Before S.S. Saron & S.P. Bangarh, JJ.

HARPREET SINGH SEKHON—*Appellant*

versus

RAJWANT KAUR—*Respondent*

FAO No. 6208 of 2011

February 22, 2013

Guardian and Wards Act, 1890 - Ss. 7&25 - Hindu Minority and Guardianship Act, 1956 - S. 6 - Baby born on 4.12.2000 in India and resides with mother - Father who is permanent resident of USA sought custody of minor daughter being natural guardian through his GPA - District Judge/Family Court dismissed petition - FAO by father through GPA dismissed - Held, welfare of minor child to be

of paramount consideration - Right of parents is secondary to the interest of the child - Right to custody will not be enforced where it conflicts with interest of the child - Further held that General Power of Attorney holder cannot be in a position to depose about the welfare of minor on the basis of personal knowledge which a father of minor might have - Moreover, it is required to be proved by appellant as to his state of mind and conduct and his bonafides with respect to minor - Unfair and unsafe to handover custody of minor to person who has not appeared in court to depose about personal state of mind.

Held, that therefore, what is primarily is to be seen is as to what is the welfare of the minor which is the foremost and paramount consideration. The Courts can supersede the natural rights of a parent and not restore the custody of the child to him/her where on account of inaptitude, the welfare of the child is in danger. The parents' right to have custody of the child is not a right like a right of property but one of trust for the benefit of the child. Therefore, where a parent fails to perform the obligations which contain a trust in his/her favour, he/she foregoes his/her right to have custody of the child. A right of the parents is secondary to the interest of the child. The right will not be enforced where it conflicts with the interest of the child.

(Para 16)

Further held, that it also needs to be emphasized that the appellant himself has never appeared in the present proceeding for seeking custody of the minor and he has been contesting the petition through his father/ attorney Dilraj Singh Sekhon. A power of attorney dated 22.2.2006 (Ex.P1) was tendered in evidence. A reading of the said power of attorney shows that Harpreet Singh Sekhon to do the following acts :-

1. To sell, transfer and purchase any immovable property in his (appellant's) name. This includes agricultural land also.

2. To open and operate saving bank and fixed deposit accounts in appellant's name.

3. To operate accounts held in appellant's name in Unit Trust of India and in any financial institutions.

4. To engage in and transact any and all lawful business of whatsoever nature or kind for the appellant and his name.

5. To exercise, do, or perform any act, right, power, duty or obligation what so ever that the appellant now have or may acquire the legal right, power or capacity to exercise, do or perform in connection with, arising out of or relating to any person, item, thing, transaction, business property, real or personal, tangible or intangible or matter whatsoever.

6. This instrument is to be construed and interpreted as General Power of Attorney giving and granting unto Harpreet Singh Sekhon said Attorney full power and authority to do and perform all and every act and things whatsoever requisite and necessary to be done in an about the premises as fully to all intents and purposes as Harpreet Singh Sekhon might or could do if personally present at the doing thereof with full power of substitution and revocation hereby ratifying and confirming all that Harpreet Singh Sekhon said Attorney do or cause to be done by virtue hereof.

(Para 17)

Further held, that a reading of the said power of attorney is in the nature of a general power of attorney which does not include any power for initiating legal action seeking custody of the minor.

(Para 18)

Further held, that therefore, Dilraj Singh Sekhon cannot be said to be duly authorized to conduct the litigation on behalf of the appellant. In any case Dilraj Singh Sekhon cannot be said to be in a position to depose as regards the welfare of the minor on the basis of the personal knowledge that the father of the minor actually may have. It is required to be proved and established by the appellant as to his state of mind and conduct and his bona fide with respect to the minor and it would be quite unfair and unsafe to hand over the custody of the minor to the father who has not appeared and deposed regarding his personal state of mind, conduct and bona fide but has been litigating through his father on the basis of a power of attorney, which even otherwise is improper.

(Para 20)

Surjit Singh, Senior Advocate with Ishreet Kaur, Advocate for the appellant and Dilraj singh Sekhon, GPA Holder of the appellant in person.

Manish Jain, Advocate, Mr. Aman Singla, Advocate and Mr. Tajinder Singh, Advocate for the respondent with respondent – Ms.Rajwant Kaur in person.

S.S. SARON, J.

(1) The appeal has been filed by the appellant Harpreet Singh Sekhon through his father and General Power of Attorney Sh. Dilraj Singh Sekhon against the judgment and decree dated 23.8.2011 passed by the learned District Judge, Family Court, Faridabad whereby the petition of the appellant under Sections 7 and 25 of the Guardian and Wards Act 1890 for seeking custody of the minor child namely Baby Seerat Kaur Sekhon has been dismissed.

(2) The respondent contested the petition by filing her written statement. It is submitted that the petition was wholly misconceived and vexatious. It had been filed only to black mail the respondent and pressurize her so that she does not pursue her multi-pronged litigation against the appellant. It is submitted that the appellant had left the respondent and her minor child in a lurch and had completely abandoned them in India while he was enjoying his life in United States of America ('USA' - for short). The appellant, it is submitted, had not come to the Court with clean hands and had deliberately suppressed the factual position in the petition. Besides, he had no locus standi to file the petition in view of his own conduct which was unworthy and unheard of a father. The birth of Baby Seerat Sekhon on 4.12.2000 in India out of the wedlock between the parties is admitted. The marriage between the parties, it is submitted, was an arranged marriage. The appellant and his parents had assured the respondent and her parents that the respondent would be taken to USA very shortly after the marriage. However, after marriage, the respondent was dumped at the parental house of the appellant at Mohali, while the appellant left for USA. He had been coming for short intervals after a year or so. The conduct of the appellant and his other family members qua the respondent was extremely bad since the inception of the marriage. They started demanding Rs.50 lacs in cash and a BMW car. The respondent was often given a beating by the appellant.

