfare and she should be allowed to live in her own country. It was further averred that the petitioner had earlier, without informing the respondent, travelled to USA leaving the child in the custody of her parents, which was clearly indicative of her not being concerned about the welfare of her child and therefore, contended that he ought to be granted the custody of the child.

8. The learned Family Court, after considering the rival submissions of the parties, has passed the impugned order dated 27.05.2022, directing the parties to lead their respective evidence. The learned Family Court has opined that since the case involved an important question of modification/grant of custody of the minor daughter of the parties, who had levelled allegations against each other, the disputed facts could be determined only after leading of evidence. It is in these circumstances that the petitioner has approached this Court by way of the present petition.

9. On 17.08.2022, when the present petition was taken up for preliminary consideration, this Court deemed it appropriate to orally examine the parties under Order X Rule 2 of the Code of Civil Procedure (CPC) and therefore directed the parties to appear before the Court on 30.08.2022. The Court further observed that it may summon other persons acquainted with the facts of the case for recording their statements under Order X CPC. Being aggrieved by this order, the respondent preferred a Special Leave Petition (SLP) before the Apex Court which was disposed of

on 10.10.2022 by holding that no interference was called for with the order passed by this Court as the same had been passed to arrive at a just and fair conclusion. The Apex Court, however left it open for both sides to raise all their objections including their right to cross-examine before this Court, at an appropriate stage, which objections were required to be considered on its own merit.

10. Consequently, in accordance with the order dated 17.08.2022, the parties were examined under Order X Rule 2 CPC on 02.11.2022. The statements of the petitioner's parents, her father-in-law as also the respondent's mother were also recorded on the same date. The Court also examined the petitioner's husband Dr. Kanotra, through video conferencing. It is pertinent to note that Dr. Kanotra categorically stated before this Court that the minor child would always be treated as his own child.

11. Having noted the factual matrix, I may now proceed to refer to the submissions of the learned counsel for the parties.

12. In support of the petition, Ms. Malvika Rajkotia, learned counsel for the petitioner begins by contending that the learned Family Court has failed to appreciate that there were no disputed questions of fact involved in the matter, warranting a direction to the parties to lead evidence and to face cross-examination. She contends that both sides are seeking modification of the mutually agreed visitation agreement on the basis of admitted facts. There is neither any dispute regarding the factum of the petitioner having married a doctor based in USA nor regarding the fact that the minor child has been in the custody of the petitioner since birth. Furthermore, it is also an admitted position that the parties had mutually agreed, both in 2018 as also in 2019 that the custody of the child would remain with the

petitioner/mother. She, therefore, submits that the learned Trial Court has gravely erred in deferring the disposal of the applications by directing the parties to lead evidence.

13. She next submits that even otherwise, the impugned order directing the parties to lead evidence, would unnecessarily delay the adjudication of the applications which, keeping in view the welfare of the minor child, are required to be disposed of at the earliest. This procedure adopted by the learned Family Court is contrary to the very objective of the Family Courts Act which envisages that summary procedure should be adopted as and when possible. By drawing my attention to the statement of object and reasons of the Family Courts Act, she submits that the Act exempts the learned Family Court from adherence to the rigid rules of procedure and evidence and clearly provides in Section 10(3) thereof that the learned Family Court can lay down its own procedure with a view to arrive at a settlement or at the truth of the facts alleged by one party and denied by other. By placing reliance on the decision of the Kerala High Court in ***Nisha Haneefa vs. Abdul Latheef and Ors., (2022) SCC Online Ker 1556***, she submits that the power granted to learned Family Court to choose its mode of procedure is indicative of the fact that it is not bound by the strictness and rigidity of the procedural laws. Furthermore, the learned Family Courts are not required to function like the ordinary Civil Courts and are granted inquisitorial powers to enquire into the truth of the matter by adopting its own procedure. In the present case, once the respondent had, at the time of entering into a settlement, both in the year 2018 and in 2019, voluntarily agreed that the custody of the daughter would be with the petitioner, who would be the sole caregiver of the child, the allegations now sought to be

levelled by the respondent were merely a counterblast to the application filed by the petitioner seeking relocation to USA. She submits that the learned Family Court failed to appreciate that the motivated allegations levelled by the respondent were liable to be ignored as the same were levelled by him only to create an impediment in her married life.

14. She next submits that the learned Family Court, while directing the recording of evidence, which will take years to be completed, has failed to appreciate that any delay in the adjudication of the petitioner's application would virtually amount to making her choose between her minor daughter and a happy married life. This she contends, would cause irreparable hardship not only to the petitioner but also to the minor child who is keenly looking forward to start a new life in USA. As a result of the pendency of these applications, the petitioner whose marriage was solemnized in April, 2021 has still not been able to join her husband in USA and is, therefore, being perforce compelled to continue to live without her husband even after almost two years of her marriage. She, therefore, prays that on account of the delay which has already occurred, this Court may itself, expeditiously decide the petitioner's application seeking relocation to USA.

15. In support of her plea as to why the petitioner should be allowed to relocate to USA with the minor child, Ms. Rajkotia submits that she has been the sole caregiver and custodian of the minor child ever since she was born and this in itself gives the daughter, a comfort that her mother loves her, which position should not be disturbed. Any alteration of this position would not be in the best interest of the child, especially when it is evident that the respondent is only trying to use the child as a tool for destroying the married life of the petitioner. The petitioner is a doctor by profession who

wishes to relocate to USA to join her husband and resume her practice at the earliest and should not be put in a situation where she has to choose between her child and her married life and career. On the other hand, if the petitioner is allowed to relocate to USA with the child, not only would she be able to make progress in her career, the same would also be in the best interest of the minor daughter as the child, she contends, would not only grow up in a happy family while in USA, but would also have better avenues for her overall development.

