



GAHC010320162019

Page No.# 1/18



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : CRP(IO)/5/2020**

SMT. POOJA LAHON  
D/O- LT. DOMBORUDHAR BARUAH, W/O- SHRI MUKTANGSHU LAHON,  
CURRENTLY RESIDING AT JB-24, 1ST FLOOR, KHIRKI EXTENSION, GUPTA  
COLONY, MALVIYA NAGAR, P.S. MALVIYA NAGAR, NEW DELHI, PIN  
110017.

VERSUS

MUKTANGSHU LAHON  
S/O- SHRI SATYENDRA NATH LAHON, R/O HOUSE NO. 12, BEHIND GNRC  
HOSPITAL, KALPATARU PATH, RUKMININAGAR, P.O. ASSAM  
SACHIVALAYA, PS- DISPUR, GUWAHATI- 781006, DIST. KAMRUP(M),  
ASSAM.

Advocate for the Petitioner : Mr. P. J. Saikia, Senior Advocate.  
Ms. M. Nirola, Advocate.

Advocate for the Respondent : Mr. N. Dhar, Advocate.

**BEFORE**

**HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

Date of Hearing : 26.07.2022

Date of Judgment : 27.09.2022

### **JUDGMENT AND ORDER (CAV)**

Heard Mr. P. J. Saikia, the learned senior counsel assisted by Ms. M. Nirola, the learned counsel for the petitioner and Mr. N. Dhar, the learned counsel appearing on behalf of the respondent.

2. This is an application under Section 227 of the Constitution of India challenging the proceedings, i.e. Misc. (G) Case No.59/2019 pending before the Court of the Principal Judge, Family Court, Kamrup (M) at Guwahati as well as the order dated 26.11.2019. Further to that, the petitioner has also sought for a direction to the Principal Judge, Family Court No.1, Kamrup (M) at Guwahati to consider and decide the petition No.1197/2019 before proceeding further in Misc. (G) Case No.59/2019.

3. The brief facts of the case is that the petitioner and the respondent were married on 18.04.2008 at Guwahati in accordance with the Hindu customary rites, rituals and ceremonies and the said marriage was also registered under the Special Marriage Act, 1954 vide Marriage Certificate No.690 dated 19.04.2008 by the Marriage Officer, Kamrup at Guwahati. Out of their wedlock, a female child was born to them on 27.06.2014 at Guwahati. On 06.10.2018, the respondent discovered that the petitioner and their daughter were not in the house and that having contacted the petitioner; she refused to return to Guwahati and took the minor daughter with her. At this stage, it may be relevant herein to mention that the respondent thereupon filed an application under Section 9 of the Hindu Marriage Act, 1955 (for short, the Act of 1955) before the Principal Judge, Family Court No.1, Kamrup (M) at Guwahati (for short, the trial court) for restitution of conjugal rights. The said proceeding was registered and numbered as F.C.(Civil) Case No.1112/2018. Vide an *ex-parte* judgment and decree dated 30.07.2019, the trial court allowed the Section 9 application for restitution of conjugal rights. During the pendency of the said application seeking restitution of conjugal rights, the respondent filed an application under Section 26 of the Act of 1955 praying for custody of the minor child namely, Avril Lahan. Upon filing of the said application, the Trial



Court vide an order dated 28.03.2019, registered the said case for custody of the minor child under Section 7 of the Guardians and Wards Act, 1890 (for short, the Act of 1890) and issued summons to the petitioner. The said application was registered as Misc. (G) Case No.59/2019. On 07.06.2019, the petitioner filed her reply to the said application being Misc. (G) Case No.59/2019 contending *inter-alia* that the application was not maintainable under Section 26 of the Act of 1955 or under the Act of 1890. Further to that, it was also mentioned that there has been initiation of proceedings under Section 12 read with Sections 18, 19, 20, 21 & 22 of the Protection of Women from Domestic Violence Act, 2005 before the learned Metropolitan Magistrate (Mahila Court), Saket at New Delhi wherein there has been certain restraint orders being passed thereby restraining the respondent herein and his family members to take forceful custody of the petitioner's daughter. It was mentioned that the petitioner had also filed the petition for dissolution of marriage by way of a decree for divorce under Sections 27 (1) (a) and 27 (1) (d) of the Special Marriage Act, 1954 (for short, the Act of 1954) on the ground that the respondent was guilty of incessant acts of cruelty meted out upon the petitioner. It was also mentioned that Section 2 (2) of the Act of 1955, the application seeking custody was not maintainable as the respondent belonged to the Schedule Tribe and as per the said Act of 1955 was *per se* is not applicable in the instant matter for which the said application seeking custody ought to be dismissed.