In 2003, the appellant took the respondent to his other parental house i.e. H. No. 645, Sector 16, Faridabad. She was left there while the appellant left for USA. At that time, the respondent was in the family way. However, neither the appellant nor any member of his family took care of her. There was no one from the side of the appellant to look after her. In the said circumstances, the respondent's parents came to her rescue. Baby Seerat was born at Faridabad. Ever after her birth, the appellant never cared to come to India to see her what to talk of any member of his family visiting India to see the baby. The appellant till date had not spent even a single penny for the maintenance of the respondent and her minor child. On the contrary, the appellant's father namely Dilraj Singh Sekhon had filed a frivolous case against the respondent, her brother namely Jagjit Singh and her father namely Sarwan Singh Nijjar that they had trespassed into the aforesaid house after breaking open the lock. The said criminal case was pending in the Court of learned Additional Chief Judicial Magistrate, Faridabad against the respondent and her brother Jagjit Singh. However, the police left Sarwan Singh Nijjar out of array of the accused. The appellant and his father Dilraj Singh Sekhon had at the same time obtained a decree of mandatory injunction from the Civil Court against the minor child Baby Seerat Sekhon for vacating House No.645, Sector 16, Faridabad. The operation of the said decree, however, had been stayed by this Court in regular second appeal. It is denied that since the date of marriage, the appellant had been keeping the respondent in full comfort or providing her all the bare necessities of life. It is also denied that the respondent from the very inception of her marriage was of a quarrelsome nature or used to pick up quarrel with the appellant and other family members on trivial issues. It is also denied that she had started disliking the appellant and always tried to create chaos and fuss in the matrimonial home. In fact the appellant had never cared for the respondent and her minor child. For most of the time after marriage, the respondent was left alone in the house at Mohali and she was not given any money to maintain herself. The respondent was compelled to seek financial help from her parents even for living in her matrimonial home at Mohali. The appellant and her parents extended only false promises to take the respondent to USA. However, in reality they had not made any effort to do so. On the contrary, the father-in-law (Dilraj Singh Sekhon) of the respondent was compelling her to apply for a Visa on the basis of false information. He was also compelling her to show herself as

unmarried in the Visa forms and he was introducing her as a daughter of his friend. The documents in this regard form part of the judicial file in the suit filed by the respondent against the appellant which was decided vide judgment and decreed dated 25.8.2010 passed by the learned District Judge, Family Court, Faridabad in terms of which the decree of divorce obtained by the appellant from a Court in USA had been set aside. In view of the demands for dowry, the respondent had to lodge FIR No.251 dated 6.7.2005 at police Station Central, Faridabad against the appellant, his father, mother and some other female relatives for committing offences under Sections 498-A and 406 Indian Penal Code. The respondent, it is submitted, was always very submissive and docile and always gave due regard and respect to the appellant and her in-laws but in turn she was abused, kicked and ill-treated, which treatment was not meted out to animals even these days. It is denied that on several occasions the respondent had misbehaved with the appellant and his other family members. It is also denied that when she was prevailed upon to make her understand, she used to beat her minor child mercilessly in the presence of the appellant. In fact the appellant never lived with the minor child for more than three or four days in one visit. He had completely abandoned and discarded the respondent and the minor child. The respondent's parent had borne the expenses incurred for the delivery of the baby. Thereafter even, they were bearing all the day to day expenses of the respondent and her minor child. It is denied that the respondent left the matrimonial home in the year 2001 by taking all her valuable clothes, ornaments, cash belongings of the appellant or taking the minor child with her stealthily. The Panchayats were arranged by the respondent's father and not by the appellant. The appellant and her parents were ruthless and they had no love and affection and mercy for the respondent and the minor child. They were behaving like barbarians. They had not spent even a single penny on the minor child till date. The respondent and her minor child were left without any moral, physical and financial support. The appellant in a most clever manner left the respondent in his parental house i.e. H. No.645, Sector 16, Faridabad. He had flown to USA with a promise to take the respondent to USA shortly. However, he did not care to come back to look after them. The father-in-law of the respondent in connivance with the appellant filed a false criminal case of trespassing in the above said house against the respondent, her brother and her father. The appellant, it is submitted, in a most fraudulent manner obtained an ex parte divorce