16. By placing reliance on the decisions of the Apex Court in ***Vikram Vir Vohra vs. Shalini Bhalla (2010) 4 SCC 209***, ***Ritika Sharan vs. Sujoy Ghosh, Civil Appeal Nos. 3544-45/2020*** & ***Rohit Thammana Gowda vs. State of Karnataka AIR 2002 SC 3511,*** she submits that it is only the welfare of the child which should be considered by the Court while deciding custody matters. She contends that the learned Family Court failed to appreciate that the allegations levelled by the parties against each other are not material for deciding the visitation rights, which are required to be determined taking into account the welfare of the child, for which purpose, she places reliance on the decision of the Bombay High Court in ***Anuradha Sharma vs. Anuj Sharma (2022) SCC Online Bom 1489.*** Her plea, thus, is that in cases where transfer of custody is sought, the usual test is to ascertain the best interests of the child and the presumption is always in favor of the parent who gives continued care to the child. In the present case, the minor child, who has been living with the petitioner since her birth, has been receiving all the love and affection from her since her tender age and it is the petitioner who has been taking efforts to ensure her all round development. The minor daughter, who has grown up receiving the love, affection and

guidance from her mother, is also deeply attached to her and this arrangement, therefore, should not be disturbed.

17. Ms. Rajkotia next submits that the respondent's plea that the petitioner is unfit to look after their minor daughter as she did not cater to her basic needs during her initial years of development and therefore, he should be granted exclusive custody, is wholly misplaced. The minor child has been staying with the petitioner since birth and it is she alone, who has been looking after her needs and well-being since her tender age. The respondent abandoned the minor daughter as soon as she was born and even shifted to Singapore for sometime without informing the petitioner. The fact that at the time of mutual divorce of the parties, the respondent had agreed that the custody of the minor daughter would remain with the petitioner is also indicative of the fact that even he was always aware that the petitioner was most suitable to retain the custody of the child. Furthermore, despite the mutually agreed limited visitation rights, the respondent did not ask for enhanced visitation rights; till the petitioner, after her marriage, sought relocation to USA. She contends that the respondent, by now levelling baseless allegations against the petitioner about her being an unfit mother, cannot be permitted to seek the custody of the child, who has always lived with the petitioner.

18. She further submits that the respondent's plea that the petitioner wants to alienate the minor child from her biological father is also without any basis. The fact that the petitioner never had any intention of alienating the daughter from her father is clear from the fact that even though, the minor child always had a USA visa till it was cancelled by the respondent on 30.04.2021, the petitioner did not leave the country without seeking

permission from the Court. Furthermore, the petitioner is not seeking any curtailment of the visitation rights of the respondent but is only seeking an adjustment thereof so that the child can continue to stay with her and grow up in a loving atmosphere. By placing reliance on the decision of the Apex Court in ***Yashita Sahu vs. State of Rajasthan, (2020) 3 SCC 67,*** wherein the Apex Court has highlighted the concept of Contact Rights in addition to the visitation rights, she submits that the petitioner is willing to protect the visitation rights of the respondent by granting him custody of the minor child during vacations when the petitioner visits India for that period or at any time when the respondent chooses to visit USA.

19. *Per contra*, Ms. Geeta Luthra, learned senior counsel for the respondent opposes the very maintainability of the writ petition by contending that there is no infirmity or perversity with the impugned order so as to warrant any interference by this Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India. The learned Family Court, after taking into account all the factual aspects has passed a reasoned and speaking order framing issues regarding grant of custody and modification of the existing custody order and has directed the parties to lead their respective evidence. She submits that this direction of the learned Family Court to the parties to lead evidence was infact necessary for determining as to whether any orders for modification of the orders for custody were called for.

20. By placing reliance on the decisions of the Apex Court in ***Puri Investments vs. Young Friends & Co. (2022) SCC Online SC 283, Garment Craft vs. Prakash Chand Goel (2022) 4 SCC 181*** and ***Celine Coelho Pereira v. Ulhas Mahabaleshwar Kholkar (2010) 1 SCC 217***, she

submits that this Court, while exercising its supervisory jurisdiction under Article 227 of the Constitution of India cannot act as a Court of Appeal and, therefore, ought not to substitute its views with that of the learned Family Court. It is only when the decision of an authority is found to be perverse and can lead to miscarriage of justice that the Court can interfere under Article 227 of the Constitution. In the present case, the decision of the learned Family Court is a well-reasoned order, which cannot be said to be perverse in any manner. The direction for leading of evidence will cause no prejudice to the petitioner and on the other hand, will assist the Court in coming to a just and proper decision as to whether the visitation rights should be modified and the custody of the child should be given to the respondent/father.

