

Reserved on:-20.07.2022  
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**AFR**

**Court No. - 39**

**Case :- FIRST APPEAL No. - 510 of 2022**

**Appellant :-**

**Respondent**

**Counsel for Appellant :- Kavish Suhail, Sr. Advocate**

**Counsel for Respondent :- Tarun Pratap Singh**

**Alongwith**

**Case :- FIRST APPEAL No. - 485 of 2022**

**Appellant :-**

**Respondent**

**Counsel for Appellant :- Komal Mehrotra**

**Counsel for Respondent :- Kavish Suhail**

**Hon'ble Mrs. Sunita Agarwal, J.**

**Hon'ble Mrs. Sadhna Rani (Thakur), J.**

1. Heard Sri Pradeep Kumar Chandra learned Senior Advocate assisted by Sri Kavish Suhail learned Advocate, Sri Atul Dayal learned Senior Advocate assisted by Sri Komal Mehrotra and Sri S.F.A. Naqvi learned Senior Advocate assisted by Sri Syed Ahmad Faizan, learned Advocate for the parties in both the connected appeals.

2. These two connected appeals have been filed by both sides challenging the order dated 30.05.2022 passed by the Additional Principal Judge, Family Court, Court No.3, Aligarh in Misc. Petition No.73 of 2019 filed under Section 8, 10 & 25 of the Guardians and Wards Act' 1890 (in short as '1890' Act. The appellants in First Appeal No.510 of 2022 are applicants of the misc. case filed under the Act' 1890 praying for custody of the minor child. The appellant in connected First Appeal No.485 of 2022 are aggrieved by the aforesaid decision only to the extent of the findings on issue No.2

where the applicants have been provided visitation right/custody of the child for a period of 15 days in one year during summer vacation in the school of the minor child till she attains majority.

3. The applicants/appellants are natural guardians, biological parents of the child who was about five years of age on the date of the application seeking custody of the child. The respondents/appellants in the connected Appeal No.485 of 2022 are maternal uncle and aunt of the child, the respondent No.1 being real brother of the appellant No.1. As stated in the application filed by the appellants, the minor child was born on 16.12.2013 at Jeddah, Saudi Arabia and a birth certificate was issued by the concerned authority at Jeddah wherein names of the applicants/appellants as parents of the child have been mentioned. The respondents herein are issue-less. Initially one Mohd. Zaheer, brother of the respondent No.2 namely sister-in-law of the applicants, gave them his minor girl child for about three months and later took her away. The respondents went under depression on account of the said incident.

4. When the applicants came to India after birth of their girl child on 11.03.2014, the respondents expressed their desire to look after the minor child for sometime so that they may overcome the crisis. It was then agreed that the minor would be in custody of the respondents and whenever the applicants come to Delhi they would be spending time with their daughter and the child would remain in touch with her parents through audio and video calls. On the request of the respondents, the passport and birth certificate of the minor child was handed over to the respondents so that they may not face any inconvenience in keeping the child with them. Believing her brother, the appellant No.1 namely Ms. Nasrin Begum had signed a written document wherein custody of the minor child was given for the time being to the respondents. The applicants/appellants then left

for Saudia Arabia. It is stated that this arrangement was made by the appellants only as humanitarian consideration, to help brother and sister-in-law of the appellant No.1 to overcome the emotional crisis faced by them.

5. In the year 2015, during vacation when the applicants/appellant came to India, they felt change in the behaviour of the respondents. Again in the year 2017, during vacation, they came to India with the main object of meeting their daughter and when they reached at the house of the respondents, the respondents did not allow them (the appellants) to meet the child. Being family members, the applicants/appellants tried to persuade the respondents through elders in the family. The appellant No.1 in the meantime, gave birth to the fourth child on 07.05.2018. During this period and thereafter, the appellant No.1 talked to her brother namely the respondent No.1 to take her child back with her to Saudi Arabia and requested respondent No.1 to give back the passport of the minor child. The respondent gave passport and photographs of the minor child to the appellant No.1 and that with this conduct of the respondent, the appellants had no doubt that the respondent would have no objection to give away the child. The process of getting visa of the child was then initiated by the appellant No.1 and visa was issued from Saudi Arabia on 25.07.2018. When the applicants/appellants came to India and went to the house of the respondents to meet the child they were not allowed to enter inside nor were permitted to talk to the child. The appellant No.1 stayed in India for about 8 months before moving the application so that she may persuade the respondents to give back her daughter. However, the respondents misbehaved with the appellant No.1 and then the appellants were constrained to approach the family court seeking for custody of the minor child. The cause of action to institute the

