IN THE COURT OF THE CIVIL JUDGE & J.M.F.C.,PONNAMPET.

Present:- **Sri. Mohanagowda M.E**.,
Civil Judge and J.M.F.C.,
Ponnampet.

Dated, the 25th day of March 2019.

Cr.M.C.No.157/2018.

Petitioner: K.M.Sonia Madiah,
W/o: Late K.M.Madaiah,
Age: 31 years,
R/o: Mathur Village,
Virajpet Taluk,
Kodagu District.

(By **Suresh V.S.,** Advocate)

- V/s -

Respondents: 1. K.M. Leelavathi,
W/o: Late K.G.Monappa,
Age: 56 years,
R/o: Mathur Village,
Virajpet Taluk,
Kodagu District.

2. Nisheen K.M.,
W/o: Naveen,
Age: 35 years,
R/o: Mathur Village,
Virajpet Taluk,
Kodagu District.

3. Kandera Prakash,
S/o: Not known,
Age: 50 years,
R/o: Sulugodu Village,

Balele Post, Virajpet Taluk,
Kodagu District.

ORDER ON I.A FILED BY THE RESPONDENT U/Sec.25(2) OF D.V Act

The respondent has filed an application under Section.25 (2) of Protection of Women from Domestic Violence Act and prays to modify the ex-parte custody order made in favor of the petitioner.

2. **The case of the Petitioner in brief is as follows:**

The petitioner is the legally wedded wife of Late Madiah. The 1st respondent is her mother-in-law, the 2nd respondent is her sister-in-law and 3rd respondent is the brother of the 1st respondent. That she married Late Sri.Viju Madaiah on 6.1.2008 as per their customs and since then she was living in her matrimonial house along with her father in law and mother in law. The petitioner in her wedlock gave birth to a son and a daughter. That on 8.2.2010 the father in law died and on 12.5.2013 the husband of petitioner died. After the death of her husband, the petitioner was ill-treated by the respondents, she was blamed for giving birth to a female child and was also harassed by saying that after her entry to the house her husband died. The respondents abused the petitioner in filthy language. The 3rd respondent being the brother of 1st respondent instigated the 1st and 2nd respondent to commit domestic violence against the petitioner. When the petitioner

questioned the conduct of respondents she was thrown out of her matrimonial house with her small daughter and did not allow her to take her son. The respondents threatened that they would kill her son if she lodges any complaint to the police. The respondents said that they would return her son after alienation of all family properties. Several meetings were held to solve the family disputes but the respondents did not agree for settlement. Now the petitioner and her daughter took shelter at her parental house, she is unable to maintain herself. The family of the petitioner's husband owns vast agricultural properties and also several sites. That after the death of her father-in-law and her husband the Respondent No.1 mutated all the revenue records to her name and to the name of Respondent No.2 and started alienating the properties to bear their fashionable expenditures. In support of her claim petitioner produced a copy of police complaint, NCR, Wedding invitation, wedding photo, study certificate, school certificate, I.D card, Family tree, sale deeds, and RTCs. In view of the above petitioner prays to allow I.A.

3. The respondents appeared before the court filed objection denying material averments of petition except the fact of marriage. Respondent submitted that after three years of the death of petitioner's husband the petitioner along with her daughter abruptly vacated her matrimonial house and moved to her parental house. That the petitioner

left her son Dillan Devaiah at the mercy of this respondent and not made any efforts to meet her son, hence this respondent has been taking care of Dillan Devaiah. The 1st respondent visited the parental house of the petitioner and paid Rs.1,50,000/- by cash towards the educations expenses of petitioner's daughter. The 1st respondent deposited Rs.2,00,000/- each in fixed deposits in the name of the petitioner and her two children in KDCC bank, Gonikoppal. The 1st respondent has insured her grandchildren in several insurance schemes. The 1st respondent has provided several golden articles to the petitioner. The petitioner has filed this petition only to harass the 1st respondent, hence it is prayed to dismiss the petition.

4. Further, the 1st respondent in her present application submitted that she has made all the arrangements to safeguard the interest of Dillan Devaiah and he is happily living with his grandmother, hence if the child is forcibly taken away from the custody of the grandmother it would adversely affect the mental health of the child. Hence it is prayed to permit her to retain the custody of Dillan Devaiah till completion of the academic year 2018.

5. Heard the arguments.

6. The following points that arise for my determination:

1) Whether the petitioner has approached the court with clean hands?

2) Whether there are sufficient grounds for modifying the ex-parte order?

3) What order?