21. She next submits that even otherwise, in the light of the serious allegations levelled against each other by the parties, the issue of modification of visitation rights could be determined only after consideration of evidence to be led by the parties, as has been rightly held by the learned Family Court. Unless evidence is led, the respondent would not be able to demonstrate that the petitioner had not only travelled to USA to meet her husband, Dr. Kanotra, leaving behind their five and a half year old child with her grandparents, but had also been utterly careless in missing the due dates of the vaccinations in the year 2018. Furthermore, even when the child suffered a fracture in her arm, the petitioner instead of taking her for regular physiotherapy sessions, flew to USA, the very same day her plaster was removed. She submits that such questions regarding the welfare of the child, can only be determined on the basis of evidence led by the parties for which purpose, she seeks to place reliance on the decision of the Apex Court

in ***Sumedha Nagpal vs. State of Delhi (2000) 9 SCC 745***. In support of her plea, she also places reliance on the decision of the Madras High Court in ***K. S. Venkat Raja vs. Dr. A.B. Chitra (2005) SCC Online Mad 698*** and of the Karnataka High Court in ***Prakash vs. Akkamahadevi (2000) SCC Online Kar 497.***

22. She next submits that the statement of the parties recorded by this Court under Order X Rule 2 CPC cannot be a substitute for regular examination under oath. By placing reliance on a decision of the Apex Court in ***Kapil Corepacks (P) Ltd. Vs. Harbans Lal, (2010) 8 SCC 452***, she contends that the statements of the parties recorded under order X Rule 2 can only help to ascertain and narrow down the controversy but cannot be used for adjudication of contentious issues, which can be effectively determined, only after leading of evidence. Once the learned Family Court found that there were serious allegations levelled by the parties against each other, the Court has rightly granted them opportunity of adducing evidence, which would also enable them to cross-examine the witnesses to elucidate the truth. By placing reliance on the decisions of the Apex Court in ***State of Madhya Pradesh vs. Chintaman Sadashiv Waishampayan AIR 1961 SC 1623, Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra (2013) 4 SCC 465***and ***R.S.Nayak v. A.R.Antulay (1984) 2 SCC 183***,she contends that cross-examination is a valuable right available to every litigant, which ought not to be curtailed in any manner. Furthermore, in case, this Court decides the applications of the parties regarding the modification of the visitation rights as also the petitioner's application seeking relocation, the same would deprive the parties of their equally valuable right to file an appeal before this Court, in case, they are aggrieved by any order passed by the learned Family

Court. She submits that the right to appeal being a creation of the statute cannot be truncated merely because the petitioner is desirous that instead of the learned Family Court, this Court should itself decide her pending applications, which the learned Family Court has found, can appropriately be decided only after evidence is led by the parties.

23. Ms. Luthra next submits that in any event, relocation of the child to the USA at this tender age will have an adverse impact on her overall development. If the child is allowed to relocate to USA with the petitioner, the same would also weaken the bond between the father and the child as the respondent would be able to meet the child only once or twice a year as against the existing regular interactions as already agreed between the parties. This, she contends, would deprive the father of being associated with the child during the important stages of her life and would also severely impair the close relation which the child presently shares with the father. By placing reliance on the decision of the Apex Court in ***Ruchi Majoo vs. Sanjeev Majoo (2011) 6 SCC 749,*** she submits that the importance of a father's care and guidance in the minor daughter's life cannot be ignored and for the healthy growth of the child, it is necessary that the parents stay in touch and share all the moments of joy, sorrow, learning etc. Furthermore, once the report of the Law Commission as also the Bombay Guidelines emphasize the importance of regular physical meetings between the child and the parent, permission to the petitioner, whose conduct evidently shows that she is not concerned with the welfare of the minor child, if granted, would not only be detrimental to the interests of the minor child but would also deprive the father to meet the child regularly and on a frequent basis. Merely because the petitioner proposes to relocate to USA, the same could

not be a sole ground to grant custody of the minor child to her as the necessary factor which needs to be taken into account is the likely impact of the proposed decision on the relation between the father with the child.

24. She submits that such relocation has not been favorably considered even by the Courts in the USA, for which purpose she places reliance on the decision of the Supreme Court of California in ***In re Marriage of LaMusga, 32 Cal. 4th 1072 and in Daghir vs. Daghir, 441 N.Y.S.2d 494.*** She also places reliance on the decision of the Court of Appeals of Arizona in ***Pollock vs. Pollock, 181 Ariz. 275*** to contend that in cases where the question of the right of the mother to travel/relocate vis-à-vis the father's right to custody is involved, the burden of proof always lies on the custodial parent to show that the relocation of the child is in his/her best interest and it is the duty of the Court to ensure that a meaningful relationship is maintained between the child and the parent. The Courts in Arizona have taken a consistent view that the child should preferably remain within the jurisdiction of the Court where he or she was born. She contends that in the present case, the acts of the petitioner of travelling to USA leaving behind her minor daughter at such a tender age, when she needed her love and affection, leaving her alone when she went to stay with Dr. Kanotra when he visited India, depriving the child of the basic vaccinations and medical health care, were incidents that clearly indicated that the petitioner was not concerned with the welfare of her minor child. She, therefore, submits that once from the undisputed facts itself, it is clear that the petitioner has been a negligent mother, who has been more concerned about her married life than about her child, her application for relocation should be rejected and the father, who is in every manner fit to take care of her, should be transferred

the custody of the minor child especially when he is willing to undertake that as and when the petitioner visits India, he will give exclusive custody of the minor child to her. She, therefore, prays that the petition be dismissed.