4. Pursuant to the said reply being filed to the application seeking custody of the minor child, the petitioner herein as respondent before the trial court, filed an application raising the question of maintainability of the petition being registered as Misc. (G) Case No.59/2019. The said application was registered and numbered as petition No.1197. In the said application, the petitioner herein raised three grounds challenging the maintainability of the proceeding, i.e. Misc. (G) Case No.59/2019. The said grounds were (i) that the marriage between the parties has been solemnized and registered under the Act of 1954 for which the petition under Section 26 of the Act of 1955 was not

maintainable. It was also contended that the trial court also has no jurisdiction to entertain the said petition treating it to be a petition under Section 7 of the Act of 1890 as the minor is ordinarily residing with the petitioner herein in Delhi and pursuing her studies at New Delhi; (ii) the petition filed by the petitioner in CT Cases/17908/2018 under the provisions of Protections of Women from Domestic Violence Act, 2005 (for short, the Act of 2005) is subjudice before the learned Metropolitan Magistrate (Mahila Court), Saket, South District at New Delhi and includes the prayer amongst other reliefs under Section 21 of the said Act and as such the respondent herein was required to approach the said court for relief claimed for and not by a separate petition; (iii) the respondent herein has suppressed the fact of pendency of SMA Petition No.06/2019 filed by the petitioner herein under Sections 27 (1) (a) and 27 (1) (d) of the Act of 1954 along with the application under Section 36 read with Section 38 of the Act of 1955 in the Court of the Principal Judge, Family Court, Saket (South), New Delhi and the matter is pending appearance of the respondent herein for reconciliation.

5. Upon the said application so filed, the Trial Court vide an order dated 07.06.2019 permitted the respondent herein to file objection, if any and in the meantime, to ascertain the scope of settlement between the parties before the Counsellor of Family Court No.II, Kamrup (M), Guwahati for counseling.

6. The records further reveals that on 10.07.2019, a petition was filed by the respondent herein stating *inter-alia* that there is another case instituted by him against the petitioner herein for restitution of conjugal rights being registered as F.C. (Civil) Case No.112/2018 which is pending before the Family Court No.1, Kamrup (M), Guwahati and as such sought for transfer of the said case to the said court. The said petition filed by the respondent was allowed by an order dated 10.07.2019 and thereby the records were sent to the Court of the learned Principal Judge, Family Court No.1, Kamrup (M), Guwahati. On the same date, another application was taken up for consideration by the Court of the Principal Judge, Family Court No.1, Kamrup (M),



Guwahati upon the case record being transferred from the Court of the Principal Judge, Family Court No.2, Kamrup (M), Guwahati. The said application was petition No.1416/2019 for striking out Section 26 of the Act of 1955 as stated in the cause title which was allowed by the Court of the Principal Judge, Family Court, Kamrup (M), Guwahati. In the said order, the Principal Judge, Family Court, Kamrup (M), Guwahati also passed an order that as the respondent was the father, he may be allowed to meet his child on holidays/every Sundays and the grandparents of the minor child were also allowed to accompany the respondent when he visits his child. It was mentioned that the meeting would take place prior to the sunset and the mother of the child would accompany the child if she desires. Subsequent thereto, on 04.11.2019, an application was filed by the respondent herein drawing the attention of the Principal Judge, Family Court No.1, Kamrup (M), Guwahati that the order dated 12.07.2019 was not adhered to by the petitioner herein by not permitting the respondent to properly meet his daughter as the petitioner repeatedly called the child/daughter inside the bedroom and passed offensive remarks against the respondent all the while and thus took away the precious time of the visits on all the three occasions, i.e. on 21.07.2019; 10.08.2019 and 11.08.2019. It was also averred that the mother of the petitioner even ordered the child not to accept the gifts the respondent brought for his daughter. It was alleged that as all the documents pertaining to the daughter of the petitioner and the respondents were with the petitioner and as such the respondent had serious apprehension that the petitioner may leave India along with their daughter without the consent of the respondent and without informing him. It was under such circumstances, the said petition was filed by the respondent seeking permission to take his daughter out of the house to spend time with his daughter for her amusement and a change of environment on holidays/Sundays; in the interim, the respondent be given the custody of his daughter during the vacation period so that the respondent can bring his daughter to Guwahati to live with him during the vacation period and prohibiting the petitioner to leave India along with his daughter without consent of the respondent during the pendency of the case or to pass such



order(s).