proceedings arose when the respondent had refused to handover the custody of the minor child to the appellants.

6. In the written statement filed by the respondent, it was admitted that the applicants/appellants are biological parents of the child. It is also admitted that the respondents are issue-less. But the application was objected with the assertion that the applicants/appellants had handed over the custody of the minor child to the respondent on 11.04.2014 willingly and now in view of the Section 25 of the Act' 1890, the appellants cannot seek the custody of the child. It is argued that an adoption deed was executed by the appellants to give the minor child in the custody of the respondents and the adoption deed was signed by the appellants out of their own sweet will, which is a notarized deed. When the child was given in the custody of the respondents, she was barely three and a half months. The respondents looked after the child as their own and she had grown to a six and a half years old beautiful girl and they cannot think of separation from the child. The child is very close to the respondents and is studying in one of the best school at Aligarh. The respondents are taking good care of the child and it is in the welfare of the child to grow in the custody of the respondents. It was admitted that there was no provision for adoption in Muslim Personal Law but contention is that the said legal grounds has no bearing on the facts that the paramount consideration of the Court in selecting a proper guardian of the minor child should be the welfare and well being of the child, which is with the respondents. On the said pleading and the documentary and oral evidences filed by the parties, the issues framed by the family court were as follows:-

"बिन्दु संख्या 1 "क्या प्रार्थीगण प्रार्थनापत्र में वर्णित तथ्यअ के आधार पर अवयस्क/नाबालिग जैनव गुफरान के बाँयोलोजिकल, नेचूरल पेरेन्टस होते हुये अभिरक्षा प्राप्त करने के अधिकारी है ?

बिन्दु संख्या-2:- "क्या प्रार्थी/वादी किसी अन्य अनुतोष को पाने का अधिकारी है?"

7. The issue No.1 has been decided against the appellants by the family court on the ground that taking paramount consideration of the welfare of the child in light of the decision of the Apex Court in **V.Ravi Chandran vs Union Of India & Ors<sup>1</sup>**, **Guru Nagpal Vs. Sumedha<sup>2</sup>**, **Vivek Singh Vs. Romani Singh<sup>3</sup>**, it is in the best interest of the child to remain in the custody of the respondents. It was opined by the family court that the children cannot be treated as chattel/property and the act of the applicants/appellants in leaving their three months child in the custody of the respondents show that they were happy with the arrangement that the child would live with her maternal uncle and aunt. When the respondents looked after the child of a tender age of three months who has now grown into a six years old girl, as an afterthought on account of the dispute with her brother, the appellant No.1 had instituted the application seeking custody of the child. The Court had also interviewed the child and noted her statement that she would call maternal uncle and Aunt as "Abba" and "Ammi" and stated that she was being looked after well by them and she wants to stay with them only. It was also noted that even the appellant No.2 examined as PW-1, natural father of the child had stated that he did not want to take away the child against her wishes. It was noted that the wishes of the child to stay with the respondents cannot be ignored by the Court.

8. It is argued by the learned counsel for the appellants that the appellants were desperate to take away their child with them and made efforts so that the amicable solution can be found as both the parties are closely related to each other. The statement of the father

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1. 2010 (1) SCC 174

2. 2009 SCC 42

3.2017 (3) SCC 231

that he did not want to take away the child forcibly as against the wishes of the respondents itself shows that the appellants made efforts to persuade the respondents to give away their child which all went in vain and hence they were constrained to file the instant application. Even before filing of the present application, Habeas Corpus petition had been filed before the High Court at Delhi which was dismissed on the ground of lack of territorial jurisdiction. It is argued by the learned counsel for the appellant that the judicial pronouncement about the welfare of the child relate to the dispute between husband and wife namely two biological parents and not an outsider. The term guardianship denotes the guardianship of a minor. The Quran is a basic of the law relating to the concept of guardianship of a minor. Muslim Personal Law makes a difference between guardian of a person and guardian of the property in case of minor.