7. On hearing the arguments and on perusal of the materials placed on record my answers to:

Point No.1:- In the Negative
Point No.2:- Partly in the Affirmative
Point No.3:- As per final order

for the following…

REASONS

Point No.1

8. This is a clear case of abuse of process of the court and this court was misled by the false affidavit, which is full of glaring lies, filed by the petitioner. Ex-parte orders are extraordinary reliefs granted in extraordinary circumstances when the delay itself defeats the object of main relief. A party claiming such relief must approach the court with clean hands.

9. The petitioner in her main petition at para 8 stated as under:

> "…At the time of throwing out the petitioner and her daughter from the matrimonial house, the 1st and 2nd respondents wrongfully restrained the petitioner son with the respondent and said that they will send the petitioner son after alienation of all the family

> properties. In fact, the respondents have wanted that if at all she lodged the complaint to the police in this regard they will kill her son…"

10. This court takes judicial notice of the fact that this court on going through the above paragraph thought that the situation was very serious and passed exparte order against the respondents. It was alleged by the petitioner that there was a threat to the life of her son from the respondents, assuming the alleged fact to be true this court took it seriously and to prevent such unfortunate incident passed exparte order and granted the custody of the child to the petitioner.

11. Now the only question is whether or not the above-mentioned allegation made in the main petition and affidavit is true.

12. During the course of arguments, the 1st respondent was present in the court and submitted that since the death of her son she developed great affection towards her grandson and she is unable to live without him. She prayed for the custody of her grandson till her death and further submitted that she is ready to give a substantial portion of her self acquired properties to her grandchildren if the court allows her to take custody of her grandson. She further submitted that if the custody of her grandson isn't given she would donate all her properties to some orphanages. She

further submitted that she wants to give few properties to 2nd respondent for her livelihood and all other remaining properties would be given to the petitioner.

13. On hearing both the parties this court thought it necessary to speak to the child before implementing the exparte order. Hence on 15.9.2018, an in camera proceedings was held and the child expressed its unwillingness to go with the mother and chose to stay with the 1st respondent. Considering the affection of the child towards its grandmother and submission of the parties this court thought it improper to implement the exparte order in hurry and hence adjourned the case for settlement as both the parties expressed their wish for settlement.

14. Interestingly during the settlement efforts, the petitioner demanded partition and the 1st respondent agreed for dividing the joint family properties. However, on perusal of the records, it appears that an allegation was made by the petitioner saying that the 1st respondent hasn't furnished the details of all the family properties and hence the petitioner refused for the settlement.

15. After going through the pleadings and hearing the parties, this court is of the opinion that the present case isn't for custody of the child but for partition of family parties. It appears that the 1st respondent wants to give few properties to her daughter i.e 2nd respondent but the

petitioner wants entire properties to herself and her children. Hence the settlement has failed.

16. Now coming to the question of petition averments, at para 8 the petition it is stated that the 1st and 2nd respondents wrongfully restrained the petitioner's son and said that they will send the petitioner's son after alienation of all the family properties. It is further alleged in the petition that the respondents wanted the petitioner that if she lodges the complaint to the police in this regard they would kill her son. On perusal of records, the version of petitioner appears to be a cooked up story to obtain the exparte order from this court.

17. Now the crucial question is whether or not there was such a great threat to the life of the child of the petitioner. The petitioner avers that she was thrown out of the matrimonial house by the respondents but she doesn't whisper the date of the incident. In the absence of such pleading or since the said fact is willfully suppressed by the petitioner this court has to rely on the documents on record. I have perused the copy of police complaint produced by the petitioner dated 26.7.2018 and the police endorsement. In the said complaint it is specifically stated that on 03.04.2017 the petitioner and her daughter was thrown out of the matrimonial house. The present petition is filed on 29.8.2018 i.e after the lapse of 1 year and four months. The

petitioner has made a very strong allegation against the respondents, as per her own contention there was a life threat to the life of her son but she waited 1 year and four months to file this petition. Further, it is to be noted that the petitioner isn't some illiterate woman, she is a graduate, she studied law and she almost completed the law degree. Considering the facts it is very difficult to believe that there was such a life threat to the son of the petitioner. Further on perusal of police complaint, present petition, and submission of the parties it appears that the petitioner is more interested in the partition of family properties than the safety of her own son. The court takes judicial notice of the fact that it is very difficult for a mother to spend a single day when her son is in such grave danger and this petitioner being educated hasn't made any efforts for 1 year and four months. Hence the contention of respondent that the petitioner abruptly vacated her matrimonial house abandoning her son at the mercy of respondent appears to be true.