7. On the basis of the said petition so filed, the Court of the Principal Judge, Family Court No.1, Kamrup (M), Guwahati vide the order dated 04.11.2019 fixed 06.01.2020 for objection initially. Subsequently, upon the consensus agreed upon between the petitioner and the respondent it was directed that on 09.11.2019 and 10.11.2019, the respondent can meet the child in the morning hours between 10:00 AM to 1:00 PM and the respondent was allowed to take the child within 4-5 KMs range from the house of the petitioner. It was observed in the said order that the petitioner would be at liberty to proceed with the child and if the petitioner accompanies the child, she would remain within a distance where the father and the child can freely mix. As regard the vacation of the child is concerned, the holiday list of the school was directed to be submitted by the parties. On the basis thereof, the case was fixed on 26.11.2019.

8. Thereafter, on 26.11.2019, the respondent was present whereas the petitioner was absent. On that day, the respondent submitted his report and also filed an application for interim visiting/custody rights of the minor daughter and he also furnished the holiday list. The said court below observed that the child would be having her winter vacation from 18.12.2019 to 15.01.2020, and under such circumstances, the petitioner was directed to produce the minor girl before the court on the next date fixed, i.e. on 06.01.2020. Thereupon, the petitioner approached this Court challenging the jurisdiction of the Trial Court as well as for a direction to the Trial Court to consider the petition No.1197/2019 before further proceeding in Misc. (G) Case No.59/2019.

9. This Court vide the order dated 03.01.2020 issued notice and stayed the further proceeding in Misc. (G) Case No.59/2019 pending before the Court of the Principal Judge, Family Court No.1, Kamrup (M), Guwahati. Further to that, vide another order dated 20.07.2020, this Court called for the records of Misc. (G) Case No.59/2019 and F.C. (Civil) Case No.1112/2019 from the Court of the Principal Judge, Family Court No.1, Kamrup (M), Guwahati.



10. To the instant application so filed under Article 227 of the Constitution of India, the respondent filed his affidavit-in-opposition. In the affidavit-in-opposition so filed, it was mentioned that the respondent had filed an application on 25.03.2019 under Section 26 of the Act of 1955 before the Court of the Principal Judge, Family Court No.1, Kamrup (M), Guwahati seeking custody of the child. It was specifically averred that the application dated 25.03.2019 filed by the respondent under Section 26 of the Act of 1955 later on was converted into an application under Section 7 of the Guardians and Wards Act, 1890 at the instance of the court below, although the Section 7 of the Act of 1890 was not applicable under the facts and circumstances of the case. It was further mentioned that the respondent did not file the application before the court below for appointing him as a guardian of his child for the property, and in fact, the minor child did not have any property which is required to be managed by the respondent, and accordingly, there is no scope for invoking Section 7 of the Act of 1890. Further to that, it was mentioned that the filing of proceedings under the Section of the Act of 2005 in the Court of the Metropolitan Magistrate (Mahila Court), Saket, South District at New Delhi was nothing but multiplicity of proceedings at the instance of the petitioner to harass the respondent. Further to that, as regards the application seeking divorce under Section 27 (1) (a) of the Act of 1954 was not maintainable in view of the Section 31 of the said Act of 1954.

11. To the said affidavit-in-opposition, the petitioner filed an affidavit-in-reply wherein it has been mentioned that F.C. (Civil) Case No.1112/2018 and the proceedings in Misc. (G) Case No.59/2019 are filed under two distinct and separate Acts, and therefore, by no stretch of imagination the later can be said to be an ancillary or a proceeding in continuation of the former. Otherwise, after passing of the decree in F.C. (Civil) No.1112/2018, the proceeding, i.e. Misc. (G) Case No.59/2019 could not have continued. Further to that, it was mentioned in the affidavit-in-reply that the statement of the respondent that he did not file any application for appointing him as a guardian of his



child or for her property, and therefore, there was no scope of invoking Section 7 of the Act of 1890 which was highly misconceived and the said statement has been made in order to mislead this Court from the core issue involved in the instant proceeding.