9. Guardianship of a person for minor for custody is given to mother who is de facto guardian of the child upto the age of seven years for a male child and in case of female child till the child attains the age of puberty as per the Hanafi law. In Shia law, the mother is a de facto guardian upto two years for the male child and seven years in case of female child. In any case, the legal guardian of a child can only be a person who is either a natural guardian or a guardian appointed by the Court. In absence of a legal guardian, the Court is entitled to appoint guardian for the betterment of the minor. Under Muslim Law the question of guardianship of a minor is very essential so as to deal with the right of the minor and his/her property, if any.

10. Be that as it may, it is argued that the family court had given a complete go-by to the legal principles of appointment of guardian under the Act' 1890 while deciding the application moved by the appellants who are natural/biological parents of the child. The

occasion for moving application before the family court arose on account of the fact that the respondents had refused to give the child in the custody of her biological parents. It is argued that the notarized deed claimed as adoption deed has no sanctity of law and, moreover, the said arrangement was made by the appellant out of sheer love and affection for the issue-less brother and sister-in-law. Under the said arrangements between the parties, the appellants were free to meet their child and to spend time with her and to take her away without any permission or consent of the respondent. The appellants were also free to stay in touch with their child by calling her through audio and video mode frequently.

11. The respondents, however, did not honor their promise and later behaved strangely in denying entry of the parents (appellants) in their house to meet the child. The appellant No.1 had to stay for a long time in India to persuade the respondents to allow her to meet the child and on their denial, the appellants were constrained to move the family court. On account of the changed behavior and attitude to the respondents where they have not only denied access to the child but also detached the child from her own parents, this dispute came to the Court.

12. Sri Atul Dayal leaned counsel for the respondent, in rebuttal, has heavily relied upon the decision of the Apex Court in **Nil Ratan Kundu & others vs. Abhijit Kundu**<sup>4</sup> to submit that in the matter of custody of a minor child, as per legal position in India, the paramount consideration for the Court is the welfare of the child. The Court has to ascertain not only the welfare but also the wishes of the child by interviewing the child. He, therefore, urged that this Court may summon the child to know her wishes if it has any doubt about the findings returned by the family court where the

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4.2008 (9) SCC 413

categorical statement made by the child was noted that the respondents are her 'Abbu' and 'Ammi' and she wants to stay with them only. It was argued that any change in the arrangement as on date or detachment of the child from the respondents who are looking after her as their own child since she was barely three and a half months old, would have an adverse effect on the mental well being of the child and may have the effect her physical health as well. It is, thus, argued that the family court had given due consideration to the circumstances of the case and based on the well settled principle of welfare of the minor child being paramount consideration, having duly ascertained the wishes of the child, has rightly rejected the application.

13. On the findings on issue No.1, about the visitation right given to the applicant/appellant the biological parents of the child, it was argued by the learned counsel for the respondents that the arrangements made by the family court while deciding issue No.2 of leaving the child in custody of the appellants was wholly uncalled for, in as much as, giving visitation right is a different consideration from that of giving custody of the minor child for 15 days to the parents who have never contributed in the upbringing of the child so far.