decree from the Court of Cook County, Illinois (USA). The said Court in fact had no jurisdiction to entertain the said petition against the respondent because the respondent never subjected and submitted herself to the jurisdiction of the said Court. The respondent had never been a citizen of America rather she never visited USA. Moreover, her marriage took place at Jalandhar in India. As soon as the respondent came to know about the frivolous and fraudulent divorce decree she challenged it by way of a Civil Suit under Section 13 of the Civil Procedure Code. The said divorce decree had been declared a nullity by the Court vide judgment and decree dated 25.8.2010. That allegations that the behaviour of the respondent was continuing to be cruel and that she had illegally occupied H.No. 645, Sector 16, Faridabad after lawful divorce of the appellant and that she is keeping unlawful custody of the minor are denied. In fact the appellant had left the respondent in the house at Faridabad in the year 2003 while flying back to USA. It is stated that it is the appellant who used to beat the minor child mercilessly while he was drunk. The appellant remained drunk during his short stay with the respondent. The respondent, it is stated, is the natural guardian of the minor child. The appellant had no right whatsoever to seek his custody. The minor daughter is in an excellent condition and she was being given the best of attention. She has been staying in Faridabad. The appellant had never cared to look after the minor child. The respondent was compelled to seek maintenance in the petition filed by her under the Protection of Women from Domestic Violence Act. The respondent and her daughter had been awarded maintenance to the extent of Rs.30,000/- and Rs.20,000/- per month respectively by the learned Judicial Magistrate Ist Class, Faridabad. However, instead of paying the maintenance allowance, the appellant had filed an appeal. The appellant's mother, it is submitted, has no right to take care of the minor daughter of the respondent. When the respondent was alive and she was trying her level best to nurture her daughter in the best possible manner then why should she be looked after by the mother of the appellant who had no love and affection for the minor daughter. Till date, the appellant's mother had never come to see the daughter of the respondent even once and now all of a sudden it is claimed to be most fit person to bring up the minor child. It is stated that the appellant, his father and mother are highly uncultured. In case the custody of the minor child is handed over to the appellant, the appellant would ruin the life of the child. The appellant was not at all attached with the minor

child. Neither the appellant nor the minor child would be able to recognise each other because the appellant had never cared to visit and meet the minor child. It is wrong and denied that the respondent had never taken pain in performing her duty of a mother towards the child. The minor daughter was now 10 years old and she could herself explain to the Court as to how her father had been cruel towards her and her mother. It is the appellant who had failed in his duties as a father in respect of the minor daughter. The welfare and interest of the child was protected only if she was in the custody of the respondent. The appellant and her parents would kill the minor daughter if her custody was handed over to the appellant. The appellant, it is stated, was not certainly entitled to the exclusive custody of the minor daughter. He was the most unfit person for the custody of the daughter as he had utterly failed towards his duties as a father.

(3) The marriage between the parties was solemnized on 9.2.2000. They lived as husband and wife and they had a daughter namely Baby Seerat Sekhon who is in the custody of the respondent. At the time of filing the petition i.e. on 14.5.2008, the minor was about seven and a half years of age and was living with the respondent-mother. According to the appellant, ever since the marriage between the parties, he had been keeping the respondent by giving her all comforts and providing her all the bare necessities of life. However, the respondent from the very inception of the marriage was found to be of quarrelsome nature. During the marriage she used to pick up quarrels with the appellant and his family members on trivial issues without there being any fault on the part of the appellant; besides, she started disliking him. She always tried to create chaos and fuss in the matrimonial home. This created physical and utmost mental cruelty to the appellant and his family members. Besides, his married life was like living in a virtual hell. On several occasions, it is alleged, the respondent misbehaved with the appellant and his family members. She was prevailed upon and made to understand but instead of improving her behaviour, she used to beat the minor child of the parties mercilessly in the presence of the appellant and when he tried to stop her from doing so, she used to threaten him and his family members by stating that she would get them involved in false dowry demand cases. It is alleged that the respondent used to insult the appellant and his family members by saying that they were nobody to interfere in her matters. She was at liberty to behave with her child in any cruel manner

whatsoever. It is alleged that the respondent in furtherance of her mala fide intention to harass, humiliate and get the appellant and his family members defamed, got lodged a false FIR No.251 dated 6.7.2005 for the offences under Sections 498-A and 406 Indian Penal Code thereby levelling false allegations against the appellant and his family members. It had become usual habit for the respondent to leave her matrimonial home without any justifiable and reasonable cause, besides, without the consent and permission of the appellant and his family members. The respondent left her matrimonial home in 2001 taking all the valuable clothes, ornaments, cash belongings of the appellant and also stealthily taking the minor child with her. Even after convening of several panchayats, repeated requests and personal visits of the appellant to the parents' house of the respondent, she did not agree to join the company of the appellant, nor she agreed to return back the custody of the minor child. Rather she expressed her intention to get her marriage dissolved with the appellant or else she and her family members would get the appellant and his family members involved in other malicious prosecution and spoil their life and career like anything. In such circumstances, the appellant was left with no other option except to get his marriage dissolved with the respondent and accordingly, the appellant filed a divorce petition before the Presiding Judge of the Circuit Court of Cook County, Illinois, USA which was duly contested by the respondent. It is submitted that after examining the documents of both the parties, the Hon'ble Judge Jenner Cleveland Bernstein Judge of the Circuit Court of Cook County, Illinois, USA vide judgment and order dated 23.5.2005 dissolved the marriage of the parties. The custody of the minor child Baby Seerat Sekhon was reserved in the said judgment and the respondent was not appointed as lawful guardian of the minor child. The habit of cruel behaviour of the respondent, it is submitted, still continued and she in collusion with her parents and other family members of her parental side despite the lawful divorce between the parties had illegally occupied House No.645, Sector-16, Faridabad which belongs to the appellant. She was keeping the custody of the minor child with her unlawfully, without authority and behaving with the minor child in a most cruel manner by beating her mercilessly on her petty faults which were detrimental to her health and brain. Such cruel behaviour would definitely have detrimental impact on the minor child. The respondent had neither been appointed nor declared as lawful guardian of the minor child by any court of law so far. The respondent had also not

been lawfully entrusted the custody of the said minor child by any order of the Court. Therefore, the appellant being the real father was a fit and a desirable person to whom the minor child, who was in India, liable to be returned. It is also submitted that if the custody of the minor child was handed over to the appellant, the mother of the appellant could give full time to the child to bring her up in a well cultured manner. The company of the father of the minor would be more affectionate and would give protection to the child in developing her personality, intelligence, character and education in a flourishing and most developing country like America. The appellant, it is stated, is deeply attached with the child and he is keenly interested in her support, welfare, goodhealth, good education and proper upbringing. As against this the respondent had never taken pain in executing her bare duties of mother towards the child. Therefore, in case the custody was handed over to the appellant, it would be in the interest, welfare and benefit of the minor. The appellant requested the respondent several times to accede to the right of the appellant and hand over his custody to him but she had been evading the same on one pretext or the other and finally on 19.4.2008, she declined to concede to the legitimate request of the appellant. It was, therefore, prayed that the custody of the minor be given to the appellant.