25. Having considered the submissions of learned counsel for the parties and perused the record, I find that vide the impugned order, the learned Family Court, has opined that since the application for modification and variation of visitation rights involved disputed question of facts, the parties should lead evidence in support of their contentions and also face cross-examination. In order to appreciate the rival submissions of the parties, it would be apposite to first note the relevant extracts of the impugned order, which read as under:

> *From the pleadings containing numerous instances referred by both the parties, it is clear that there are various factual aspects alleged and denied by both the parties, and contentions and inferences being drawn on the admitted as well as disputed facts by both the parties are diametrically opposite and it is necessary and proper in the facts and circumstances of this case that parties be afforded an opportunity to lead evidence in respect of their contentions and face cross-examinations also. In my considered opinion without affording opportunity to the parties to do so, inferring in favour of one or the another will be highly improper. Detailed and disputed factual matrix require leading of the evidence by both the parties and in my considered opinion in the absence of the same, such an important aspect of modification and variation particularly with reference to the relocation to USA should not be decided as primarily it relates to the welfare of the child more than the rights of the parties.*

26. Since the petitioner has vehemently urged that the directions to the parties to lead evidence was wholly uncalled for and were, therefore, wholly

perverse, the first and foremost issue that arises for my consideration is as to whether the learned Family Court was justified in directing the parties to lead evidence in support of their contentions. As already noted hereinabove, this direction of the learned Family Court for recording of evidence is based on the premise that there were various disputed factual aspects which were required to be determined. While it is the petitioner's plea that there were no disputed facts, the respondent contends otherwise.

27. In order to appreciate these rival pleas, it may be appropriate to, at the outset, note the facts on which the parties are not at variance. The fact that the parties voluntarily entered into a settlement agreement on 25.05.2019, whereby it was mutually agreed between them that the custody of the daughter was to remain with the petitioner, is admitted by both sides. Consequently, there is no denial to the fact that both at the time of the initial settlement in 2018 and at the time of the subsequent settlement in 2019, the respondent was agreeable to the petitioner being the primary caregiver of their daughter. The respondent also does not dispute that the daughter has been in the custody of the petitioner ever since her birth and prior to the petitioner filing the application seeking modification and relocation, the respondent had never sought any modification of this visitation arrangement, which provided a limited overnight visitation right to him. The fact that the petitioner in April, 2021 has married Dr. Ritesh Kanotra, a resident of USA and wants to relocate to USA to join her husband with the minor child is also not in dispute.

28. Soon after her marriage with Dr. Kanotra, the petitioner in June, 2021 filed the application for modification of visitation rights so as to relocate to USA with the child. It is thereafter that the respondent also moved an

application in October, 2021 seeking modification of visitation rights by praying that the custody of the child be given to him. However, what emerges is that the entire basis of the petitioner's application seeking modification and relocation is that now that she is married to a doctor in USA, she needs to move to USA. It is her case that the young child has been in her exclusive care ever since birth and therefore, it would be in the interest of the child to move to USA with her. The petitioner's prayer is based solely on account of the changed circumstances as a result of her marriage with a doctor permanently residing in USA. What needs to be noted is that the petitioner's prayer for modification is not based on any act of the respondent and therefore her prayer is not based on any allegations levelled against the respondent.

29. On the other hand, even though the respondent in his application for enhancement of visitation rights, levelled various allegations against the petitioner, it is pertinent to note that this application was filed only on 27.10.2021, i.e., almost after five months of the petitioner seeking relocation. These allegations have therefore to be considered with a pinch of salt and cannot be baldly accepted. Even otherwise, most of the allegations pertained to the period between September, 2018 to February, 2019, whereafter, the parties had mutually entered into a settlement on 25.05.2019. These allegations, therefore, in my view, would not have any bearing on the question as to whether the modification needs to be allowed or not.

30. At this stage, it may be useful to note the relevant terms of the settlement agreement. Para 9 of the agreement, wherein the parties had agreed to the terms of visitation, reads as under:

> *It is further agreed between the parties that the custody/care of the child shall remain with the mother, Aakriti and husband petitioner shall have visitation rights as follows:*
>
> *(a). The husband shall meet the child Anaisha twice in a month Le. on the first Sunday of the month for five hours, i.e., from 11:00 AM to 4:00 PM. It is also agreed that the child shall be picked up by the father/petitioner er family members at the decided time and shall be dropped back by the petitioner/husband of his family members.*
> *(b) On the fourth Saturday the petitioner/family members shall pick up the child at 6:00 P.M. and petitioner/father shall drop the child back at 6:00 P.M. to the respondent /mother's house on fourth Sunday (Following day).*
> *(c) It is also agreed that during summer vacations, the petitioner shall have visitation rights to meet the child for five days and lor three days during winter vacations. The parties shall by way of exchange of emails/whatsapp messages shall decide the days of visitation during the vacations.*
> *(d). It is agreed that the petitioner shall have visitation rights for three hours on the child's birthday between 11:00 AM to 2:00 PM.*
> *(e)It is further agreed that petitioner shall have visitation rights to meet the child on the festival of Diwali for three hours Le, between 11:00 A.M. to 2:00 P.M.*

31. From a perusal of the aforesaid, it is evident that the parties had specifically agreed in May, 2019 that the custody of the child would remain with the petitioner/mother and the respondent/father would be entitled to meet the child twice a month. One of these monthly meeting was to be an overnight stay with the respondent and his family members on the fourth Saturday of every month. Besides this, the respondent was also entitled to have the custody of the child for five days in the summer vacations and three days in the winter vacations.