18. Further, the petition is drafted by suppressing material facts, the whole petition is silent about the date on which the petitioner was thrown out of the matrimonial house. However, on a plain reading of the petition as a whole, it creates an illusion that it might have happened a few days ago. However, the respondent alleges that the petitioner left the house after 3 years after the death of the petitioner's

husband. If the allegation was really true certainly she would have filed first information or at least the present petition a few years back. The petitioner has deliberately suppressed the material fact i.e the date on which she left the matrimonial house. This court doesn't appreciate the suppression of fact which was intended to mislead the court.

19. Further, the respondent has produced several Fixed Deposit receipts and LIC certificates made in the name of her grandchildren and even in the name of petitioner. Considering those documents it is difficult to believe the averment of the petitioner at para 8.

20. Now, the crucial question is why the petitioner is insisting for the custody order. On perusal of records and hearing the parties it appears that after the death of her son the 1st respondent has developed too much attachment towards her grandson and she is unable to live without him. Hence the petitioner by way of this petition is trying to make her yield to her demands and force her to transfer all the family properties to her name without providing anything to the 2nd respondent. The counsel for the respondent submitted that the petitioner is blackmailing the 1st respondent emotionally, considering the circumstances the submission appears to be true.

21. On perusal of the records, it is crystal clear and this court has absolutely no doubt that the petitioner in her petition at para 8 made false and misleading allegations against the respondents only to obtain exparte order. Hence this court holds that she hasn't approached the court with clean hands.

22. Further, as per the respondents' version, the child is residing with the 1st respondent from past 2-3 years and she is spending more than one lakh rupees per annum towards annual school fee of child and admitted him in one of the most reputed schools in Gonikoppa. If the respondents were greedy of assets as alleged in the petition the respondents would not have done it. The 1st respondent has developed too much attachment towards the child as her son is dead and the grandchild is her only hope. The respondents contended that the petitioner is greedy and wanted to grab all the family properties when the 1st respondent did not yield to her demands she filed this false case against the respondents to emotionally blackmail them, knowing that the 1st respondent cannot live without the child. It is submitted that the petitioner wants to use this petition to compel the respondent to yield to her demands.

23. The respondent further contended that for past 2 years the petitioner was silent and now all of sudden in her petition stated that there is a life threat to the child, if the

contention was true she would have filed the petition 2 years back. I have carefully perused both the versions, on perusal of materials produced by the respondent it is difficult to believe the version of the petitioner.

24. Further, now the court has to ascertain whether or not there is any threat to the life of the child of petitioner as alleged in the affidavit. The petitioner alleged in her petition "..the 1st and 2nd respondents wrongfully restrained the petitioner son with the respondent and said that they will send the petitioner son after alienation of all the family properties.". If the allegation of the petitioner is true the respondent must have made some serious efforts to dispose of all her family properties to defeat the property rights of the petitioner and her children. If the respondents really wanted to dispose of the properties they could have done it in a few weeks or months, no prudent man keeps the child as a hostage and waits to 2-3 years to sell the property. In view of the above, the contention of the petitioner appears to be false and vexatious.

25. Considering the facts, circumstances, and submissions of the parties and counsels it appears that the petitioner tried to convert civil disputes into a domestic violence case. The counsel for the respondent submitted that the petitioner insisted the 1st respondent to transfer all the

family properties to the name of petitioner but the 1st respondent refused to do so hence she filed this case. It is crucial to note that 2nd respondent also has rights in the family properties and hence the alleged demand of the petitioner can't be reasonable. Hence instead of filing partition suit, she filed this petition to take away the child and thereby create psychological and emotional pressure on the 1st respondent. In view of the above it is clear that the petitioner has not approached the court with clean hands, she suppressed the material facts and made vexatious false allegations against the respondents.

26. Further, even after the institution of this case, the petitioner hasn't acted in good faith. After hearing both the parties this court thought it necessary to speak to the child before implementing the exparte custody order, hence on 15.9.2018 one in camera proceedings was held and the child expressed its unwillingness to go with the mother and chose to stay with the 1st respondent. Considering the affection of the child towards its grandmother and submission of the parties this court thought it improper to implement the exparte order in hurry. If this court wanted to implement the exparte custody order it would have done it on that day itself when the child was before the court. The Hon'ble Apex court and High courts held that the children aren't chattels to snatch from one and to give to another. A lot of emotions and attachments are involved in child

custody cases, hence as an abundant precaution, this court wanted to hear both the parties on merits of I.A filed U/Sec.25(2) of DV Act before implementing the exparte order. In the middle, both the parties took several adjournments to finalize the terms of partition deed.