(4) The appellant filed a replication to the written statement of the respondent. The averments made in the written statement are denied. It is stated that the respondent is a divorcee and had filed false and baseless Court cases against the appellant and his close relatives as a counter-blast to the divorce granted against her by the Circuit Court of Cook County, Illinois, USA. A reference has been made to the court cases filed by the respondent on her own behalf and on behalf of Baby Seerat relating to the properties in India and in USA which, it is stated, were dismissed as withdrawn because the respondent could not produce documents of ownership or possession for which she had filed affidavits. The respondent, it is stated, had deserted her husband and she did not fill up the Immigration Form G325A which later on led to divorce. It is stated that the appellant had been undergoing medical treatment in USA for heart problem and father of the appellant had sent $10,000/- to him through the State Bank of India, Ludhiana for his medical treatment. The respondent, it is stated, had been misusing the Baby for grabbing the property. Jagjit Singh, brother of the

respondent, it is stated, is in forcible possession of the house owned by the father of the appellant in Faridabad. The house was taken over by him about six years earlier with the help of his relatives after breaking open the lock of the house during the period the owner of the said house was living in USA. The respondent and the Baby had not lived in the said house even for a single day. The respondent reaches the said house whenever the Investigating Officer goes there. The marriage, it is stated, was a fraud and the respondent keeps playing fraud everywhere. It was not known as to which class had the respondent studied but she was holding a fake B.A. Degree. The respondent and her brother Jagjit Singh were facing trial in the Court of learned Additional Chief Judicial Magistrate for the offences under Sections 453/34 Indian Penal Code. The baby (Seerat Sekhon) was living in a very bad environment. Both the father and mother of the respondent, it is stated, are illiterate and Baby Seerat was living in the same house in which they were living. The father of the respondent had worked as a tempo driver in Faridabad and did not miss a single evening when he did not drink. This environment was not conducive for the daughter of the appellant to live in. Therefore, the appellant wants to take the Baby to USA to give her education there. The company of educated family members coupled with the education standard in USA would boost the intellectual capability of the baby. The father of the appellant is a retired Senior Class I officer from Government of India and had been working as Adjunct Professor in City Colleges of Chicago in USA. The mother of the appellant had also taught in the Central Schools in India. The respondent was quarrelsome and swollen headed. Her behaviour towards the baby was very rude. She had been beating the baby mercilessly on her petty faults. The other allegations as made by the appellant are denied. It is stated that the entries in the passport of the appellant show that he was not coming for short intervals after a year or so and he was not in India in the year 2003 to take the respondent to Faridabad to leave her in H. No.645, Sector 16, Faridabad. It is submitted that after marriage, the father of the appellant had arranged the admission and had sent sponsorship for the respondent but she could not get Visa from the American Embassy, New Delhi. Thereafter, brother of the appellant had sent sponsorship from Canada but the respondent did not go to the Canadian Embassy for an interview. Thereafter, the appellant sent Immigration Form G325A which the respondent did not fill. The entries in the passport held by the respondent confirm that she had gone to the

American Embassy and the signature of the respondent on blank Immigration Form G325 A confirm that she had received the Immigration Form. As regards the FIR lodged by the respondent it is stated that nothing could be substantiated during police investigations. The protest petition filed by the respondent against the un-traced police report was dismissed by the learned Additional Chief Judicial Magistrate, Faridabad on 4.9.2010. When the respondent was on her family way, the appellant and his family members were living in USA/Canada but before that they had made all possible efforts to take the respondent to USA. The Baby of the parties was born on 4.12.2000 and the appellant came to India on 30.12.2000 to see the Baby. Financial support for the respondent and the Baby was provided by the father of the appellant who was in India. The respondent and her brother Jagjit Singh had to undergo trial in the Court of learned Additional Chief Judicial Magistrate, Faridabad for the criminal offences committed by them. As regards the stay granted by the High Court, it is stated that the operation of the decree passed by the Court at Faridabad was stayed in the absence of the father of the appellant who was absolute owner of the house. Earlier Civil Revision No.435 of 2006 was dismissed by the High Court on 28.7.2008. The divorce decree passed by the Circuit Court of Cook County, Illinois, USA meets the requirement laid down under Section 13 of the Civil Procedure Code. In terms of Section 6 of the Hindu Minority and Guardianship Act it is stated that the father is the natural Guardian of the son and an unmarried daughter.

(5) The learned trial Court on 10.2.2012, on the basis of the pleadings of the parties, framed the following issues:-

1. Whether the petitioner is entitled for the custody of minor daughter Seerat Sekhon aged 7½ years on the grounds mentioned in the petition? OPP

2. Whether the petition is not maintainable in the present form on the grounds mentioned in the written statement? OPR.

3. Whether the petitioner has not come with clean hands before the Court? OPR.

4. Relief.

(6) The general power of attorney of the appellant namely Dilraj Singh Sekhon appeared as PW1 and closed the evidence on behalf of the appellant. The respondent examined herself as RW1 and closed her evidence. Written arguments were filed by the general power of attorney of the appellant. Besides, documents were tendered in evidence. The learned trial Court after considering the evidence and material on record has dismissed the petition filed by the petitioner/appellant.