14. Having considered the submissions of the learned counsel for the parties and perused the record, we find that this is a peculiar case of the parents (both) being the applicants seeking custody of their minor child from their close relatives who have fostered the child for few years. As is evident from the record, there is no dispute about the fact that the minor girl child was left in the custody of the respondents when she was barely three and a half months old. The arguments of the appellants/biological parents are that they have given the child in the custody of the respondent being their close relatives i.e. brother and sister-in-law of appellant No.1, so that they



may overcome depression which they were facing at the particular point of time. However, as per the arrangement between the parties, the child was to remain in the custody of the respondents but the appellants were free to meet her and to spend time with their child whenever they want. From the turn of events, it seems that the said arrangement did not work for long as the respondents had refused to allow the appellants (the parents) to meet their child. There was lot of resistance at the ends of the respondents which is also evident from the fact that the respondents are even not happy with the arrangement made by the family court to allow the parents to have the custody of their child for 15 days in one year. The respondents have resisted this arrangement on the premise that the appellants would take the child to Saudi Arabia forcibly and illegally. This apprehension was raised before the Court at the time when the interim application of the applicant/appellant was considered and allowed by this Court and the child was sent with appellant No.1 for 15 days during summer vacation as per order of the family court.

15. It is evident from the record that the child was denied access to her own parents. She has been deprived of her right to know her own parents and spend time with them. Though, there cannot be a doubt to the fact that the child was brought up by the respondents as their own daughter and she would call them as 'Abbu' and 'Ammi', but restraining a child to meet her parents, to our mind, is nothing but denial of her birth/natural right to know her own self. As the child is living with the respondents since when she was three and a half months old and barely got the chance to know her parents, interviewing her or knowing her wishes would have served no useful purpose as the child would want to remain in the custody of the persons with whom she is residing at present and who she knows as her own parents. We may record that for this reason and for other

reasons for the discussion made hereinafter, we did not accept the prayer made by the learned counsel for the respondent to summon the child to ascertain her wishes.

16. Further, this situation takes us to the observations made by the Apex Court in the case of **Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka**<sup>5</sup> wherein the Apex Court while declining to interview the minor child had noted that it was satisfied in the facts of that case that the minor child was not fit to form an intelligent preference which may be taken into consideration in deciding her welfare. In the facts of that case, the parents of the child were litigating and the court while dealing with the said case had noted that any child who is placed in such an unfortunate position can hardly have the capacity to express an intelligent preference which may require the court's consideration to decide what should be the course to be adopted for the child's welfare. It was observed that mature thinking is indeed necessary in such a situation to decide as to what will enure to her benefit and welfare. The relevant observations of the Apex Court in the said decision as noted in paragraph No.'81' of **Nil Ratan Kundu (supra)** are required to be noted hereinunder:-

*“81. Considering the facts of the case, however, the Court refused to undertake that exercise and stated;*

*“In the facts and circumstances of this case we are however, not inclined to interview the minor daughter, as we are satisfied in the present case that the minor is not fit to form an intelligent preference which may be taken into consideration in deciding her welfare. We have earlier set out in extenso the various orders passed by the various learned Judges of the Bombay High Court after interviewing the minor and the learned*

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5.1983 (1) SCR 49

*Judges have recorded their impressions in their judgments and orders. The impressions as recorded by the learned Judges of the Bombay High Court, go to indicate that the minor has expressed different kinds of wishes at different times under different conditions. It also appears from the report of the Social Welfare Expert that these interviews cast a gloom on the sensitive mind of the tender girl and caused a lot of strain and depression on her. Torn between her love for both her parents and the acrimonious dispute between them resulting in the minor being dragged from court to court, we can well appreciate that the sensitive mind of the minor girl is bound to be sadly affected. Though the girl is quite bright and intelligent as recorded by the learned Judges of the Bombay High Court in their orders after their interviews with the girl who is of a tender age and is placed in a very delicate and embarrassing situation because of the unfortunate relationship and litigation between her parents for both of whom she has great deal of affection, she is not in a position to express any intelligent preference which will be conducive to her interest and welfare. Mature thinking is indeed necessary in such a situation to decide as to what will enure to her benefit and welfare. Any child who is placed in such an unfortunate position, can hardly have the capacity to express an intelligent preference which may require the Court's consideration to decide what should be the course to be adopted for the child's welfare. The letters addressed by the daughter to her mother from Panchgani and also a letter addressed by her to her aunt (father's sister) also go to show that the minor cannot understand her own mind properly and cannot form any firm desire. We feel that sending for the minor and interviewing her in the present case will not only not serve any useful purpose but will have the effect of creating further depression and demoralisation in her mind".*

*(emphasis supplied)"*

17. The principles of law in relation to the custody of a minor child, as to the paramount consideration of the welfare and interest of the child and the custody not being the rights of the parents under a

statute is well settled. However, the said position of law has been stated and reiterated in those cases where the parents have been litigating over the custody of the child after separation. In some of the cases, the grand parents have litigated with one of the parent of the child after death of another and the issue was examined from the angle of the welfare of the child in the facts and circumstances of the case.