32. Except for the period when the pandemic was at its peak, this arrangement has continued uninterruptedly for the last more than three years during which period, the child has grown from a two years old infant to a six year old child, who has a mind of her own. There is no allegation by the respondent that the child is unhappy or that she has ever complained to him that she does not want to live with the petitioner. This is certainly an important factor especially when it is the common case of the parties that the respondent has been regularly interacting with the child either physically or through video calls. One of the main pleas of the respondent to seek custody of the child is that the petitioner had left the child in the company of her parents on some occasions to meet her then prospective husband, Dr. Kanotra. What is noteworthy is that the petitioner has not at all denied that on some occasions, she did leave the minor child with her parents but has explained that during this period, the child was being well looked after as she not only had the company of her maternal uncle and aunt but also of her two cousins. In these circumstances, I am unable to fathom as to what are the disputed facts as would be relevant for determining the issue of modification, which are needed to be proved through evidence. This Court fails to appreciate that as to what further evidence can the parties be expected to lead or what fruitful result will be achieved through cross-examination. As is evident, the petitioner has based her application on the factum of her marriage with a doctor residing in USA and of the necessity of the minor daughter, continuing to reside with her as has been the position, since birth, none of which facts have been denied by the respondent. I, therefore, have no hesitation to come to the conclusion that for the adjudication of the applications, there was absolutely no requirement for any

evidence to be led.

33. I have also considered the decisions in ***Chintaman Sadashiva Waishampayan(supra), Ayaaubkhan Noorkhan Pathan (supra), Sumedha Nagpal (supra), K.S. Venkat Raja (supra) and Akkamahadevi (supra)*** relied on by learned senior counsel for the respondent but find that the same are not applicable to the facts of the present case. While there can be no quarrel with the proposition that for adjudication of disputed facts/issues, the right to lead evidence and cross-examination is a valuable right of the parties which ought not to be curtailed, in the present case, I find that there are no disputed facts at all. These decisions therefore, do not forward the case of the respondent in any manner.

34. It appears that the learned Family Court, while passing the impugned order, has overlooked the fact that family matters, especially where minor children are involved, are required to be expeditiously decided. Learned counsel for the petitioner is therefore correct in relying on Section 10(3) of the Family Courts Act which provides that the learned Family Court can lay down its own procedure to arrive at the truth and is not at all bound by the strict rules of evidence as laid down under the Civil Procedure Code and Code of Criminal Procedure. In my view, in a case like the present, where the Family Court is required to assess the welfare of a minor child, unless there are real and substantial disputed questions of fact, the Court should try to adopt a summary procedure as far as possible. In the present case, the very fact that the parties entered into a mutual settlement whereby they agreed to the custody of the minor daughter being with the mother and the father having overnight visitation for one day in every month along with five days in summer vacations and three days in winter vacations, makes it

evident that there were no disputed questions of facts for which evidence was required to be led. After the parties arrived at this settlement, nothing material in so far as the child is concerned, has changed except that both the parties have now remarried. The impugned order, in so far as it holds that for adjudication of the applications moved by the parties, it was necessary for them to lead evidence and face cross-examination, is therefore unsustainable.

35. Having found that the applications of both the sides could have been decided on the basis of the material already on record, what next? Should this Court remand the matter back to the learned Family Court for deciding the applications or whether this Court should take upon itself, the task of deciding these applications. Ms. Luthra has vehemently urged that in case this Court, while exercising its supervisory jurisdiction under Article 227 of the Constitution of India were to decide the applications, the same would deprive the parties of their valuable right to file an appeal before this Court against the order of the learned Family Court. Even though this plea of the learned senior counsel for the respondent appears to be attractive on the first blush, this Court cannot lose sight of the fact that the petitioner married Dr. Kanotra in April, 2021 and moved the application for relocation in June, 2021 but even after more than one and half year has passed, she is still waiting for adjudication of her application on merits. The Family Courts Act is a special Act where the Court is exercising jurisdiction of an altogether different kind and is not only dealing with matters involving the now turned bitter relationship between the husband and the wife but also with questions regarding the welfare of the minor children in exercise of its *parens patriae* jurisdiction. The issues before the Family Courts are therefore, required to

be decided with promptitude. It goes without saying that any delay in adjudication of custody matters would but naturally be traumatizing for a child. In the present case, the Court is only required to determine as to whether the mother, who wishes to relocate to USA on account of her remarriage, should be permitted to take her daughter along with her by modifying the visitation rights of the respondent/father. When seen in this light, I am of the view that it will indeed be in the welfare of the child that the applications are decided at the earliest. This Court is, therefore, taking upon itself, the task of deciding the applications preferred by the parties, one by the petitioner/mother seeking modification of the custody order so that she can relocate to USA with the child and two by the respondent father, wherein he has sought, not only the enforcement of the existing visitation agreement but also the custody of the minor child.

36. In order to appreciate the prayers sought by the parties by way of these applications, it may be apposite to refer to the impugned order wherein the learned Family Court had, after noticing the grievances of the parties, observed that all the three applications pertained to the custody order, which was based on the mutual settlement entered into between them. The relevant extract of the impugned order reads as under

> *"The sole dispute in the present case relates to the custody of the child particularly in the background that the custodial parent i.e. mother is now married and the husband is a doctor in USA and she wants to relocate to USA and accordingly seeks modification of present arrangement as to the interaction of non-custodial parent i.e. father with the child which was as per the mutual settlement and was acted upon while seeking divorce by mutual consent and the order was accordingly passed while passing decree of dissolution of the marriage by mutual consent. Subsequently respondent/father*

> *has also sought custody of the child in the background that there was a contumacious breach of the order despite the custody arrangement with the father being minimal in nature. It was argued that during the Covid 19 lockdown despite direction of the court the custodial parent i.e. mother refused to permit interaction and only when he approached Hon'ble High Court, the interaction through video call and physical interaction was restored."*

