NIL RATAN KUNDU & ANR. A

v.

ABHIJIT KUNDU

(Civil Appeal No. 4960 of 2008)

AUGUST 8, 2008 B

[C.K. THAKKER AND D.K. JAIN, JJ.]

Guardians and Wards Act, 1890 – ss. 7 and 17 – Custody of minor child – Sought by father – Father facing criminal trial u/s 498A and 304 IPC for causing death of the mother of C *the child – Child in custody of maternal grand-parents – Courts below granting the custody to the father – On appeal, held: Courts below granted custody to the father without applying principle of welfare of the child as paramount consideration – Custody of minor being humane problem, to be solved with* D *human touch and not solely by interpreting legal provisions – The court in selecting a guardian exercises parens patriae jurisdiction – Thus bound to consider welfare and well-being of child –On the facts, courts were bound to consider the pendency of criminal case against the father – In such cases* E *wishes of minor also are required to be ascertained by the court – Hindu Minority and Guardianship Act, 1956 – s. 13.*

Respondent filed an application under Guardians and Wards Act, 1890 seeking custody of his minor son. The minor child was in custody of the appellants (maternal F **grand parents of the child). Appellants had lodged an FIR against the respondent u/s 498A and 304 IPC for causing death of their daughter (mother of the child). Criminal case was pending against the respondent-father. Appellants had got the custody of the child at the age of five years when** G **he was found sick in the house of the respondent. Trial court allowed the application holding that the respondent being the father and natural guardian, the present and future of the child would be better secured in his custody.**

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A High Court upheld the order of the trial court and also drew inference that the child had been tutored against his father. Hence the present appeal. The child, when asked by this Court, refused to go to the respondent.

Allowing the appeal, the Court

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HELD: 1.1 In the instant case, the Courts below were not right or justified in granting custody of the minor to the respondent-father without applying relevant and well-settled principle of welfare of the child as paramount consideration. [Para 83] [1141-A]

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1.2 In deciding a difficult and complex question as to custody of a minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided *solely* by interpreting legal provisions. It is a humane 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 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. [Para 56] [1133 G-H] [1134 A-C]

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1.3 In such cases, it is not the 'negative test' that the father is not 'unfit' or disqualified to have custody of his son/daughter is relevant but the 'positive test' that such

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custody would be in the welfare of the minor which is material and it is on that basis that the court should exercise the power to grant or refuse custody of minor in favour of father, mother or any other guardian. [Para 62] [1135-C-D]

1.4 On the facts and in the circumstances of the case, both the Courts were duty bound to consider the allegations against the respondent herein and pendency of criminal case for an offence punishable under Section 498A IPC. One of the matters which is required to be considered by a Court of law is the '*character*' of the proposed guardian. It is no answer to state that in case the father is convicted, it is open to maternal grand parents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and appropriate order ought to have been passed. [Para 72] [1137 C to F]

Rosy Jacob v. Jacob A. Chakramakkal **1973 (1) SCC 840;** *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka* **1982 (2) SCC 544;** *Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu* **1984 (3) SCC 698;** *Elizabeth Dinshaw (Mrs.) v. Arvand M. Dinshaw* **1987 (1) SCC 42;** *Chandrakala Menon (Mrs.) v. Vipin Menon (Capt)* **1993 (2) SCC 6;** *Mausami Moitra Ganguli v. Jayant Ganguli* **JT 2008 (6) SC 634**; *Kirtikumar Maheshanker Joshi v. Pradip Kumar Karunashanker Joshi,* **1992 (3) SCC 573 – relied on.**

Saraswathibai Shripad v. Shripad Vasanji, **ILR 1941 Bom 455 : AIR 1941 Bom 103;** *Tarun Ranjan Majumdar and Anr. v. Siddhartha Datta,* **AIR 1991 Cal 76;** *Bimla Devi v. Subhas Chandra Yadav 'Nirala'* **AIR 1992 Pat 76;** *Goverdhan Lal and Ors. v. Gajendra Kumar* **AIR 2002 Raj 148;** *M.K. Hari Govindan v. A.R. Rajaram,* **AIR 2003 Mad 315;** *Kamla Devi v. State of Himachal Pradesh* **AIR 1987 HP 34 – referred to.**