18. In **Rosy Jacob Vs. Jacob A. Chakramakkal**<sup>6</sup>, the Apex Court has 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 minor's (words) health, maintenance and education. It was held that the power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of-course to be given to the right of the natural guardian but if the custody of the father (in that case) cannot promote the welfare of the children, he may be refused such guardianship. It was observed by the Apex Court in the facts of that case, that merely because there is no defect in the personal care and attachment of the father for his child, which every normal parent has, the father 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. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions must yield 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. It was observed that the Court as a guardian of the minor in

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6.1973 (1) SCC 840

case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

19. In **Bimla Devi Vs. Subhas Chandra Yadav 'Nirala'**<sup>7</sup> the Court has held that paramount consideration should be welfare of minor and normal rule (the father is natural guardian and is, therefore, entitled to the custody of the child) may not be followed if he is alleged to have committed murder of his wife. In such case, appointment of grand-mother as guardian of minor girl cannot be said to be contrary to law. Construing the expression 'welfare' under the Hindu Minority and Guardianship Act, 1956 liberally, it was observed by the Court therein that:-

*"It is well settled that the word 'welfare' used in this section must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being".*

20. In **Kamla Devi Vs. State of Himachal Pradesh**<sup>8</sup> it was observed by the Apex Court that the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education

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7.AIR 1992 Pat 76

8.AIR 1987 HP 34

and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other.

21. All the above noted decisions have been taken note of by the Apex Court in **Nil Ratan Kundu (supra)**, the judgement relied upon by the learned counsel for the respondent, to decide the matter of custody of the child in a case where father had moved an application under the Guardian and Wards Act' 1890 seeking custody of his child. In that particular case, the mother of the child had died in unfortunate circumstances. The first information report was lodged against the father of the child that he had brutally assaulted his wife who had died out of the injuries inflicted by the husband. The appellants before the Apex court were grandparents of the child to whom the child was handed over after death of his mother while the father was in jail. The child was barely five years old at that point of time. After the father was enlarged on bail, he moved application for custody of the child. The family court as also High Court gave the custody of the child noticing that the present and future of the child would be better secured in the custody of his father and directed that the child be immediately removed from the custody of his maternal grandparents.

22. While upturning the said decision, it was noted by the Apex Court that both the trial as also the High Court had erred in not applying correct principle and proper test of welfare of minor as a paramount consideration. It was also noted that the trial court had fell in error in not ascertaining wishes of the child as to with whom he wanted to stay. It was noted by the Apex Court that even the statutory provisions in the form of Section 17(3) of the Act' 1890 provides that proceeding in appointing or declaring the guardian of a minor the

Court shall be guided by not only the law to which the minor is subject, but the welfare of the minor as appears in the circumstances of the case and if the minor is old enough to form an intelligent preference, the court may consider that preference. It was noted in the facts of that case that the father was facing the charge of attributing death of mother of the child and a criminal case was pending in the Court. This indeed was a relevant factor for a court of law which must be addressed while deciding the custody of a minor in favour of the father.

23. In the facts and circumstances of the case, the Apex court did not agree to the observations of the High Court that the child was tutored by the maternal parents to make him hostile towards his father. The Court did not accept the submission of the counsels for the father therein that the trial court was not bound to interview the child and held that the observations in **Thrity Hoshie Dolikuka (supra)** about the perilous effect of interviewing the child at the time of deciding the issue of custody, was in the peculiar facts and circumstances of the case, as the Court was satisfied that calling a minor girl and interviewing her several times had not served any useful purpose and rather had the effect of creating further depression and demoralization in her mind.