27. That, all of a sudden on 18.3.2019 the petitioner approached the CDPO and with the help of police implemented the exparte custody order and obtained the custody of the child. Here no doubt on the face it appears that the petitioner just implemented the order of this court however, in fact, it was not done in good faith. On 16.3.2019 i.e Saturday counsel for the petitioner took time for addressing his arguments on the present I.A and the counsel for respondent prayed for time for settlement, hence the case was adjourned to 20.4.2019. But all of a sudden on 18.3.2019 i.e Monday the petitioner goes behind the court and implements the order by misleading the CDPO and police. If the petitioner wanted to implement the order she should have insisted the court to pass an appropriate order on the present I.A but in the open court she seeks time to address arguments and behind the back of court she implements the order by using her money power.

28. Further, how the order is implemented is also relevant. The court is a temple of justice, where there is no scope of foul play or hide and seek. There was an exparte

order, if she wanted to implement it she should have done it properly. On 18.3.2019 morning the 1st respondent sends the kid to school and in the evening she waits at bus stand waiting for her grandson but to her shock her grandson doesn't come back home, so she suddenly approaches jurisdictional police and comes to know that the petitioner went to school and took the child from school authorities without even informing the 1st respondent for courtesy, obviously it is a heartbreaking situation for any grandmother. If the petitioner wanted to take the custody then she should have at least informed the 1st respondent about it and implemented the order, however, she goes to the school and takes the child without intimating the person who actually had the custody of the child. It appears as if the child was stolen on the pretext of the court order, it is nothing but an insult to the temple of justice, it doesn't look fair. If this court passes an order then it has every right and means to implement it, but this court never wanted to implement it in such a stealthy way. Justice is done in broad daylight and not in behind the back of someone.

29. Further, this court after the appearance of the respondent and after talking to the child thought it improper to implement the exparte order in hurry. But to the shock of court, the petitioner got the order implemented behind the back in a malafide way, hence this court issued a notice to CDPO and SHO to file a report explaining what

made them implement the order so suddenly which they didn't implement for nearly 6 months even after directing them to implement it. CDPO appeared before the court and submitted the report stating that S V Suresh, advocate for the petitioner insisted on her sub-staff to implement the old order and misled them by giving false information about case status. It is submitted that she was in a meeting at Madikeri and hence her office staff requested S V Suresh, advocate to wait till the arrival of CDPO but still he insisted them to act on the old order. It is further submitted that CDPO is the proper authority to deal with such matter and the computer operator and messenger have exceeded their powers by yielding to the pressure of the counsel for petitioner. It is submitted that normally when custody of the child is taken then the child is produced before the Child Welfare Committee, there only after intimating the other side the custody is handed over to the party, however yielding to the pressure of counsel for the petitioner the computer operator and messenger of CDPO office implemented the order without following the due procedure. The above circumstances are self-explanatory and don't require reasoning from this court.

30. First of all there was no threat to the life of child, secondly the settlement failed because the 1st respondent didn't yield to the demands of petitioner in dividing the family properties and thirdly the petitioner implemented the

exparte custody order behind the back of court and by indirectly threatening or misleading the subordinate staff of CDPO office. All these go to show that the petitioner hasn't approached the court with clean hands.

31. Regarding the duty of litigants to approach the court with clean hands the Hon'ble Apex Court in Ramjas Foundation v. Union of India, (2010) 14 SCC 38 held:

> "21. The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue(s) arising in the case."

32. Regarding the duty of litigants to approach the court with clean hands the Hon'ble Apex Court in S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1 held:

> "5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent

> of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

33. In view of the above judgments and facts of the case, this court holds that the present case is a clear case of abuse of process of the court and this court was misled by the false affidavit filed by the petitioner. Ex-parte orders are extraordinary reliefs granted in extraordinary circumstances when the delay itself defeats the object of main relief. A party claiming such relief must approach the court with clean hands, however, in this case, the party has suppressed all material facts and misled the court only to obtain exparte order and by doing so she made an attempt to make the respondents yield to her demands. In view of the above reasons, this court holds **Point No.1 in the Negative.**

Point No.2

34. Since the petitioner hasn't approached the court with clean hands and misled the court by false affidavit, in view of the above-discussed judgments this court can straight

away set aside the exparte order and proceed with the trial. However, since it involves the sensitive issue of custody of child this court proceeds to discuss the merits of the case.

