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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

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DATED THIS THE 22ND DAY OF APRIL, 2024

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.6789 OF 2023 (GM-FC)

BETWEEN:

1 . SAMIULLA SAHEB
S/O LATE ABDUL GAFFAR
AGED ABOUT 56 YEARS,

2 . MUBEEN TAJ
W/O SAMIULLA SAHEB
AGED ABOUT 46 YEARS.

BOTH ARE RESIDING AT:
NEXT TO JAMIYA MASJID MADANI MOHALLA
MAMBALLI POST AND HOBLI
YALANDUR TALUK
CHAMARAJANAGARA – 571 442.

... PETITIONERS

(BY SRI. MOHAMMED TAHIR, ADVOCATE)

AND:

MOHAMMED SAMEER
S/O REHAMUTHULLA
AGED ABOUT 28 YEARS

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R/AT DOOR NO.3146/2, 1ST STAGE
2ND CROSS, RAJIVNAGAR
MYSURU – 570 019.

... RESPONDENT

(BY SRI. H.A.PURUSHOTHAMA PRASANNA, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO SET ASIDE THE IMPUGNED ORDER DTD 03/02/2023, PASSED IN G AND WC NO. 49/2021 BY THE HONBLE III PRL. FAMILY JUDGE AT MYSORE, AT ANNEXURE-A.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioners are, defendants in G & W.C.No.49 of 2021, they are before this Court calling in question an order dated 03-02-2023 passed by the III Additional Principal Family Judge, Mysuru rejecting the application filed by the petitioners under Order VII Rule 10 r/w Section 151 of the Code of Civil Procedure seeking return of the plaint to be presented before an appropriate Court.

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2. Heard Sri. Mohammed Tahir, learned counsel appearing for the petitioners and Sri H.A. Purushothama Prasanna, learned counsel appearing for the respondent.

3. The facts, in brief, are as follows:-

The petitioners are the parents-in-law of the respondent. Daughter of the petitioners and the respondent got married and from the wedlock a child is born. The daughter of the petitioners who is the wife of the respondent dies on 16-05-2021 and since then it is the case of the petitioners that minor child is in their custody. The respondent, father of the minor child, registers G & W.C. petition before the Family Court at Mysuru in G & W.C. No.49 of 2021 on 21-12-2021 seeking custody of the minor child claiming that the child should be with the father. The petitioners - the defendants file an application seeking return of the plaint and transfer of the case to a Court of appropriate jurisdiction. The concerned Court, by its order dated 03-02-2023, rejected the application filed by the petitioners. It is the rejection that has

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driven the petitioners/defendants to this Court in the subject petition.

4. The learned counsel Sri. Mohammed Tahir appearing for petitioners submits that the child is a resident at Yelandur, Chamarajnagar District staying with grandparents/petitioners herein. The respondent is a resident of Mysuru. The learned counsel would submit that where the child resides would be the jurisdiction of the Court and not where the relatives or the father or the mother would reside. It is, therefore, his contention that the concerned Court has erred in rejecting the application filed by the petitioners.

5. Per-contra, the learned counsel appearing for the respondent would refute the submissions to contend that the biological father resides in Mysuru. Merely because the child is in the custody of the petitioners, after the death of their daughter, would not clothe jurisdiction to the Court at Mysuru. He would further contend that the application is filed by the defendants, which would not be maintainable in terms of Order VII Rule 10 of the CPC. Therefore, on the said ground, he seeks dismissal of the

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petition contending that the order does not warrant any interference.

6. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

7. The issue lies in a narrow compass. The afore-narrated facts are a matter of record. The respondent registers G & W.C case in G. & W.C. No.49 of 2021 seeking custody of the child who is presently with the petitioners. After receipt of the notice from the hands of the concerned Court, the petitioners/defendants preferred an application in I.A.No.VII under Order VII Rule 10 r/w 151 of the CPC for return of the petition for want of territorial jurisdiction. The contentions are as narrated hereinabove. The concerned Court, by its order dated 03-02-2023 rejects the application by the following order:

"…. …. ….