37. From the aforesaid, it is evident that even though the learned Family Court was dealing with three applications, the sole question which it was required to determine was as to whether the custody order was required to be modified. The petitioner has primarily urged that now that she has remarried and her husband is settled in USA, it is necessary for her to join her husband in USA so as to fulfil her marital obligations. Furthermore, since she is a qualified radiologist, she would want to explore professional avenues in USA. Being a custodial parent and the primary caregiver, who has been single handedly taking care of the child since her birth, it would be in the interest and welfare of the child who is barely six, that she shifts to USA with the petitioner. It has been further urged that taking into account that the respondent cannot be deprived of his right to interact with the child, the petitioner is willing to undertake to bring the child to India during the vacations so that the respondent can be granted exclusive custody for three to four weeks in lieu of the agreed monthly interaction and visitation.

38. On the other hand, it is the respondent's case that given the young age of the child, even though he had agreed to the petitioner being the primary caregiver, the same was subject to the condition that he would be permitted to have regular interactions with the child so as to enable him to develop a healthy bond with her. The petitioner, having voluntarily agreed to this

arrangement, according to which the respondent is entitled to regular monthly visits on the first Sunday of every month and overnight stay on the fourth Saturday of every month, cannot now be permitted to wriggle out of this arrangement merely because she has married a doctor settled in USA. Any variation of the existing arrangement would not only be against the interest of the respondent/father but also against the welfare of the child who would be deprived of the care and guidance from her father in her growing years. It has also been urged that the petitioner's marriage with Dr. Ritesh Kanotra was the result of a pre-meditated arrangement as he was in regular touch with her for the last many years and was infact one of the reasons for the marital discord between the parties. Furthermore, it has been urged that the petitioner has been a negligent mother who has been repeatedly travelling to USA to meet Dr. Kanotra by leaving behind the child with her old parents. It has therefore been prayed that the petitioner's request for relocating to USA to the child be rejected.

39. In order to appreciate these rival submissions of the parties, it is necessary to first refer to the decisions relied upon by the parties as the same lay down the parameters for dealing with matters pertaining to the custody of minor children.

40. Since the respondent has vehemently urged that the existing custody arrangement is based on a mutual settlement, the same cannot be now altered, it may be appropriate to refer to the decision in ***Vikram Vir Vohra (supra),*** relied upon by the petitioner. In the said decision**,** the Apex Court, while allowing the request of the mother, who was the custodial parent and was wanting to relocate to Australia to pursue her career, emphasized that custody orders, even if they are consent orders, are always considered as

interlocutory orders and can always be altered in the welfare of the child. The relevant extracts of the said decision read as under:

> *12. In a matter relating to the custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child.*
>
> *13. In Rosy Jacob v. Jacob A. Chakramakkal [(1973) 1 SCC 840] a three-Judge Bench of this Court held that all orders relating to the custody of minors were considered to be temporary orders. The learned Judges made it clear that with the passage of time, the Court is entitled to modify the order in the interest of the minor child. The Court went to the extent of saying that even if orders are based on consent, those orders can also be varied if the welfare of the child so demands.*
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> * * * * *
>
> *18. Now coming to the question of the child being taken to Australia and the consequent variations in the visitation rights of the father, this Court finds that the respondent mother is getting a better job opportunity in Australia. Her autonomy on her personhood cannot be curtailed by the Court on the ground of a prior order of custody of the child. Every person has a right to develop his or her potential. In fact a right to development is a basic human right. The respondent mother cannot be asked to choose between her child and her career. It is clear that the child is very dear to her and she will spare no pains to ensure that the child gets proper education and training in order to develop his faculties and ultimately to become a good citizen. If the custody of the child is denied to her, she may not be able to pursue her career in Australia and that may not be conducive either to the development of her career or to the future prospects of the child. Separating the child from his mother will be disastrous to both.*
>
> *19. Insofar as the father is concerned, he is already*

> *established in India and he is also financially solvent. His visitation rights have been ensured in the impugned orders of the High Court. His rights have been varied but have not been totally ignored. The appellant father, for all these years, lived without the child and got used to it.*

41. I may now refer to the decision in ***Rohith Thamanna (supra),*** wherein, the Apex Court has emphasized that in matters involving custody of children, the primary question is as to what would be in the best interest of the child concerned. The Court held that in such matters, it may not always be necessary to deal with the counter allegations of the parties in their respective pleadings and affidavits. The relevant observations of the Apex Court in Para 8 of this decision read as under:

> *8.At the outset we may state that in a matter involving the question of custody of a child it has to be borne in mind that the question 'what is the wish/desire of the child' is different and distinct from the question 'what would be in the best interest of the child'. Certainly, the wish/desire of the child can be ascertained through interaction but then, the question as to 'what would be in the best interest of the child' is a matter to be decided by the court taking into account all the relevant circumstances. When couples are at loggerheads and wanted to part their ways as parthian shot they may level extreme allegations against each other so as to depict the other unworthy to have the custody of the child. In the circumstances, we are of the view that for considering the claim for custody of a minor child, unless very serious, proven conduct which should make one of them unworthy to claim for custody of the child concerned, the question can and shall be decided solely looking into the question as to, 'what would be the best interest of the child concerned'. In other words, welfare of the child should be the paramount consideration. In that view of the matter we think it absolutely unnecessary to discuss and deal with all the contentions and allegations in their respective pleadings and*

affidavits.