(7) We have heard learned counsel appearing for the respective parties and with their assistance gone through the records of the case. The primary contention on behalf of the appellant is that the appellant is the father and natural guardian of his minor daughter and the mother is not entitled for the custody of the minor when the father is alive. It is submitted that the respondent is not earning and is not in a position to support the minor. The appellant is a permanent resident of USA and he can bring up the minor in USA where he can support her and provide her with the best education in USA, which is free. Besides, it is submitted that no tutor would be required for the minor in USA. She would be taught by the father of the appellant who was working as Adjunct Professor in City College of Chicago. Baby Seerat is living in a bad environment and both the parents of the respondent were illiterate and that environment was not conducive for the minor. Besides, it is highlighted that the respondent has been quarrelsome and used to quarrel on trivial matters.

(8) In response, learned counsel for the respondent has contended that the minor daughter of the parties was born in the year 2000 and the appellant has no interest in the minor and neither does he have any love and affection for her. According to the learned counsel for the respondent, the appellant had dumped the minor child as also the respondent in India and he had never paid any maintenance amount to the minor or to the respondent despite specific orders of the Court. The learned trial Court also examined the minor in Court so as to ascertain from her as to with whom she desires to reside. The minor stated that she was happy in the custody of her mother and she had never seen her father nor had he come to meet her till date. She further stated that she does not want to live with her father and her custody should remain with her mother. She stated that she was studying in MVN Public School at Faridabad.

(9) In cases relating to the custody of a minor child what is primarily to be seen and ascertained is as to what would be the welfare and interest of the minor. It has come in evidence that the minor is not wanting to live with her father. Besides, the father of the minor namely Harpreet Singh has not come to India and he is contesting the litigation through his father Dilraj Singh who is stated to be holding a general power of attorney for the appellant. The petition and the appeal have been filed and the evidence led by the appellant is through his father and general power of attorney Dilraj Singh Sekhon.

(10) During the course of hearing we had asked learned Senior Counsel appearing for the appellant as to whether the appellant could come from USA or as to when would he be in a position to come so as to consider and workout some amicable settlement between the parties. However, the father of the appellant who is statedly holding general power of attorney for the appellant, stated that the appellant has suffering from heart problems and is unable to travel to India. Therefore, this Court was left with no chance to consider for working out some amicable settlement between the parties and the case is proceeded to be decided on the basis of evidence and material on record.

(11) The General Power of Attorney namely Dilraj Singh Sekhon in his deposition in Court tendered in evidence his affidavit (Ex.PW1/A) along with the documents Exhibit P1 to Exhibit P4. In his affidavit (Ex.PW1/A) the averments as made in the petition are reiterated. It is stated that the petitioner was left with no option but to get the marriage between the parties dissolved by a decree of divorce. Accordingly, the petitioner filed a divorce petition before the Presiding Judge of the Circuit Court of Cook County, Illinois, USA which was decreed vide judgment and order dated 23.5.2005 (Ex.P3) and the marriage between the parties was dissolved on 9.2.2000. Allegations have been made with regard to the misbehaviour of the respondent and her bad and disapproving temperament. Insofar as the question regarding custody of the minor is concerned, it is stated that the father of the minor is the only person who would be able to look after his own child in a better way with full fatherly love and affection. Besides, the minor would also get love and affection of her father in all respects. The petitioner is living in USA and has been working in family transportation business. The minor can be brought up in a well-cultured manner. The other family members of the

petitioner can also devote much time with the minor after discharging their duties and the child would also feel homely while in the custody of her natural/real father. The petitioner is deeply attached with the child and he is keenly interested in her support, welfare, good health, extremely good education and proper upbringing. The petitioner is having joint family. His father had been teaching in the Universities and City Colleges in Chicago, USA. In his deposition in Court it is stated that the petitioner has been undergoing medical treatment in USA. He has a heart problem. As such he is not able to work full time in his job. This aspect was objected to being beyond pleadings. It is stated that the petitioner had been living in USA for the last more than 18 years and for the last about 8 years, he has a medical problem for which he had undergone medical treatment. Medical reports in this connection would be submitted. In cross-examination it is denied by the General Attorney Dilraj Singh Sekhon that he had no authority to prosecute the present case. He had brought the original General Power of Attorney (GPA) in Court. It was incorrect to suggest that in the GPA he had not been given authority and right to sue or to defend his son in any case and in any court of law. It is stated as incorrect to suggest that in Family Court only the petitioner in person is required to appear and entitled to prosecute the case. He had been driving a Cab for the last about 15 years. Again said he was doing general duties prior to that. He did not remember what general duties he was doing and in which establishment whether private or government. The Cab belongs to his wife. They had only one cab. The vehicle meaning thereby the Cab was being replaced from time to time. He did not have any knowledge as to which model and make was being driven by his son. He did not know whether his son was paying income-tax or not but he was in financial difficulties and unable to meet the expenditure of medical treatment. His son was a green card holder. He did not have details of the same. His son was holding an Indian passport and was an Indian citizen. It is stated a incorrect that he was concealing the details of green card holding of his son because he feared that the respondent would obtain details of income of the petitioner from the Government of USA if the particulars of his green card were disclosed in Court. He voluntarily stated that he tried to obtain the copies of income tax return of his son. It is further stated that he would not produce income-tax returns of his son for the last 18 years. It is incorrect that he was deliberately concealing the income-tax returns of his son for the last 18 years and that is why he had