35. The next crucial question is whether or not this court is bound to grand the custody of the child to the petitioner.

36. In this regard, the petitioner relied on the following judgment.

a). Nirmal Jain vs The State and Ors AIR 1983 Del 120

I have carefully perused the above judgment submitted by the counsel and applied to ratio to the facts of the case. With utmost respect the above-cited judgment I have also considered the legal principles discussed in judgments cited by me in this order.

37. In Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413 The Hon'ble Apex Court Held as under:

> "**Principles governing custody of minor children**
>
> 52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by

precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

65. As already noted, Antariksh was aged six years when the trial court decided the matter. He was, however, not called by the court with a view to ascertain his wishes as to with whom he wanted to stay. The reason given by the trial court was that none of the parties asked for such examination by the court.

66. In our considered opinion, the court was not right. Apart from the statutory provision in the form of sub-section (3) of Section 17 of the 1890 Act, such examination also helps the court in performing onerous duty, in exercising discretionary jurisdiction and in deciding the delicate issue of custody of a tender-aged child. Moreover, the final decision rests with the court which is bound to consider all questions and to make an appropriate order keeping in view the welfare of the child. *Normally*, therefore, in custody cases, wishes of the minor should be ascertained by the court before deciding as to whom the custody should be given.

72. We have called Antariksh in our chamber. To us, he appeared to be quite intelligent. When we asked him whether he wanted to go to his father and to stay with him, he unequivocally refused to go with him or to stay with him. He also stated that he was very happy with his maternal grandparents and would like to continue to stay with them. We are, therefore, of the considered view that it would not be proper on the

> facts and in the circumstances to give custody of Antariksh to his father, the respondent herein."

38. Considering the above judgment and the psychological impact on the child this court thought it necessary to speak to the child before implementing the exparte custody order. Hence on 15.9.2018 one in camera proceedings was held and the child expressed its unwillingness to go with the mother and chose to stay with the 1st respondent. Considering the affection of the child towards its grandmother and submission of the parties this court thought it improper to implement the exparte order in hurry. In view of the above judgment, it is clear that the opinion of the child is very important. In that case, the child was 6 years old, but in the present case the child is 10 years old and has more maturity. Further, it is crucial to note that the 1st respondent brought the kid to the court to assist the court to arrive at a right decision, hence the court was able to talk to the child to know its heart. On the other hand, after forcefully taking the custody of the child the petitioner appeared before the court and intimated the court that the child doesn't wish to go with its grandmother. The conduct of the petitioner is blameworthy, she is not even ready to bring the child to the court, hence adverse inference can be drawn. Hence the contention of the respondent that the petitioner has threatened the child and forcefully confined the child appears to be true and it can't

be ruled out easily. The conduct of the petitioner is corroborating the allegations of the respondent. Hence in view of the above judgment, after going through the records this court is of the opinion that the child wants to go with its grandmother but the petitioner has taken the custody of the child without following due procedure. In the above judgment, in the interest of the child, the Hon'ble Apex court passed custody orders in favor of grandparents of the kid overruling the right of the natural father. In the present case also in my humble opinion, the child's psychological health would be better if it stays with the grandmother.

39. In Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413 The Hon'ble Apex Court Held as under:

> "58. Though this Court in *Rosy Jacob* [(1973) 1 SCC 840] held that children are not mere chattels nor toys, the trial court directed handing over custody of Antariksh "*immediately*" by removing him from the custody of his maternal grandparents. Similarly, the High Court, which had stayed the order of the trial court during the pendency of appeal, ordered handing over Antariksh to his father *within twenty-four hours positively*. We may only state that a child is not "*property*" or "*commodity*". To repeat, issues relating to custody of minors and tender-aged children have to be handled with love, affection, sentiments and by applying human touch to the problem."

40. In the present case, the aged grandmother in her application submits that in the interest of psychological health of the child it is proper not to implement the order forthwith and prays to permit her to have the custody till

completion of the academic year. On the hand, here we have a well educated mother who goes to the school on the last working day with Police and CDPO staff and takes away the child as if it is just "a chattel or toy" and leaves the school without even intimating the grandmother who took care of the kid for nearly 10 years. How does a child feel, when it is taken from the school in the presence of police officers, in the uniform, and the poor kid had to travel from Gonikoppal to Mysore and unfortunately it didn't even get an opportunity to say goodbye to his beloved grandmother who sent him to school earlier that morning. In my humble opinion, this is not the way of implementing the order of the court, further that exparte order was made considering the false affidavit of the petitioner, after knowing the truth this court chose not to implement the order in hurry and thought it proper to hear both the parties in detail. The petitioner making use of order which was 6 months old misled the authorities and took the custody of the child. It is the mother of a child who is treating the child like a pawn for the game and in my humble opinion, it is blameworthy.