Mc Grath, Re, **1893 (1) Ch 143 : 62 LJ Ch 208;** *Howarth v. Northcott,* **152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758– referred to.**

A *Halsbury's Laws of England,* **Fourth Edition, Vol. 24, para 511**; *Habeas Corpus* **by Bailey Vol. I, page 581**; *American Jurisprudence, Second Edition,* **Vol. 39; para 31 and 148 pp. 34 and 280-81– referred to.**

B **2.1 The trial Court ought to have ascertained the wishes of the child as to with whom he wanted to stay. The child whose custody is in question 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 Court was not** C **right in giving the reason that none of the parties asked for such examination by the Court. Apart from statutory provision in the form of sub-section (3) of Section 17 of Guardians and Wards Act, 1890, such examination also helps the Court in performing onerous duty, in exercis-** D **ing discretionary jurisdiction and in deciding 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 cus-** E **tody cases, wishes of the minor should be ascertained by the Court before deciding as to whom custody should be given. In view of the fact that when this Court ascertained the wishes of the child, he refused to go to his father, it would not be proper to give custody of the child to** F **his father-respondent. [Paras 74, 83 and 84] [1137 H, 1138 A 1141 A-B,C,D]**

2.2 There is no material on record as to on what basis the inference that the child has been tutored to make him hostile towards his father was drawn or opinion was G **formed by the High Court. [Para 70] [1136, H]**

Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, **1982 (2) SCC 544 – distinguished.**

Anni Besant (Mrs.) v. G. Narayaniah and Anr., **41 IA 314** H **: AIR 1914 PC 41 – referred to.**

Case Law Reference

1893 (1) Ch 143	Referred to	Para 25
17 ALR 3rd 758	Referred to	Para 28
AIR 1941 Bom 103	Referred to	Para 41
1973 (1) SCC 840	Relied on	Para 42
1982 (2) SCC 544	Relied on	Para 44
	Distinguished	Para 78
1984 (3) SCC 698	Relied on	Para 45
1987 (1) SCC 42	Relied on	Para 45
1993 (2) SCC 6	Relied on	Para 45
JT 2008 (6) SC 634	Relied on	Para 46
1992 (3) SCC 573	Relied on	Para 48
AIR 1991 Cal 76	Referred to	Para 50
AIR 1992 Pat 76	Referred to	Para 51
AIR 2002 RAJ 148	Referred to	Para 53
AIR 2003 Mad 315	Referred to	Para 54
AIR 1987 HP 34	Referred to	Para 55
AIR 1914 PC 41	Referred to	Para 75

CIVIL APPELLATE JURISDICTILN : Civil Appeal No. 4960 of 2008

From the final Judgment and Order dated 7.12.2007 of the High Court of Calcutta in F.M.A.T. No. 3185 of 2006

R.K. Gupta, S.K. Gupta, Arun Yadav and A.N. Bardiyar for the Appellants.

Jaideep Gupta, S.N. Mitra, Partha Sil, Kunal Chatterjee and B.K. Pal for the Respondent.

A The Judgment of the Court was delivered by

C.K. THAKKER, J. 1. Leave granted.

2. The present appeal is filed against the judgment and order passed by the Additional District & Sessions Judge, Fast B Track, 1st Court, Barasat on July 15, 2006 and confirmed by the High Court of Calcutta in F.M.A.T. No. 3185 of 2006 on December 7, 2007. By the impugned orders, both the Courts below directed handing over custody of minor child Antariksh Kundu to father-Abhijit Kundu, respondent herein.