refused to place them on record. His son was living in a rented accommodation. He had no idea that how many rooms were there in the present rental accommodation. He did not know how much rent was being paid by his son. His son was got settled by his mother. His wife had been residing in USA for the last 20 years. She was not working and was a house-wife only. The petitioner did not feel necessary to disclose about the illness in the present petition. He voluntarily stated because he was doing a part time job. The part time job was plying a Cab. He did not have any proof regarding ownership of the vehicle being driven by his son as a Cab in favour of his wife. It is stated as incorrect that his son was a full time transporter having several vehicles. It is stated as incorrect that his son under his and his wife's guidance had deserted the respondent and the minor child. It is stated as incorrect to suggest that the appellant had no right to claim custody of the minor child. It was also incorrect to suggest that his son was a hard-core drunkard who drinks every day. It is stated as incorrect that the decree of divorce granted to his son by an American Court had been set aside by the Court. He voluntarily stated that he had filed an appeal against the judgment and decree (Ex.R1) in the High Court which was admitted. It is stated as correct that vide order Ex.R3, a maintenance allowance in favour of the respondent to the tune of Rs. 30,000/-, and Rs. 20,000/- in favour of the minor child respectively had been passed. He had filed an appeal against the said order. He did not know if stay was granted in his favour or not. The petitioner had not complied with the aforesaid order of interim maintenance allowance. He had deposited Rs.70,000/- in the High Court as litigation expenses from his own income. It was incorrect to suggest that the petitioner had not paid a single penny to the respondent and her minor child till date. He had not brought any record of payment of maintenance to the respondent and her child. He had paid amounts from time to time, which are mentioned. It is stated as correct that his son had never taken the respondent and the minor child to USA. It is voluntarily stated that they themselves did not go to USA. It is stated as incorrect to suggest that his son had never applied for Visas of the respondent and the minor child with the USA Embassy. It is also stated as incorrect to suggest that he had sent a form for applying Visa to the respondent showing her unmarried daughter of his friend. He had no proof to produce that his son had ever applied for Visas for the respondent and her minor daughter. It is voluntarily stated that further immigration progress could not be filled by the respondent. It

is stated as incorrect to suggest that the petitioner (appellant) had left the respondent and the minor child since 2003. It is stated as incorrect to suggest that he, out of revenge, filed a false case of trespassing against the respondent and her brother because she filed a case under Sections 406 and 498A Indian Penal Code at Police Station Central Faridabad. It is stated as incorrect to suggest that the welfare of the child would be protected and secured only with the respondent. He did not know how much the petitioner was earning at present as he was working part time. He was fully fit and earning a lot but did not want to pay anything to the respondent and her minor child. He denied that he was deposing falsely.

(12) The documents tendered by the petitioner are the general power of attorney date 22.02.2006 (Ex.P1) executed by Harpreet Singh Sekhon (appellant) in favour of his father Dilraj Singh Sekhon who has been pursuing the case. Photocopy of passport of Harpreet Singh (Ex.P2), mentioning the dates of arrival in India and departure. Photocopy of the judgment for dissolution of marriage dated 23.5.2005 (Ex.P3) passed by the Court of Circuit Court of Cook County, Illinois, USA and a photocopy of letter (Ex.P4) of Malcolm X College, one of the City colleges of Chicago mentioning that Dilraj Singh Sekhon (GPA of the appellant) began teaching as an Adjunct Professor at Malcolm X College in November, 1998. Besides, Mark A was submitted which is a photostat of Form G-325 A and is shown to be signed by Rajwant Kaur (respondent) biographic information, besides, Mark B was submitted which is a certificate issued by Dr. Vishnu D. Gaiha, M.D. It is certified therein that Harpreet Singh Sekhon (appellant) was his patient who had coronary artery disease, status post coronary bypass surgery, status post AICD implantation, history of myocardial infraction and diabetes. He felt that the patient could not work on a full time basis. Mark C is another document of the Court of Cook County, Illinois which is a photostat copy signed by Rajwant Kaur mentioning her as appearing in the matter through her attorney Sh. Mandeep Singh Sachdev. Mark D is a photostat copy of letter dated 19.4.2005 of Malhotra & Malhotra Associates, International Lawyers wherein it is stated that appearance on behalf of Rajwant Kaur Sekhon was being put in. Mark E is a compliant filed by the respondent Rajwant Kaur in the Court of learned Ilaqa Magistrate/ Additional Chief Judicial Magistrate, Faridabad against the petitioner (appellant), his parents namely Dilraj Singh Sekhon (father of the appellant)

and Tajinder Kaur Sekhon (mother of the appellant), Satnam Kaur (parental-mother-in-law of the respondent) and Smt. Pikki wife of Sh. Prem Pal Olakh (sic. - Aulakh). The said complaint was dismissed for want of prosecution vide order dated 04.09.2010. Mark 'F' is a copy of the complaint filed by Dilraj Singh Sekhon to the Director General of Police, Haryana against Rajwant Kaur (respondent). Marg 'G' is a photostat copy of the order dated 14.3.2011 passed by this Court whereby the Regular Second Appeal of Seerat Sekhon in the suit filed by her for declaration and prohibitory injunction that she was owner in actual physical possession of the suit property and she along with her mother be declared as actual owner as per their equal share as per law was dismissed.