41. In Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673 Hon'ble Apex Court Held as under:

> "19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents

under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

21. In Rosy Jacob v. Jacob A. Chakramakkal [(1973) 1 SCC 840] a three-Judge Bench of this Court in a rather curt language had observed that: (SCC p. 855, para 15)

> "15. ... The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them."

> 24. Having interviewed Satyajeet in our chambers for some time, we find it difficult to accept the stand of the appellant that the father does not have sufficient time or resources to look after the welfare of the child. We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression to him.
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> 25. It is also significant to note that during the course of hearing on one of the dates, when we had not yet interviewed Satyajeet, we had suggested that it would be better if the child could stay with his mother for some more time. However, upon hearing us, he started crying and whining and, showed reluctance to go with the mother. Watching his reaction, we dropped the proposal.
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> 26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained. We feel that the visitation rights given to the appellant by the High Court, as noted above, also do not require any modification. We, therefore, affirm the order and the aforeextracted directions given by the High Court. It will, however, be open to the parties to move this Court for modification of this order or for seeking any direction regarding the custody and well-being of the child, if there is any change in the circumstances."

In the above case, the court gave custody of the child to the father overruling the right of the mother. In view of the above judgment, it is clear that mother doesn't get the absolute right to custody of child just because of her

"Motherhood", it is the interest of child which is paramount here. In the present case, firstly there was no threat to the life of child but the petitioner made false allegation and sworn to false affidavit, secondly the settlement failed because the 1st respondent didn't yield to the demands of petitioner in dividing the family properties and thirdly the petitioner implemented the exparte custody order behind the back of court and by indirectly threatening the staff of CDPO office. Hence in my humble opinion, it would be better if the child stays with the grandmother who is kind-hearted, generous and fair in her deeds.

42. In Anurag Vashisht vs Smt. Kusum 2015 SCC OnLine Raj 1216 Hon'ble High court held as under:

> "The question now comes as to whether custody of the children should be given in view of the above and only for the reason that prayer under Section 21 has been made. It would be necessary to clarify that as per Section 23 of the Act of 2005, the court can pass interim order, which includes even for custody of the children. The court is well within its right to pass appropriate order. It should not construe that even a case is not made out, an interim order is to be passed. The interim order can be passed only in appropriate case and not in all the cases where prayer is made. The prayer should be accepted subject to scrutiny by the judicial process.....
>
> The impugned order does not show that children were called to find out their desire. The same is the position of the revisional court. It is nothing but the orders have been passed in mechanical manner without finding out desire of the children. It is moreso when several judgments of the Hon'ble Supreme Court mandate for the opinion of the children."

In the present case, a false affidavit was filed before this court. There is no threat to the life of the child as falsely alleged in the affidavit of the petitioner. Considering the false affidavit this court was of the opinion that there is an imminent threat to the life of the child and hence this court passed exparte custody order. As per the above apex court judgment, this court ought to hear the child before granting custody order and just because it is prayed by the petitioner it isn't mandatory for the court grant the custody, this court has the discretion to reject the custody at the interim stage. Considering the falsity of the affidavit, attachment of the grandmother to child and conduct of the petitioner this court deems it proper not to use its discretionary power to pass any orders U/Sec.21 R/W 23 of the DV Act.

43. Further, this court doesn't appreciate the ingenious method of the petitioner to suppress the material facts. The child is not an animal to snatch from one and to give it another. By birth child won't get any attachment, it is the love and affection which nourishes humanity, in the present case for past 2-3 years the kid was exclusively with the grandmother , for 10 years it is with the grandmother and has developed attachment towards her. Hence in my humble opinion taking away the kid from 1st respondent is not proper.

44. The next crucial question is whether or not this court can set aside the exparte custody order when the I.A filed U/Sec.25(2) of DV Act became infructuous. In the present case, the respondent prayed to permit her to have the custody of the child till completion of the academic year 2018. On the last day of the academic year the petitioner by misleading the officials of CDPO office took the custody of the child, hence the petitioner argued that the present IA technically has become infructuous.

45. In my humble opinion, the contention of the petitioner can't be accepted. The court has to go through the pleadings first i.e Main petition and Objection filed to the main petition. All other interlocutory applications have to be read as part of the pleadings, the petitioner herself in her Affidavit filed U/Sec.23 submitted "..may be read as part and parcel of this affidavit..". Hence in this case also there is no impediment to read the main objection as part of the I.A. No doubt the present I.A looks infructuous but in the main objection the respondents pray to dismiss the petition itself. Further in Badat And Co vs East India Trading Co 1964 AIR SC 538 Hon'ble Apex court held that pleadings in the mofussil court are loosely drafted and that liberal construction should be always given to such pleadings.