12. While the aforesaid pleadings were continued, there were various miscellaneous applications filed before this Court. First of such miscellaneous applications was I.A.(C) No.913/2020 which was an application seeking alteration, modification, cancellation and/or vacating the order dated 03.01.2020 passed by this Court. As noted herein above, already this Court vide an order dated 03.01.2020, had stayed further proceedings of Misc. (G) Case No.59/2019 pending before the Court of the Principal Judge, Family Court No.1, Kamrup (M), Guwahati. To the said application, the petitioner filed her affidavit-in-opposition. From a perusal of the records of said Misc. Case, i.e. I.A.(C) No.913/2020, it reveals that there was no effective order being passed.

13. On 20.01.2021, an application was filed by the respondent as applicant seeking interim direction/order for granting visitation right to the respondent for visiting his child/daughter. By way of the said application, it was averred by the respondent as applicant that for more than two years, the visitation rights of the respondent has not been granted during the pendency of CRP(IO) No.5/2020, and as such, the applicant may be allowed/provided the visitation right to visit his daughter who has been residing with the petitioner/mother in Delhi on Sundays or any other holidays for 3 to 4 hours in a day and direct the petitioner/mother to connect the daughter with the respondent/father over telephone/video call Apps twice a week and direct the petitioner/mother to bring the daughter to Guwahati on every summer/winter holidays so as to get the love and affection of grandparents who could not travel to Delhi regularly on account of their old age and/or pass such order as may deem fit.

14. The petitioner filed an affidavit-in-opposition. It is averred that the proceedings pending before the learned Principal Judge, Family Court No.1, Kamrup (M), Guwahati is without jurisdiction and *void ab initio*, and therefore, the applicant/the respondent was





not at all entitled to any relief pursuant to the order passed in the said proceedings. It was mentioned in the said application that the petitioner allowed the daughter to speak to the respondent over telephone or any other video calling Apps but when allowed the respondent not only uses filthy, abusive words towards the petitioner but also to the daughter over the telephone and video call, causing immense mental trauma to the petitioner as well as the minor daughter which forced the petitioner to discontinue the call sessions. It was also mentioned that the court at Delhi, where various proceedings are pending, would be the appropriate court to assess the facts and situation and pass appropriate order or grant visiting rights to the respondent on such terms and conditions that may be deemed fit by the said court. Further to that, it was also mentioned that the prayer of the respondent for bringing the daughter to Guwahati is with an oblique motive to harass the petitioner that too at the cost of the minor daughter in as much as the respondent is well aware that the petitioner is engaged in a private job in New Delhi for her livelihood and looking after the child very safely and securely and the said minor daughter is attending her school on week days and also engaged in other extracurricular activities on Sundays. Further to that, it was mentioned that the prayer made in the application shows the vindictive nature of the respondent. It was denied that the parents of the respondent cannot travel to Delhi regularly is absolutely false and such statement is made only to suit the case.

15. This Court vide the order dated 29.06.2022, after hearing both the parties, passed an order directing the petitioner to permit the respondent to meet their child on 04.07.2022 and 11.07.2022 as agreed by the learned counsel for the parties. It was also made clear that under no such circumstances, the respondent shall take the child beyond the radius of 4 to 5 KMs from the house of the petitioner and would return the child to her mother on or before the three hours from taking the child by the respondent. As regards the prayer pertaining to telephonic conversation/video calling, this Court further taking into account the welfare of the child and love and affection of the father is as

essential as that of the mother, directed the petitioner to permit the respondent twice a week to have telephonic conversation/video calling with their child.

16. I have heard the learned counsel for the parties and perused the materials on record. The instant matter arises out of a challenge to the jurisdiction of the trial court, i.e. the Court of the Principal Judge, Family Court No.1, Kamrup (M), Guwahati to decide the application seeking custody. The application seeking custody which has been registered and numbered as Misc. (G) Case No.59/2019 was filed during the pendency of the proceedings initiated under Section 9 of the Act of 1955. Admittedly, the said application was filed initially under Section 26 of the said Act of 1955.