42. At this stage, reference may also be made to a decision of the Bombay High Court in ***Anuradha Sharma (supra)***, where the Court, while dealing with the request of a mother who wanted to relocate to Poland to pursue her professional career, highlighted that the primary consideration for deciding this request had to be the welfare of the child. The Court also emphasized that even if permission for relocation were to be granted, the rights of the non-custodial parent must be protected. Paras 29,30,33,34 of the said decision read as under:

> *29. Needless to state that the custody of the minor girl is with the mother, who is the natural guardian and considering her age, the girl must accompany her mother, particularly when it is the case the petitioner that she has single handedly brought up the child, on being separated from the husband.*
>
> *30. No doubt, the issue is very sensitive, considering the deep love and affection of both the parents towards young Akshita, who is likely to turn 9 in one or two days. The father is enjoying the access of the child, virtually and physically at definite intervals. He is naturally concerned about the welfare of the child and his only anxiety is that the bond between the two shall be severed, if she is moved to Poland.*
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> * * * * *
>
> *33. Necessarily, a balance has to be drawn between the interest of both the parties and by offering paramount consideration to the welfare of the child, so as to ensure that in the situation where the parents are in conflict, the child has a sense of security and it is always in the interest of the child to have presence of both the parents while he or she grows up, but here is a situation when the parents are at loggerheads and the child is with the mother with a limited access being granted to the father, which he must avail qualitatively. The petitioner is the mother of the child and has been continuously with the child, since her birth and though a working woman, has struck a balance between her work and care and affection of the child*

> *and ensured that she enjoy an healthy upbringing. The option suggested by the husband that the child should be left with him and his family will take care of her is not a viable one, as the little girl has always stayed with her mother, barring for few hours, when she was exclusively in company of her father or his family. One thing is clear that the girl cannot be separated from the petitioner-mother.*
>
> *34. However, at the same time, being conscious of the fact that the child has developed a strong bond with the father and the same is required to be nurtured and continued, even if the child accompany her mother to Poland for her better prospects, which she cannot be stopped from availing.*

43. Having noted some of the decisions wherein the Courts have dealt with similar applications of the custodial parent for relocation, I may now turn to the facts of the present case. At the outset, what needs to be noted is that under the existing arrangement which was mutually agreed to between the parties, the respondent was entitled to 20 days of overnight visitation, with one overnight visitation being on the fourth Saturday of every month, five overnight visitations during the summer vacations and three during the winter vacations. This was in addition to the monthly 'day visitation' of five hours on the first Sunday of every month. The petitioner has urged that the minor child is deeply attached to her as she has been staying with the petitioner since birth and has been receiving all the love and affection from her since tender age. The child has grown up receiving love, affection and guidance in every walk of life not only from her mother but has, except, during the peak of the Covid Pandemic, never been denied the opportunity to spend time with her father. Even during the pandemic, she had been regularly interacting with the father through video calls. It is, therefore, the petitioner's prayer that these 20 days of the existing arrangement of

overnight stay can be easily compensated by granting exclusive custody of the child to the respondent on her annual trips to India. Besides this, the respondent can freely interact with the child, as and when he wants, through video calls, which it is urged, has emerged as a common way of interaction after the Covid pandemic era. It has, thus been, contended that it is not as if the petitioner is wanting to curtail the visitation rights of the respondent, who as a father, is entitled to maintain his bond with the child, but is only seeking some modification of the terms of visitation so that she is not compelled to choose between her married life and her daughter, whom she dearly loves.

44. Ms. Luthra, learned senior counsel for the respondent has vehemently urged that it is important for the minor child to have her father's constant care and guidance during this formative and impressionable stage of her life. It is her plea that the father is not like a Santa Claus whose rights can be said to be adequately safeguarded by merely permitting him to meet the child, once every year. The minor child at this young age, should not be deprived of regular interactions with the father, which are *sine qua non* for strengthening their bond. It has therefore been urged that the child should not be permitted to be taken to a place outside the jurisdiction of this Court.

45. Having given my thoughtful consideration to these rival submissions of the parties, I am inclined to agree with Ms. Luthra that the father, even if he is a non-custodial parent, plays a very important role in the life of the child and no minor child should be insulated from the parental touch and influence of any of his parents as both of them play an important role in the development of child's personality. In this regard, it may be useful to refer to the observations of the Apex Court in Para 73 of its decision in ***Ruchi***

Majoo (supra), relied upon by the respondent. The same read as under:

> *73. It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life. Nor can the role of the father in his upbringing and grooming to face the realities of life be undermined. It is in that view important for the child's healthy growth that we grant to the father visitation rights that will enable the two to stay in touch and share moments of joy, learning and happiness with each other. Since the respondent is living in another continent such contact cannot be for obvious reasons as frequent as it may have been if they were in the same city. But the forbidding distance that separates the two would get reduced thanks to the modern technology in telecommunications.*

46. Thus, while there can be no doubt that the respondent as a father, should not be deprived of his right to interact frequently with the minor child, does that mean that this right can be secured only by way of physical meetings, is the question before this Court. An ancillary question would be as to whether taking into account that the petitioner has married a doctor in USA, should she be compelled to give up the custody of the child only because the respondent wants to meet the child physically twice every month. It is important to note that the child, who will turn six in a few weeks, has admittedly been brought up single handedly by the petitioner and is apparently in a happy state of mind. It is not even the respondent's case that she has ever complained of being neglected by the mother. To the credit of the mother, the child has also never expressed any dislike for the father. Fortunately, the child, unlike as is often found in custody disputes, has not developed any feelings of dislike towards the father. This, in my view, goes a long way to show that the petitioner, who, with the consent of the respondent, was made the custodial parent in May, 2019 when the child was

barely two, has brought up the child with love and care.