46. Now the question is whether or not this court has the power to decide the correctness of exparte custody order

without looking into the I.A filed U/Sec.25 or Objection of the respondents. Is it mandatory for the court, even when it comes to know the truth, to expect the parties to file proper objections or applications? Is the court so helpless that it can't set aside its own order when it is crystal clear that the petitioner obtained the exparte order by playing fraud on the court? In this context, this court deems it proper to quote a popular quote of Attr. St. Augustine which reads as "The truth is like a lion. You don't have to defend it. Let it loose and it will defend itself.". In my humble opinion in the present case the truth doesn't require any assistance from these respondents, it is plain and simple, no doubt the respondents haven't contested the case properly by filing proper applications but as it is said "Truth doesn't need anyone to defend it". Further the motto of judiciary is also "Satyameva Jayate", judiciary isn't here to implement the law unmindful of the consequences, that much of discretion and power is vested with every court inherently. While dealing with the inherent powers of courts the Hon'ble High Court in *Chikkathimmegowda v. Deputy Commissioner* ILR 1991 KAR 3238 held that when the Court has jurisdiction to pass final order, the power to pass interim order stems from the very power to pass final order, that in the absence of such a power the jurisdiction will not be meaningful and effective. In the present case this court has power to pass final orders allowing or dismissing the claims of the petitioner in full or in part. The petitioner has to prove her

case by leading cogent evidence and she can't bank upon the weakness of the other side. Hence this court has power to decide the correctness of exparte custody order without looking into the I.A filed U/Sec.25 or Objection of the respondents. In my humble opinion, this court has every right to decide what is right irrespective of the contents of the objection filed by the respondents. This court can't pass illegal order, just because the opponent consents or fails to take a proper stand. In the same way, if the opponent doesn't seek proper remedies this court can't sit helplessly and allow the illegality or legalize an illegal act. In the present case the respondent could have sought for the custody of child even after the academic year 2018 but due to lack of knowledge or due to the mistake of her counsel it was not done, but this court can't pretend to be blind when the 1st respondent herself in the open court prays for custody of child. Giving undue importance to the pleadings than to the intention of the parties serves no logical purpose, especially in cases like this. Moreover the Hon'ble Supreme Court in Pasupuleti Venkateshwarulu vs The Motor and General Traders AIR 1975 SC 1409 held that the procedure is the handmaid and not the mistress of the judicial process. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice.

47. Further, objections and I.As are filed by the counsels and not by the parties. In the present case during the course of arguments, the 1st respondent herself was present and prayed for the custody of the child. Hence it appears that the learned counsel for the respondent by oversight hasn't filed proper I.A or hasn't made proper prayers in the present I.A. But that itself isn't ground to pass inappropriate orders in the present case. The Hon'ble High Court in Homeo Dr. T.K. Prabhawati v. C.P. Kunhathabi Umma, AIR 1981 Ker 170 held:

> "14. It is well-known that plaints are drafted by counsel; and so long as infallibility is not a universal virtue, a mistake committed by counsel should not be the undoing of the client in every case. Where the court is satisfied that a bona fide error is committed, that high stakes are involved, and that it would be unjust on the facts and circumstances of the case to allow the defendant to take advantage of such an error, it must have the power to do what is just, and that is one thing that cl. (b) permits....."

48. Moreover, the respondent has every right to amend the I.A or objection or file fresh I.A. This court takes judicial notice of the fact that even in 5 years old cases applications are filed for amendment of pleadings. In this case, since both the parties were fighting tooth and nail short dates were given at the time of filing the objection. After appearing before the court the respondent filed the objection and the present IA in just two days, on the other hand, the petitioner had 2-3 years time to prepare the petition to suit her needs. Hence in view of the above judgment, the

respondent can't be made to suffer for the fault of her counsel.

49. Further, from the materials available on record if this court is certain that the petitioner has suppressed the facts and filed a false affidavit to obtain exparte order then this court need not feel helpless. In my humble opinion, this court has every right to deny the relief to the petitioner even in the absence of any objection or IA from the side of respondents. If the court knows that the petitioner has not approached the court with clean hands then it need not wait for the contention or defenses of the other party, the court can suo moto rectify its mistakes or else it would be a mockery of the judicial process. Further, section 28 of Act empowers the court to lay down its own procedure in the interest of justice, when the court comes to know that the petitioner has misled the court to get exparte order it can not blindly sit and ask the other party to approach the appellate court. When this court comes to know the truth, then without worrying too much on the technicalities the court shall act firmly to uphold the dignity of the temple of justice.