8. As far as contention of respondents that as per Sec.9 of Guardian and Ward's Act this petition has to be fled before the court within jurisdiction of which the

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minor is residing is concerned**, the case of respondent is not sustainable and sec.9 of Guardian and Ward's Act is not applicable to case on hand. Sec.9 of Guardian and Ward's Act, is applicable where the petition for appointment of a guardian of a minor or of his property is filed. Here in this case, the question of guardianship or the property of minor is not involved. Therefore, this case will not come within the purview of sec.9 of Guardian and Ward's Act. Hence, the contention of the respondents that this court has no territorial jurisdiction to entertain the petition, is not acceptable. **This petition is filed for custody of minor son of petitioner. The fact that the petitioner is natural guardian of minor and now the minor is under custody of parents-in-law of petitioner are undisputed facts. Hence, Sec.9 of Guardian and Ward's Act is not applicable to case on hand.

*9. More over, in this case, the respondents have appeared before court on 16/04/2022 and are represented by Advocate with permission of court. Thereafter, till 01/06/2022, the respondents did not chose to file objections to main petition. Thereafter, when case was posted for respondents' evidence, the respondents came with application seeking permission to file objections to main petition. However, this court has permitted the respondents to file objections and posted the case for cross-examination of Pw1 on 29/11/2022. When the matter was fixed for cross-examination of Pw1, the respondents have come up with present application raising objection with regard to territorial jurisdiction of this court. As per provision of CPC., No objection as to the place of suing shall be allowed by Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice. Therefore, it is clear from perusal of materials on record that the respondent has not raised objection with regard to territorial jurisdiction of this court at the earliest possible opportunities immediately after their appearance before court or before commencement of evidence of petitioner and thereby they acquiesce the territorial jurisdiction of court. More over, the respondent participated in reconciliation process. The respondent waited till the case was posted for cross-examination of Pw1. **Then the respondents have raised objections with regard to territorial jurisdiction and filed this application. From these***

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> ***circumstances, it is clear that the case of petitioner that the respondent wish to deprive the petitioner of his company with his minor son and to cause delay in disposal of the case, they are trying to drag on the matter on one or the other reason is more probable. Perusal of facts and circumstances of the case show that since the minor is now aged about 1½ years, the petitioner being natural guardian of minor son has every right to seek custody of child. If the petition is not disposed of within reasonable time, then there are chances of child to lose love and affection of its father at right time, at right age.*** *The love & affection of father is necessary for overall welfare of the child. For these reasons, it is opined that the application filed by respondents at belated stage of the case, for return of petition, is not maintainable. If this application is allowed, then the rights of petitioner who is natural guardian of minor child will be affected. Hence to avoid miscarriage of justice it is necessary to reject application of respondents. For these Reasons above point is answered in Negative."*
>
> *(Emphasis added)*

The Court rejects the application on the score that Section 9 of the Guardians and Wards Act, 1977 ('the Act' for short) is not applicable to the fact situation and the case has travelled up to the stage of cross-examination and the petitioners have not filed their written statement to the main petition. The application so rejected, is on the face of it, contrary to law. Section 9 of the Act reads as follows:

> ***"9. Court having jurisdiction to entertain application.- (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.***

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> *(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.*
>
> *(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction."*

(Emphasis supplied)

Section 9 permits filing of an application in the Court having jurisdiction of the place in which the minor ordinarily resides. Therefore, the law itself directs that the application for guardianship of a minor should be filed before the Court where the minor child resides, only that Court is conferred with jurisdiction. It is trite law that a Court without jurisdiction, even if it has travelled upto the stage of reserving the matter for its judgment, would be a proceeding which is a nullity in law, as no amount of consent or acquiescence, of the parties, would confer jurisdiction on any Court, which does not have such jurisdiction. It is admitted that the petitioners and the minor child are residing at Yelandur which comes within the jurisdiction of Chamarajnagar District. It is again

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settled principle of law that it is not where the father or mother resides that would confer jurisdiction, but it is where the child resides.

8. The Apex Court interpreting Section 9 of the Act in the case of ***RUCHI MAJOO v. SANJEEV MAJOO***[1] has held as follows:-

"…. …. ….