47. Even though, I have no hesitation in agreeing with Ms. Luthra that the child must not be denied the right to regularly interact with the father, the question before this Court now is as to whether this right of the child as also of the father can be protected only by compelling the child to stay back in India, when her mother relocates to USA. The answer, in my considered view, is a clear 'No.'. Today, the technology has advanced so much that regular interactions between two individuals living in different countries or even continents can be easily be maintained through video calls and video conferencing. Infact, in the last three years, when the world was grappling with the Covid pandemic, interactions through video calls have become the new norm. This is also evident from the fact that even when Courts today are functioning fully physically, lawyers are being permitted to join through video conferencing. This is only because of the advancements in technology.

48. The respondent, who voluntarily permitted the petitioner to take care of the child ever since the age of two and was satisfied with two visitations every month with one of them being an overnight visitation, cannot now be permitted to urge that because the mother wants to relocate to USA, she must leave the child behind in his custody. In my view, taking into account that the child has been in the exclusive custody of the mother, to whom she is stated to be extremely attached, it will indeed be in her welfare to continue to stay with her. Any separation of the child from her mother at this stage is likely to cause undue anxiety to her which certainly needs to be avoided. On the other hand, even while in USA, the child will also be in a position to regularly interact with her father through video calls, even on a daily basis, if she so desires. While there can be no doubt that the respondent's rights as

a father to regularly interact with the child physically, would be effected if the child is permitted to relocate with her mother to USA, I am of the considered view that it would still be in the welfare of the child to remain in the custody of the mother. This curtailment of the father's rights can, to a large extent be compensated by permitting him to interact through video calls and granting him exclusive custody during the vacations.

49. I may also note that though this Court, was at one stage, inclined to interact with the minor child, keeping in view her young age and the vehement opposition by the respondent, the child was not called for interaction. It also needs to be noted that in the present case, this Court had the occasion, not only to record the statement of the petitioner, her parents and her present husband but also that of the respondent and his mother. The statement of the respondent's present wife could not be recorded as she is stated to be no longer residing with him. Even though, the statements recorded under Order X Rule 2 CPC, cannot be a substitute for statements recorded under oath as per provisions of Order XVIII CPC, the same cannot be said to be wholly irrelevant. Having perused the said statements, I find no reason to accept the respondent's bald plea that if the child shifts to USA with the petitioner, she may not grow up to be a happy individual.

50. I have also considered the decisions in ***In re Marriage of LaMusga(supra), Daghir (supra) and Pollock (supra),*** relied upon by the respondent but find that they do not apply to the facts of the present case. None of these decisions lay down any blanket proposition as is sought to be contended by Ms. Luthra that a child should never be permitted to relocate to a place outside the jurisdiction of the Court where he/she had been regularly residing. In my view, the question as to whether the custodial

parent should be permitted to relocate with the child to a place outside the jurisdiction of the Court, would depend on the facts of every case. No straight jacket formula can be laid down or followed while deciding such requests for relocation of the custodial parent. In the facts of the present case, I am of the considered opinion that it will certainly be in the interest of the child to relocate to USA with her mother and the rights of the respondent can be adequately protected by freely permitting him to interact through video calls as also granting him exclusive custody of the child during the vacations when the petitioner will ensure that she is brought to India.

51. Before I conclude, I may also note that the respondent has made extensive submissions regarding the petitioner being a negligent mother on account of some vaccinations of the child having been delayed by a few months. However, taking into account that these incidents pertain to the period prior to May, 2019, when the respondent voluntarily agreed that the custody of the child should remain with the petitioner, I do not deem it necessary to deal with these aspects.

52. In the light of the aforesaid, the impugned order, being unsustainable, is accordingly set aside. While the application filed by the petitioner seeking relocation is allowed, the applications filed by the respondent are dismissed. The petitioner is permitted to relocate to USA with the minor Child Ms. Anaisha. The same would, however, be subject to the following conditions:

(a) The respondent would be at liberty to interact with the child through video calls or on any suitable video-conferencing platform for one hour on every Saturday and Sunday and for five to ten minutes on other days.

(b) The petitioner will ensure that the presence of the child in

Delhi, once a year during the course of her vacations, for a period of atleast three weeks unless prevented by travel restrictions imposed by the government of either country. During this period, the respondent will be entitled to have exclusive custody of the child.

(c) If the respondent travels to Phoenix, Arizona, USA, he would be entitled to meet the child over the weekends subject to the mutual convenience of the parties and the child. However, if his trip is during the vacations of the child, he would be entitled to have custody of the child for the number of days to be mutually decided by the parties, which days will then be excluded from the period of three weeks as directed in clause (b) hereinabove.

(d) The petitioner will, within one week, file an undertaking before this Court to abide by the conditions imposed vide this order. The petitioner will, in her undertaking also provide that she will not relocate with the child to any other country without leave of this Court. This would, however, not preclude the petitioner from taking the minor child for holidays outside Phoenix, Arizona, USA.

(e) A copy of the undertaking shall be placed on record of the learned Family Court as well.

53. The petition, along with all pending applications, is allowed in the aforesaid terms.

(REKHA PALLI)
JUDGE

FEBRUARY 03, 2023/acm