24. On overall consideration of the case, it was held therein that the trial court ought to have ascertained the wishes of the minor child as to with whom he wanted to stay.

25. The above decisions in **Nil Ratan Kundu (supra)** was heavily relied upon by the learned counsel for the respondent to argue with vehemence that the wishes of the minor child is one of the most relevant considerations to decide the issue of the custody of the child.

26. In light of the above, we may record that the present case

presents peculiar facts and circumstances where the child has been deprived of her right to know as to who her biological parents are. She has been denied access to her parents by her maternal uncle and aunt who brought up her as her own child from the tender age of three and a half months. They have not only fostered the child but brought her as their own child. The maternal uncle and aunt of the child have no legal adoption and cannot be said to be legal guardian of the child and can only be said to be the foster parents. It is evident that they looked after the child very well but they are wrong in not allowing the child to meet her parents. They brought up the child as their own and changed her perception about her own parents. The child who is in the care and custody of the respondents from the tender age of three and a half months would not even know as to who her parents are.

27. In this admitted facts, in our considered opinion, no useful purpose would have been served in interviewing the child as in all probabilities she would reiterate what she had stated before the family court. The observations in the Apex Court in **Nil Ratan Kundu (supra)** that the Court was required to ascertain the wishes of the child as to with whom he wanted to stay, therefore, would not be of any help to the respondents to support their assertion that the wishes of the child has been duly ascertained by the family court in order to decide the issue of custody of the child and no interference should be made by the Court without further interviewing the child.

28. We may further record that we have no doubt about the statement of the minor girl noted by the family court that she wants to stay with the respondents, her maternal uncle and aunt, whom she calls 'Abbu' and 'Ammi'. The question, however, is about the welfare of the child. In a case where the welfare of the child is pitted against the wishes of the child, the wishes of the child has to yield in favour



of the paramount consideration of welfare of the child who may wish otherwise. This is one of the issues which was considered by the Apex Court in **Triti (supra)** while refusing to interview the child again.

29. We may further note sub-section (3) of Section 17 of the Act' 1890 which provides that the court may consider the preference of the minor if the minor is old enough to form an intelligent preference which may taken into consideration in deciding her welfare.

30. It was held by the Apex Court in **Nil Ratan Kundu (supra)** that it is not the 'negative test' that the father is not 'unfit' or disqualified to have custody of his son/daughter 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 minor in favour of father, mother or any other guardian.

31. Coming to the instant case, simply the fact that the sister (appellant No.1) had left her child with her brother and sister-in-law who are issueless would not deprive her from the custody of her minor child. The child has not been legally adopted. The answer to the question that was considered by the trial court to give custody of the child to the maternal uncle and aunt is guided by the wishes of the child who does not even know as to who her birth parents are. The family court was swayed away by the fact that the detachment of the child from her maternal uncle and aunt who have brought her up as her own child, would have perilous effect on the physiology of the child. Whereas the parents are fighting for the custody of the child since the child was in a tender age of five years. It was categorically stated by the appellants that they were not allowed to meet their child

and the respondents have refused to give back the child despite their best efforts to find out an amicable solution. The vehemence of the respondents in not allowing the child to meet her birth parents is evident from their resistance in even allowing the child to see her birth parents once in a year for 15 days. Several cases including criminal complaints were filed between the parties because of the dispute relating to the custody of the child.

32. In exercise of our jurisdiction as *parens patriae*, giving due consideration to the circumstances such as ordinary comfort, contentment, intellectual, moral and physical development, health, education and general maintenance of the child as also the favourable surroundings, as noted by the Apex Court in **Kamla Devi (supra)**, we are of the considered opinion that it is in the best interest of the child whose welfare is our paramount consideration that she be in the custody of her birth parents. The reason being that:-

(i) The applicants are biological parents (both mother and father) of the child. The child as a human being has a right to know as to who are her parents and has a legal right to remain in the custody of her parents till she attains majority.