(13) The respondent in her evidence tendered her affidavit Ex.RW1/A as also documents Ex.R1 to R4. In her evidence she stated that the petition was wholly misconceived and vexatious. It was filed only to blackmail her and to pressurize her so that she may not pursue the multi-pronged litigation. The affidavit (Ex.RW1/A) that has been filed by the respondent is in consonance with the written statement filed by her. In cross-examination she inter alia stated by the respondent that Baby Seerat was studying in Sixth class. It was correct that she had engaged a tutor privately for Rs.4000/- per month to teach her daughter. She (respondent) passed her B.A. in the year 1997 from Delhi University in the subjects of Political Science, Hindi, English and History. It is stated as incorrect that in the back ground of her education she was incompetent to teach her daughter. She had not joined any job. It is stated as incorrect to suggest that baby Seerat had suffered fracture in September 2009 because of the beatings given by her. It is stated as incorrect to suggest that she and her daughter were staying with her parents in Sector 9. It was incorrect to suggest that her parents were totally illiterate. It was incorrect to suggest that her father used to drive a tempo in Faridabad. It was incorrect to suggest that her father used to drink everyday. She did not know if her husband had been residing with his parents in USA as she had never gone to USA. She voluntarily stated that her father-in-law was always living in Faridabad and she had been seeing him. It is stated as correct that she wrote letters to her mother-in-law on her address in Chicago. She did not know that after her father-in-law came to India or that Harpreet had been bearing all household expenses and paying rent of the apartment. She did not agree with the suggestion

that the petitioner (appellant) was smart enough to look after and keep Baby Seerat and that it would be for the welfare of Seerat. She (respondent) would never be happy to send her child to America for any reason including education.

(14) The respondent in her defence tendered in evidence a copy of the judgment dated 25.8.2010 (Ex.R1) passed by the learned District Judge, Faridabad in a suit for declaration in terms of which the suit of the respondent was decreed in her favour and the divorce decree dated 23.5.2005 passed by the Circuit Court of Cook County, Illinois, USA was declared as null and void and not binding on the right of the respondent. A copy of the order dated 4.10.2010 (Ex.R2) passed by a Division Bench of this Court whereby in FAO No. 5742 of 2010 against the judgment and decree dated 25.8.2010 (Ex.R1) notice was issued subject to the appellant's depositing an amount of Rs.70,000/- (Provisional) towards litigation expenses to be paid to the respondent within a week from 4.10.2010 with the Registry of the High Court. Notice of motion in the application regarding condonation of delay and also in the main appeal were issued. Besides, a copy of the order dated 13.12.2010 (Ex.R3) passed by the learned Judicial Magistrate Ist Class, Faridabad in proceedings under the Protection of Women from Domestic Violence Act, 2005 was tendered in evidence whereby interim maintenance to make the payment of Rs.30,000/- to Rajwant Kaur (respondent) and Rs.20,000/- to Seerat before ten of every month from the date of application was passed.

(15) It may be noticed that in the present case, the appellant has been in America and he has not cared for the minor at any time. As against this the minor is in the custody of her mother who is the respondent. The minor herself has desired to live with her mother. Nothing has been in evidence by the appellant to show that he paid for the minor except for an amount of Rs.70,000/- towards litigation expenses which too was on account of the order dated 4.10.2010 (Ex.R2) passed by this Court issuing notice of motion on the application regarding condonation of delay and in the main appeal against the judgment and decree dated 25.8.2010 (Ex.R1) whereby the divorce decree dated 23.5.2005 (Ex.P3) passed by the Circuit Court of Cook County, Illinios (USA) as not binding upon the right of the plaintiff (now respondent Rajwant Kaur) had been decreed. Besides, it has come in evidence that the appellant is suffering from heart ailment and according to his father Dilraj Singh Sekhon, he is in financial difficulties and not in a position to pay for his medical treatment.

(16) The contention on behalf of the appellant is that in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956, the father is the first natural guardian and the mother comes after that. Therefore, the custody is liable to be given to the appellant. In this regard, it may be noticed that the Hon'ble Supreme Court in ***Smt. Surinder Kaur Sandhu*** versus ***Harbax Singh Sandhu and another (1),*** held that Section 6 of the Hindu Minority and Guradianship Act could not supersede the paramount consideration as to what was conducive to the welfare of the minor. The boy from his own point of view, it was held ought to be in the custody of the mother. In ***Ms. Githa Hariharan and another*** versus ***Reserve Bank of India and another (2),*** it was held that a mother can act as the natural guardian of a minor even when the father is alive. Word 'after' in Section 6 (a) of the Hindu Minority and Guradianship Act, it was held, has to be read as meaning "in the absence of father" to make the the said Section consistent with constitutional safeguard of gender equality. The word 'after' need not necessarily mean "after the lifetime". In the context in which it appears in Section 6 (a), it means "in the absence of", the word "absence" therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If a father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. It was further held that while both the parents are dutybound to take care of the person and property of their minor child and act in the best interest of his welfare, in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reasons is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as natural guardian of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be "absent" for the purposes of Section 6 (a) of the Hindu Minority and

(1) AIR 1984 SC 1224
(2) AIR 1999 SC 1149

Guradianship Act and Section 19(b) of the Guardians and Wards Act. In ***Gaytri Bajaj*** versus ***Jiten Bhalla (3)***, it was held that the interest and welfare of the minor should be treated as being of paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are some of the relevant factors that have to be taken in account by the court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court. Therefore, what is primarily is to be seen is as to what is the welfare of the minor which is the foremost and paramount consideration. The Courts can supersede the natural rights of a parent and not restore the custody of the child to him/her where on account of inaptitude, the welfare of the child is in danger. The parents' right to have custody of the child is not a right like a right of property but one of trust for the benefit of the child. Therefore, where a parent fails to perform the obligations which contain a trust in his/her favour, he/she foregoes his/her right to have custody of the child. A right of the parents is secondary to the interest of the child. The right will not be enforced where it conflicts with the interest of the child.