17. For the purpose of deciding the dispute, it is relevant to take note of Section 26 of the Act of 1955 which is quoted herein below:-

*“26 Custody of children. —In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made: [Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.]”*

18. A reading of the said provision would show that in any proceeding under the said Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody,



maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by the petitioner for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions previously made. The proviso to said Section stipulates that such application shall be disposed of as far as possible within sixty days from the date of service of notice on the respondent. Therefore, it would be seen that the custody, maintenance and education of minor children can be made in the decree that may be passed in the proceedings or may after the decree upon application by the petitioner of an application under Section 26 of the Act for the purpose be passed, as if such proceedings were pending.

19. However, a proceeding under Section 7 of the Act of 1890 is in relation to appointing a guardian of his person or property or both or declaring a person to be such guardian. Such application has to be filed in terms with Section 10 of the said Act of 1890 and there is a specific procedure laid down under Section 11 of the said Act for admission of such application. A perusal of Section 12 of the said Act of 1890 makes it clear that a proceeding under the said Act for appointment of a guardian is a substantive proceedings in as much as Section 12 of the said Act empowers the Court to pass interlocutory order for production of minors and interim protection of person and property. If this Court further peruses the said Act of 1890, it would be seen that Section 8 enumerates the persons entitled to apply for an order as to guardianship. Section 9 empowers the court having jurisdiction to entertain an application for guardianship. Section 17 stipulates the matters to be taken into consideration by the court in appointing guardian. Section 19 prohibits the court in appointing guardians in certain cases. The Sections 20 to 42 prescribes the duties, rights and liabilities of the guardian.

20. Now reading the provisions of the Act of 1890 with the provision of Section 26 of the Act of 1955 it would appear that while Section 26 of the said Act of 1955 is in the form of a supplementary proceedings for custody, maintenance and education of minor children wherein there is a substantive proceeding initiated or have been disposed of under the Act of 1955 and in contradistinction, the said Act of 1890 is itself a substantive provision for appointment of guardian in terms with Section 7 read with Sections 10 to 19 of the said Act of 1890. Therefore, a proceeding under Section 26 of the Act of 1955 is in aid to a substantive proceedings under the said Act of 1955 and in the instant case the Section 9 proceedings initiated by the respondent (husband) before the Trial Court. Consequently, such application under Section 26 of the Act of 1955 derives the jurisdiction for the substantive proceedings initiated under the said Act of 1955.

21. In the instant case, it would be seen that the respondent initially filed an application under Section 9 of the Act of 1955 which is parimateria to Section 22 of the Act of 1954. The said proceedings are substantive in nature wherein decrees can be passed and in the instant case there is a decree passed for restitution of conjugal rights on 30.07.2019 in favour of the respondent. It is during the said proceedings that initially an application was filed under Section 26 of the Act of 1955 which is parimateria to Section 38 of the of the Act of 1954 seeking custody of the minor child. At this stage it may also be relevant to mention that a perusal of the application seeking custody also shows that the said application was filed in terms with Section 26 of the Act of 1955 and it is a well settled principle of law that the nomenclature of the petition under a particular provision does not effect the jurisdiction of the court, if the court has the power to exercise the jurisdiction by applying the correct provision of law.

22. The question as to whether the Principal Judge, Family Court No.1, Kamrup (M), Guwahati would have the jurisdiction is a question pending before the said court in a petition registered as petition No.1197/2019. There had been no decision whatsoever on the said petition by the learned court below. Taking into consideration that the said

petition is pending before the Trial Court, this Court is of the opinion that it would be the trial court which should decide the said aspect rather than this Court deciding the same in a proceeding under Article 227 of the Constitution that too when there is an application pending before the Trial Court. Consequently, this Court, therefore, directs the Trial Court to decide the said petition bearing petition No.1179/2019 before further proceeding in respect to Misc. (G) Case No.59/2019. It is however, observed that the petition so filed bearing Misc. (G) Case No.59/2019 should be decided taking into account that the said application is an application under Section 26 of the Act of 1955 and not an application under Section 7 of the Act of 1890.