22. *It is in the light of the above averments that the question whether the courts at Delhi have the jurisdiction to entertain a petition for custody of the minor shall have to be answered.*

23. *Section 9 of the Guardians and Wards Act, 1890 makes a specific provision as regards the jurisdiction of the court to entertain a claim for grant of custody of a minor. While sub-section (1) of Section 9 identifies the court competent to pass an order for the custody of the person of the minor, sub-sections (2) and (3) thereof deal with courts that can be approached for guardianship of the property owned by the minor. Section 9(1) alone is, therefore, relevant for our purpose. It says:*

> *"**9.Court having jurisdiction to entertain application**.—(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides."*

24. It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the "ordinary residence" of the minor. The expression used is "where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn

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[1]*(2011) 6 SCC 479*

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is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy.

25. *The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There are serious disputes on those aspects to which we shall presently refer.*

26. *We may before doing so examine the true purpose of the expression "ordinarily resident" appearing in Section 9(1). This expression has been used in different contexts and statutes and has often come up for interpretation. Since liberal interpretation is the first and the foremost rule of interpretation it would be useful to understand the literal meaning of the two words that comprise the expression. The word "ordinary" has been defined by Black's Law Dictionary as follows:*

> *"Ordinary (adj.).—Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterised by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual."*

The word "reside" has been explained similarly as under:

> *"Reside.—Live, dwell, abide, sojourn, stay, remain, lodge. (Western-Knapp Engg. Co. v. Gilbank [129 F 2d 135 (CCA 9th Cir 1942)] , F 2d at p. 136.) To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as a quality, to be vested as a right.(Bowden v. Jensen [359 SW 2d 343 (Mo Banc 1962)], SW 2d at p. 349.)"*

27. *In Webster's Dictionary also the word "reside" finds a similar meaning, which may be gainfully extracted:*

> *"1. To dwell for a considerable time; to make one's home; live. 2. To exist as an attribute or quality with in. 3. To be vested: with in."*

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28. *In Annie Besant v. G. Narayaniah [(1913-14) 41 IA 314 : AIR 1914 PC 41] the infants had been residing in the district of Chingleput in the Madras Presidency. They were given in custody of Mrs Annie Besant for the purpose of education and were getting their education in England at the University of Oxford. A case was, however, filed in the District Court of Chingleput for the custody where according to the plaintiff the minors had permanently resided. Repeating the plea that the Chingleput Court was competent to entertain the application Their Lordships of the Privy Council observed: (IA p. 322)*

> *"… The District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By the 9th section of that Act the jurisdiction of the court is confined to infants ordinarily resident in the district. It is in Their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the district of Chingleput."*

29. *In Jagir Kaur v. Jaswant Singh [AIR 1963 SC 1521 : (1963) 2 Cri LJ 413] this Court was dealing with a case under Section 488 CrPC and the question of jurisdiction of the court to entertain a petition for maintenance. The Court noticed a near unanimity of opinion as to what is meant by the use of the word "resides" appearing in the provision and held that "resides" implied something more than a flying visit to, or casual stay at a particular place. The legal position was summed up in the following words: (AIR p. 1524, para 8)*

> *"8. … Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases thereon, we would define the word 'resides' thus: a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case."*

30. *In Kuldip Nayar v. Union of India [(2006) 7 SCC 1] the expression "ordinary residence" as used in the Representation of the People Act, 1950 fell for interpretation. This Court observed: (SCC p. 96, paras 243-46)*

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"243. Lexicon refers to Cicutti v. Suffolk County Council [(1981) 1 WLR 558 : (1980) 3 All ER 689 (DC)] to denote that the word 'ordinarily' is primarily directed not to duration but to purpose. In this sense the question is not so much where the person is to be found 'ordinarily', in the sense of usually or habitually and with some degree of continuity, but whether the quality of residence is 'ordinary' and general, rather than merely for some special or limited purpose.

244. The words 'ordinarily' and 'resident' have been used together in other statutory provisions as well and as per Law Lexicon they have been construed as not to require that the person should be one who is always resident or carries on business in the particular place.