(ii) The appellants have other children, the child would grow with her siblings which is a positive environment being favourable surroundings for the welfare of the child.

(iii) Knowing her real identity as a human being is the first right of the child. She must know who her birth parents are. She must know who her siblings are. She must know who the persons are who are fostering her at present. The child cannot be allowed to live in a camouflage of her own being. Even an adopted child within the family sometime faces emotional turmoil when he is grown up and told about his/her real parents. The deprivation of the company or

even knowledge about her birth parents may come as a shock to the child when she is grown up. The deprivation of the child of the company of her own siblings may prove to be a shock for her, later.

33. We are conscious of the fact that she might face some difficulty in the beginning to stay away from the respondents whom she know as her real parents, but we hope and trust that the parents appellants being well educated persons would succeed in creating a positive environment for the child so that she may adjust to the new environment with the proper care and support of her parents. Her siblings may also add to the said efforts of the parents.

34. In any case, a child as a human being cannot be deprived of the company of her birth parents under a concealed identity of the respondents being her real parents. The mother who gave birth to the child cannot be deprived of the company of her daughter just for the fact that for sometime the child was given in the foster care of her maternal uncle and aunt. It is not about the right of the applicants (the parents) or the respondents (the maternal uncle and aunt) rather it is about the right of the child as a human being. A minor has a birth right to remain in the custody of her/his birth parents, who are the best persons on earth to know the welfare of the child. The maternal uncle and aunts/foster parents of the child have not acted in a matured manner in the situation in which they fall. Their emotions on the one hand and the welfare of the child on the other are pitted against each other. The attitude and behaviour of the foster parents in the whole scenario is also not understandable. Had it been a case of legal adoption with the wishes of the parents of the child, the situation would be otherwise. Without there being any legal adoption but only under an arrangement within the family, in our considered opinion, the foster parents (the respondents) should have though fostered the child as their own but should have allowed the child to know as to

who her birth parents are, to meet them, to spend time with them and then take an informed decision, an intelligent preference as to with whom she wanted to stay, to spend her childhood.

35. On overall consideration of the facts of the present case, in exercise of our judicial discretion, giving paramount consideration to the welfare of the minor, we are of the considered opinion that for contentment, intellectual, moral and physical development of the child, the best interest of the child is to be in the custody of her birth parents. The wishes of the child who is not old enough to form an intelligent preference cannot prevail over the welfare of the child.

36. We, therefore, provide that the child be handed over to the appellants/applicants by the respondents within a period of one month from the date of delivery of the judgement.

37. For handing over the custody of the child, both the parties shall appear before the Principal Judge, Family Court at Aligarh. The Principal Judge, Family Court shall record the process of the handing over and taking over the child by the respondents and the appellants; respectively, and transmit the said documents to this Court as compliance of this order.

38. We, however, provide that the appellants should allow the child to meet with her maternal uncle and aunt who have fostered her for about six years. The child should be allowed to spend time with her maternal uncle and aunt whenever the parents visit India and during her school vacations, atleast once or twice in a year depending upon her visit to India.

39. The respondents namely the maternal uncle and aunt of the child may also go to Saudi Arabia, the place of residence of the child to meet her and spend time with her.

40. We hope and trust that with the passage of time when the emotions between the parties (sister and brother) are settled down, they both can contribute towards the upbringing of the child so that she may grow into a confident, self reliant human being. We can only advise the litigating respondents who are closely related to the child to contribute in the upbringing of the child not financially but emotionally and morally so that she may grow up without any negative effect on her life because of the current dispute between the parties.

41. With the above observations and directions, the judgement and order dated 30.05.2022 passed by the Additional Principal Judge, Family Court, Court No.3, Aligarh hereby set aside. The First Appeal No.510 of 2022 is hereby allowed. The First Appeal No.485 of 2022 is disposed of in view of the above observations and directions.

42. The compliance report shall be submitted by the Principal Judge, Family Court within a period of two months from today and shall be placed on the record by the office.

43. No order as to cost.

**Order Date:-21.09.2022**

Himanshu