23. Before concluding, this Court would also like to take note of that it is an undisputed fact that the rights of the child needs to be respected as he/she is entitled to the love of both the parents. Even if there is a breakdown of the marriage, it does not signify the end of parental responsibility. It is also relevant to take note of that it is the child who suffers most in a matrimonial dispute. The Supreme Court, in various judgments, has held that while deciding the matter of custody of the child, the primary and paramount consideration is always the welfare of the child. If the welfare of the child so demands, then technical objections cannot come in the way. However, while deciding the welfare of the child, it is not the view of one's spouse alone which has to be taken into consideration. The courts should decide the issue of custody on a paramount consideration who is the victim in the custody battle. In the judgment of the Supreme Court in the case of *Soumitra Kumar Nahar vs. Parul Nahar*, reported in (2020) 7 SCC 599, the Supreme Court while disposing of the said proceedings directed the parties prior to take steps in filing of custody of the guardianship petition for custody of the minor children before the competent court of jurisdiction to abide by the interim directions passed therein by the Supreme Court. The said interim direction so passed by the Supreme Court in the said judgment relates to interim visitation rights which can be seen from the paragraph No.21 and its sub-paragraphs and paragraph No.22. The same, for the sake of

convenience, are quoted herein below:-

**“21.1. Order dated 7-9-2017 : (Soumitra Kumar Nahar case, SCC OnLine SC paras 1-3)**

*“1. With reference to our order dated 25-8-2017, we are happy to note that the learned counsel on both the sides, with due instruction from the parties, have submitted the following plan for all the three vacations i.e. Dussehra, Diwali and Winter Vacation:*

*For Dussehra Break — 28-9-2017 (Check out 12.00 noon to 3.00 p.m.) to 3-10-2017 (Check in 10.00 a.m. to 3.00 p.m.)*

*Mr Soumitra Kumar Nahar can pick up Ms Sanjana from the school on 28-9-2017 and she can remain with him till 2 p.m. on 30-9-2017. Thereafter, Mr Nahar shall give the custody of Ms Sanjana to Mrs Parul Nahar at 2 p.m. on 30-9-2017 in New Delhi. Consequently, Ms Sanjana shall remain with Mrs Parul Nahar for the remainder of her Dussehra break and she would drop her back to school on 3-10-2017 by 3 p.m.*

*For Diwali Break — 16-10-2017 (Check out 12.00 noon to 3.00 p.m.) to 23-10-2017 (Check in 10.00 a.m. to 3.00 p.m.)*

*Mr Soumitra Kumar Nahar can pick up Ms Sanjana from the school on 16-10-2017 and she can remain with him till lunch on 19-10-2017. Post-lunch on 19-10-2017, Mr Soumitra Kumar Nahar shall hand over custody of Ms Sanjana to Mrs Parul Nahar in New Delhi and thereafter Ms Sanjana shall remain with Mrs Parul Nahar for the remainder of her Diwali break. Mrs Parul Nahar will drop Ms Sanjana back to school on 23-10-2017.*

*Winter Vacation*

*Mr Soumitra Kumar Nahar shall pick up Ms Sanjana from the All Saints School on 12-12-2017 and Shravan from Sherwood College on 23-11-2017 the children shall remain with him till half of the winter vacations respectively. After half of vacation of each child he will hand over the children to Mrs Parul Nahar in New Delhi and thereafter children shall remain with Mrs Parul Nahar for the remainder of her winter vacations. Mrs Parul Nahar shall drop both the children back to respective schools at Nainital after completion of vacations.*

*Dussehra Break for Shravan*

*Mr Soumitra Kumar Nahar will pick up Shravan from Sherwood College on 29-9-2017 and hand over Shravan to Mrs Parul Nahar on 30-9-2017 at 2 p.m. Mrs Parul Nahar will drop Shravan to Sherwood School at 5 p.m. on 30-9-2017. Subject to the approval of Principal of Sherwood College.*

*Diwali Break for Shravan*

*Mr Soumitra Kumar Nahar will pick up Shravan from Sherwood College on 15-10-2017 and hand over Shravan to Mrs Parul Nahar on 19-10-2017 at 2 p.m. Mrs Parul Nahar will drop Shravan to Sherwood College at 2.00 p.m. on 22-10-2017.*

*2. We direct the Principal of both the schools i.e. All Saints College and Sherwood, Nainital, to inform both the parents, in advance, the events in which the presence of the parents is required. We also direct the Principal of both the schools to act according to the order, as above, and also facilitate a suitable time for both the children to meet occasionally.*

*3. For further directions, post on 26-10-2017 at 1.45 p.m. before the same Bench.”*

**21.2.** *Order dated 21-8-2018, (Soumitra Kumar Nahar case, SCC OnLine SC paras 1-3)*

*“1. We direct the District Judge, Nainital to go and meet both the children, namely, Ms Sanjana at All Saints’ College, Nainital and Master Shravan at Sherwood College, Nainital and ascertain whether they would like to come to Delhi during the short vacation of Rakshabandhan and if they want to come to Delhi with whom do they want to stay with.*