(17) It also needs to be emphasized that the appellant himself has never appeared in the present proceeding for seeking custody of the minor and he has been contesting the petition through his father/attorney Dilraj Singh Sekhon. A power of attorney dated 22.2.2006 (Ex.P1) was tendered in evidence. A reading of the said power of attorney shows that Harpreet Singh Sekhon (appellant) appointed his father Dilraj Singh Sekhon to do the following acts :-

1. To sell, transfer and purchase any immovable property in his (appellant's) name. This includes agricultural land also.
2. To open and operate saving bank and fixed deposit accounts in appellant's name.
3. To operate accounts held in appellant's name in Unit Trust of India and in any financial institutions.
4. To engage in and transact any and all lawful business of whatsoever nature or kind for the appellant and his name.

(3) (2012) 12 SCC 471

5. To exercise, do, or perform any act, right, power, duty or obligation what so ever that the appellant now have or may acquire the legal right, power or capacity to exercise, do or perform in connection with, arising out of or relating to any person, item, thing, transaction, business property, real or personal, tangible or intangible or matter whatsoever.

6. This instrument is to be construed and interpreted as General Power of Attorney giving and granting unto Harpreet Singh Sekhon said Attorney full power and authority to do and perform all and every act and things whatsoever requisite and necessary to be done in an about the premises as fully to all intents and purposes as Harpreet Singh Sekhon might or could do if personally present at the doing thereof with full power of substitution and revocation hereby ratifying and confirming all that Harpreet Singh Sekhon said Attorney do or cause to be done by virtue hereof.

(18) A reading of the said power of attorney is in the nature of a general power of attorney which does not include any power for initiating legal action seeking custody of the minor.

(19) Learned counsel for the respondent has raised strong objections to the nature of power conferred inasmuch as it specifically does not authorize Dilraj Singh Sekhon to pursue the litigation on behalf of the appellant Harpreet Singh Sekhon.

(20) In ***Mt. Inderwati*** versus ***Hari Ram and another (4),*** an application for leave to appeal in forma pauperis was filed. The application was not presented by the applicant but by one Sada Nand who described himself as an authorized agent of the applicant. The power of attorney in favour of Sada Nand who filed the application, it was held did not specifically authorized him to present an application for the applicant to appeal in forma pauperis. The power of attorney only gave him the power to conduct the appeal. It was held that there was no proper presentation by a person duly authorized to present the application. Reliance was placed on ***Sakinabibi*** versus ***Charnjit Singh (5),*** wherein an application for permission to sue as a pauper was presented under the authority of a Power of Attorney granted by the plaintiff to two pleaders and a duly certificated 'Mukhtar'. It was held that the Legal Practitioners merely had an ordinary Power of Attorney and were not specially authorized for the presentation of such an application. The power of attorney (Ex.P1) herein indeed does not provide for any specific authority to litigate on behalf of the appellant. Therefore, Dilraj Singh Sekhon cannot be said to be duly authorized to conduct the

(4) AIR 1937 Lahore 318
(5) AIR 1915 Lahore 369

litigation on behalf of the appellant. In any case Dilraj Singh Sekhon cannot be said to be in a position to depose as regards the welfare of the minor on the basis of the personal knowledge that the father of the minor actually may have. It is required to be proved and established by the appellant as to his state of mind and conduct and his bona fide with respect to the minor and it would be quite unfair and unsafe to hand over the custody of the minor to the father who has not appeared and deposed regarding his personal state of mind, conduct and bona fide but has been litigating through his father on the basis of a power of attorney, which even otherwise is improper. The evidence that has been led by the appellant that has been referred to above does not inspire confidence in this Court to hand over the custody of the minor to the appellant. Except for bald assertions through the alleged attorney of the appellant that the minor would be brought up well in USA, there is no bona fide intention that has been shown in this regard.

(21) The learned District Judge, Family Court in his impugned order held that the executor of the general power of attorney never allowed his attorney to file a petition for the custody of the minor daughter. It was held that the appellant was a patient of coronary artery disease and he cannot work on full time basis. The petitioner (appellant) had never visited to meet his minor daughter. Dilraj Singh Sekhon, the alleged attorney of the appellant has in his cross-examination stated that he did not know whether his son was paying income tax or not but he was in financial difficulty and unable to meet the expenditure of medical treatment. He did not know the income of his son. The minor has been in the custody of her mother. There are many litigations going on between the parties. The possibility of the appellant filing the petition for seeking custody only to put the pressure on the respondent as has been alleged by her cannot be entirely ruled out. The learned trial Court has also held that it would not be in the interest and welfare of the minor daughter, if her custody was given to her mother (respondent) and therefore, the appellant was not held entitled to the custody of the minor. In view of the afore-stated position, we find no infirmity with the said findings and conclusions reached at by the learned trial Court on the basis of evidence and material on record and submissions of the counsel for the parties. Therefore, there is no ground to interfere with the order of the learned trial Court.

(22) Consequently, there is no merit in the appeal and the same is accordingly dismissed.

A. Jain

3105/HC ILR—Govt. Press, U.T., Chd.