50. Section.21 of P.W.D.V. Act empowers the magistrate to grant temporary custody of any child or children to the aggrieved person at any stage of the application. In view of the above, it is clear that only temporary custody can be

given to the petitioner and not permanent custody. Further, this court is not bound to grant the custody order just because an application is filed because the section says "magistrate may". Hence, it appears that the legislature in its wisdom thought it proper to give temporary custody of the child to the petitioner only in extraordinary circumstances and the court is not bound to pass custody order in all the cases. The legislature never intended this court to decide the custody of child and the proper remedy is to proceed under The Guardians and Wards Act, 1890, there the civil court has authority to decide these kind of delicate issue. Moreover this is a summary proceedings and delicate issues like the temporary custody of child can't be decided by this court unless for compelling reasons. In my humble opinion in the present case the child was exclusively with the 1st respondent for past 2-3 years, for 10 years it was in the house of 1st respondent and has developed attachment towards her, hence immediately taking away the child may adversely affect the psychology of the child.

51. Further, during the course of arguments, the 1st respondent argued for herself and submitted that the application schedule properties include both ancestral and her self acquired properties. It appears that the 1st respondent has purchased several properties from her own income or stridhan, hence as per Section.14 of Hindu

Succession Act the property owned by a woman becomes her absolute property, hence the exparte order made against the respondents restraining them from alienating all the application schedule properties is not proper and it is proper to limit the same to ancestral properties. Moreover at this stage it is crystal clear that the petitioner has filed false affidavit and misled the court to obtain exparte order, hence it is possible that all application schedule properties may not be ancestral properties and the petitioner might have included the self acquired properties of the respondents to compel them to yield to her partition demands. Further, the 1st and 2nd respondent have their own rights in the ancestral properties and they can't be restrained from dealing with their rights. Further, normally agriculture is done by raising agriculture loans from banks at a lower interest rate, hence if this court compels the respondents not to create any encumbrance then it may be difficult for them to maintain the properties and at the same time pay the interim maintenance to the petitioner. Further, it involves the determination of civil rights, hence it is not proper to restrain the respondents completely, but at the same time, it is proper to restrain the respondents from adversely affecting the rights of the children of the petitioner. This court can't restrain the respondents from alienating their shares in the joint family property, it can only restrain them not to sell the share of children of the petitioner in the joint family property.

52. Interestingly the 1st respondent hasn't objected for the interim maintenance order and submitted that it is her duty to pay maintenance to the petitioner and petitioner's daughter and she didn't seek for any modification in that regard.

53. In Lakshmi vs Radhamani 2016 SCC OnLine Ker 38358 the High Court of Kerala held that the trial court can set aside ex-parte order passed under Section 23 (2) of the Protection of Women from Domestic Violence Act, 2005. In A. Suresh Anto vs Anto Teena Mary 2016 SCC OnLine Mad 5304 the Hon'ble High court held that the trial court under Section 25 of the Act can set aside or modify the ex-parte order passed under Section 23 (2) of the Act. In view of the above judgments it is clear that this court after hearing both parties can set aside or modify the exparte order passed in this case.

54. In view of the above reasons and judgments this court answers **Point No.2 in the Affirmative.**

Point No.3

55. In view of my answers to the above points this court proceeds to pass the following:

ORDER

The order passed by this court U/Sec.21 of P.W.D.V.A 2005 granting the temporary custody of child named Dillan Devaiah to petitioner is hereby set aside.

Order U/Sec.18 (e) of P.W.D.V.A 2005 prohibiting the respondents from alienating or mortgaging or creating any kind of charge on application schedule properties is hereby set aside. However, Acting U/Sec.18 (e) of P.W.D.V.A 2005 the respondents are hereby prohibited from alienating or creating any kind of charge on the share of the children of the petitioner in the ancestral properties.

The exparte order regarding the interim maintenance shall remain in force till disposal of the main petition.

Office to send copies of this order to the Protection Officer, SHO of the concerned Police Station and Sub-registrar for proper execution and for information.

(Typed by me on my computer, after clerical additions by the stenographer, corrected and pronounced by me in the Open Court on this the 25th March 2019)

-sd-

(Mohanagowda M.E.,)
Civil Judge and J.M.F.C.
Ponnampet.