*2. The District Judge, Nainital shall ascertain this information tomorrow itself and pass on the same confidentially to Secretary General of this Court, who shall communicate the same confidentially to this Court on 23-8-2018.*

*3. List before the same Bench on 23-8-2018 at 1.40 p.m.”*

**21.3.** *Order dated 23-8-2018 : (Soumitra Kumar Nahar case, SCC OnLine SC paras 1-5)*

*“1. We have the relevant inputs from the Report of the District Judge, Nainital. We permit the father of the children to collect them from both the schools during*

*the Raksha Bandhan holidays and drop them back as required by the schools concerned. There shall be no interference by the mother at the time of picking up of the children from their respective schools or while dropping them back.*

*2. If any of the children wants to visit the mother, they are free to visit and stay also during the period of Raksha Bandhan holidays. We direct the father to make necessary arrangements in terms of the wish expressed by any of the children, either to visit or to stay with the mother.*

*3. As far as any other issues are concerned, we make it clear that it will be open to the parties to pursue their grievance, including the criminal complaint, in appropriate jurisdiction.*

*4. We further make it clear that in case the mother wants to talk to the children on phone, there shall be no interference on the part of the father.*

*5. It is further made clear that this arrangement is only for the purpose of Raksha Bandhan holidays.”*

*22. Finally, both the children were shifted to Sherwood College, Nainital as is revealed from the order dated 22-2-2019 that the arrangement regarding custody of the minor children during school vacations would continue in terms of earlier order until further orders.”*

24. From a perusal of the above quoted paragraphs of the Supreme Court’s judgment, it would be seen that both the parents were given equal time during the vacation period to be with the children. It would be seen that the Supreme Court has also made it clear in the said judgment that when one of the parents having the custody of the children, it was directed that the other parent shall not cause any interference. Further to that, the Supreme Court has also observed that whenever one of the parents want to talk to the children on the phone, there shall not be any interference on the part of the other parent. Drawing the same analogy on the basis of which the Supreme Court in the above quoted judgment has made the observation, this Court is of the opinion that pending disposal of the proceedings, i.e. Misc. (G) Case No.59/2019, the parties to the instant proceedings





are directed as herein under:-

- i). Whenever the respondent is scheduled to visit Delhi, he would file an appropriate application by serving an advance copy of the said application to the counsel appearing on behalf of the petitioner before the Court of the Principal Judge, Family Court No.1, Kamrup (M), Guwahati intimating therein that on those particular days, the respondent shall be visiting Delhi and the Court of the Principal Judge, Family Court No.1, Kamrup (M), Guwahati, on the basis of the said application so filed, shall permit the respondent to meet the child on such days as may be permitted by the trial court by imposing such conditions as deemed fit.
- ii) It is made clear that that the respondent shall not take the child beyond the radius of 4-5 KMs from the house of the petitioner and would return the child to her mother on or before three hours from taking the child by the respondent.
- iii) The respondent and his family members would be entitled to talk to his child/daughter on telephone as well as through video calling for 3 days in a week and in that regard, the petitioner shall not cause any interference.
- iv) During the vacation, the petitioner is directed to either bring the child to Guwahati so that the child may be able to meet her grandparents. The respondent, however, shall have to incur all such expenses of the petitioner and the child on account of all such travel and other expenses incurred in bringing the child to Guwahati by the petitioner. The Trial Court is directed to impose such terms and conditions upon the parties in consonance to the observations made hereinabove as well as in the judgment of the Supreme Court referred to above.
- v) The Trial Court is directed to dispose of the petition No.1179/2019 first



by taking into account the observations made herein. The same shall be done within 30 (thirty) days from the date of appearance of the parties before the Trial Court. It is further observed that, if the Trial Court is of the opinion that the said court has the jurisdiction, then in that case the Trial Court shall dispose of the said custody proceedings as expeditiously as possible keeping in mind the proviso to Section 26 of the Act of 1955.

25. The order passed by this Court staying the further proceedings in Misc. (G) Case No.59/2019 is vacated and the parties are directed to appear before the Trial Court on **02.11.2022**.

26. With the above observations and directions, the petition stands disposed of. Send back the LCR forthwith so that the trial court is in a position to take up the proceedings on **02.11.2022**.

**JUDGE**

**Comparing Assistant**