245. The expression coined by joining the two words has to be interpreted with reference to the point of time requisite for the purposes of the provision, in the case of Section 20 of the RP Act, 1950 it being the date on which a person seeks to be registered as an elector in a particular constituency.

246. Thus, residence is a concept that may also be transitory. Even when qualified by the word 'ordinarily' the word 'resident' would not result in a construction having the effect of a requirement of the person using a particular place for dwelling always or on permanent uninterrupted basis. Thus understood, even the requirement of a person being 'ordinarily resident' at a particular place is incapable of ensuring nexus between him and the place in question."

31. *Reference may be made to Bhagyalakshmi v. K. Narayana Rao [AIR 1983 Mad 9], Aparna Banerjee v. Tapan Banerjee [AIR 1986 P&H 113], Ram Sarup v. Chimman Lal [AIR 1952 All 79], Vimla Devi v. Maya Devi [AIR 1981 Raj 211] and Giovanni Marco Muzzu (Dr.), In re [AIR 1983 Bom 242],* ***in which the High Courts have dealt with the meaning and purport of the expressions like "ordinary resident" and "ordinarily resides" and taken the view that the question whether one is ordinarily residing at a given place depends so much on the intention to make that place one's ordinary abode."***

(Emphasis supplied)

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The Apex Court clearly holds that in matters of custody, the residence of the child would ordinarily decide the jurisdiction. Ordinary residence would depend upon intention of the parties to make the child stay in that place which would be a matter of evidence. It is apposite to refer to a judgment of the High Court of Madras, to which I am in complete agreement of, the High Court of Madras in the case of ***C.NARASARAJU V. S.RAMESH***[2] has held as follows:

"…. …. ….

14. It is well settled that the question whether one is ordinarily residing at a given place depends so much on the intention to make that place one's ordinary abode. In this case, there is a clear admission in the Original Petition by the Respondent himself that the custody of the minor child was with the Revision Petitioner herein right from his birth at Mysore. Therefore, I hold that the ordinary residence of the minor, in this case, is Mysore where the Revision Petitioner is residing and having the custody of the minor child right from the date of his birth. *The Revision Petitioner has also proved the custody of the minor with him from the date of his birth and he has also admitted the child in L.K.G. in a school at Mysore. Under those circumstances, the Court below erred in dismissing the Application filed by the Revision Petitioner herein praying to pass an order returning the Original Petition filed by the Respondent herein to be presented before the proper Court having jurisdiction for adjudication of the matter in controversy between the parties hereto. The order passed by the Court below is also not sustainable in the light of the decision of the Honourable Supreme Court reported in Ruchi Majoo v. Sanjeev*

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[2] *2011 SCC OnLine Mad 2088*

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Majoo, 2011 (3) CTC 873 (SC) : 2011 (6) SCC 479. Therefore, the Court below has no jurisdiction to entertain the Petition filed by the Respondent."

(Emphasis supplied)

The High Court of Madras was interpreting Section 9 of the Act. The circumstances projected before the High Court of Madras are somewhat similar to what bears projection in the case at hand. The High Court of Madras follows the judgment of the Apex Court in the case of ***RUCHI MAJOO*** *supra*.

9. The learned counsel for the respondent has placed heavy reliance upon Section 20 of the Code of Civil Procedure to contend that the cause of action should be in terms of what is ascribed therein. Therefore it becomes necessary to notice Section 20 of the CPC and its interpretation in harmony with special enactments by the Apex Court and other High Courts. Section 20 of the CPC reads as follows:

"***20. Other suits to be instituted where defendants reside or cause of action arises.***—***Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—***

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> ***(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or***
>
> *(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally works for gain, as aforesaid, acquiesce in such institution; or*
>
> *(c) The cause of action, wholly or in part, arises.*
>
> * * * * *
>
> *Explanation.—A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."*
>
> *(Emphasis supplied)*

In terms of Section 20 of the Code of Civil Procedure, a suit can be instituted at a place where the cause of action arises be it in part or in full, but when it comes to special enactments which have overriding effect on any other general law, the special enactment would prevail is what is held by the High Court of Kerala in the case of ***ANOOP VIJAY v. ARUNIMA P.T.***[3]. The High Court of Kerala holds as follows:

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[3] *2021 SCC OnLine Ker 267*

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> ***"18. Section 20 of the Act gives the Family Court Act an overriding effect over all other laws. The overriding effect of the Act under Section 20 and the applicability of CPC made subject to the provisions of the Act, makes it abundantly clear that, the intention of legislature was to give exclusive jurisdiction to the Family Courts Act. Coupled with the aforesaid statutory provisions, is the applicability of the principle of special law prevailing over the general law. In the instant case, the Family Courts Act is a special law while the CPC is the general law****. So viewed, the forum for execution created under the Family Courts Act will prevail over the forum specified under the CPC."*

I am in respectful agreement with what is rendered by the High Court of Kerala. Therefore, the concerned Court ought to have taken note of this fact and allowed the application filed by the present petitioners/defendants therein.

10. Yet another submission is made by the learned counsel for respondent that an application under Order VII Rule 10 of the CPC could not have been maintained by the present petitioners/the defendants before the concerned Court. I decline to accept the said submission. Order VII Rule 10 of the CPC reads as follows:

> *"**10. Return of plaint**.—(1) [356][Subject to the provisions of Rule 10-A, the plaint shall] at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.*
>
> *[357][Explanation.—For the removal of doubts, it is hereby declared that a court of appeal or revision may direct, after*

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> *setting aside the decree passed in a suit, the return of the plaint under this sub-rule.]*
>
> *(2)* ***Procedure on returning plaint****.—On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.”*

Order VII Rule 10 of the CPC permits filing of an application for return of plaint. Sub-section (1) of Section 10 permits the concerned Court to return the plaint to be presented before the Court in which the suit should have been instituted. The procedure to be followed on returning the plaint is dealt with under sub-section (2) of Section 10. Order VII Rule 10 of the CPC touches upon the jurisdiction of a Court to have entertained a suit. The question of jurisdiction cuts at the root of the matter, and if the Court has no jurisdiction territorial or otherwise, to entertain a plaint, it cannot. Who brings up the issue before the concerned Court is immaterial, as Order VII Rule 10 of the CPC nowhere indicates that it is only to be filed by the plaintiff and not the defendant. What is brought to the notice of the Court *qua* jurisdiction is what is important and not who brings it. In a given case, a defendant/s has/have a right to file application or even raise an oral objection for raising grounds based on Order VII Rule 10 or

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Order VII Rule 11 of the CPC. The Court cannot direct the defendant to file a written statement for raising objections, if he does not desire to do so. But if he chooses to do so, it is an altogether a different circumstance, which is not the circumstance in the case at hand.

11. The present application in the case at hand under Order VII Rule 10 of the CPC, is filed by the defendant. Though the Court does not reject the application on the said ground of it being filed by the defendant, since the submission is made, I have deemed it appropriate to consider the said submission and answer it holding that the defendant also has a right to file an application seeking return of the plaint under Order VII Rule 10 of the CPC, for want of jurisdiction of a particular Court, to try the suit. The submission that it is the right of the plaintiff only, stands repelled.

12. In the light of the preceding analysis and the judgments rendered by the Apex Court and that of other High Courts and the undisputed fact that the child is residing within the jurisdiction of Chamarajnagar District, the concerned Court ought to have

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answered the application under Order VII Rule 10 of the CPC in favour of the petitioners/defendants, as the Court before which the main petition is presented did not have territorial jurisdiction.

13. For the aforesaid reasons, the following:

ORDER

(i) Writ Petition is allowed.

(ii) The order dated 03-02-2023 passed by the III Additional Principal Family Judge, Mysuru in G & W.C. 49 of 2021 stands quashed.

(iii) The Application – I.A.VII filed by the petitioners under Order VII Rule 10 r/w Section 151 of the CPC is allowed. The petition/plaint is directed to be returned, for it to be filed before the Court having appropriate jurisdiction – where the child is residing.

Sd/-
JUDGE

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CT:SS