C *Factual matrix*

3. To understand the controversy in the appeal, it is appropriate if we narrate relevant facts of the case:

4. The appellants herein, (i) Nil Ratan Kundu and (ii) Smt. D Kabita Kundu are maternal grand father and grand mother respectively of minor Antariksh, father and mother of deceased Mithu Kundu and father-in-law and mother-in-law of Abhijit Kundu-respondent herein. It is the case of the appellants that they had a daughter named Mithu whom they gave in marriage to Abhijit E Kundu on August 8, 1995. The marriage was performed according to Hindu rites and ceremonies. Sufficient amount of dowry by way of money, ornaments and other articles was given to the respondent. According to the allegation of the appellants, however, the respondent and his mother were not satisfied with F the dowry and they started torturing Mithu for bringing more money from the appellants. On November 18, 1999, a male child-Antariksh was born from the said wedlock. The appellants thought that after the birth of son, torture on Mithu would be stopped. Unfortunately, however, it did not so happen. Mithu was G totally neglected and the harassment continued. She became seriously sick. Coming to know about the ill-health of Mithu, the appellants brought her to their house and got admitted her in a nursing home for medical treatment. On being cured, she returned to her matrimonial home, but the demand of dowry persisted and physical and mental cruelty did not stop.

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5. In the night of April 9, 2004, as alleged by the appellants, Mithu was brutally assaulted by the respondent and his mother and was brought to a hospital where she was declared dead. Immediately on the next day *i.e.* on April 10, 2004, appellant No.1 lodged First Information Report (FIR) against the respondent and his mother at Baranagar Police Station which was registered as Case No. 90 for offences punishable under Sections 498A and 304, Indian Penal Code (IPC). The respondent was arrested by the police in that case.

6. On April 18, 2004, custody of Antariksh was handed over to the appellants. Antariksh was found in sick condition from the residence of the respondent. At that time, he was only of five years. It was his maternal grand father-appellant No.1, who maintained the child with utmost love and affection. He was admitted to St. Xavier's Collegiate School, Kolkata which is a well-known and well-reputed school in the State of West Bengal.

7. After due investigation of the case, on May 31, 2005, police submitted a charge-sheet against the respondent and his mother and the criminal case is pending. After the respondent was enlarged on bail, he filed an application under the Guardians and Wards Act, 1890 (hereinafter referred to as '1890 Act') praying for custody of Antariksh. A reply was filed by the appellants to the said application strongly objecting to the prayer made by the respondent. It was expressly stated in the reply that custody of child Antariksh was given to them when he was found in ailing condition in the house of the respondent. The respondent and his mother had killed their daughter and a criminal case was pending and custody of Antariksh may not be given to the father-respondent.

Trial Court's order

8. The trial Court, after considering the evidence on record, allowed the application and held that respondent was father and natural guardian of Antariksh and the present and future of Antariksh would be better secured in the custody of respon-

A dent. Accordingly it passed an order that custody of Antariksh be *'immediately'* given to the father.

High Court's order

9. Being aggrieved by the said order, the appellants approached the High Court. But the High Court also, by the order impugned in the present appeal, dismissed the appeal holding that the trial Court was right in ordering custody to be given to the father and the said order did not suffer from infirmity. The Division Bench of the High Court, therefore, directed the appellants to handover child Antariksh in the custody of his father with visitation rights to the appellants. The said order is challenged by the appellants-maternal grand parents of Antariksh in this Court.

Earlier orders

10. On March 7, 2008, when the matter was placed for admission hearing, notice was issued by this Court and was made returnable on March 24, 2008. The Court also observed that let the child (Antariksh) remain present in the Court on that day at 10.30 a.m. The learned counsel appearing for the appellants stated that the appellants would bear expenses of bringing Antariksh to the Court. Accordingly, a direction was issued that for that purpose, custody of Antariksh may be given to the appellants on March 22, 2008.

11. On the returnable date, *i.e.* on March 24, 2008, the Court heard learned counsel for the parties. The Court also ascertained the wishes of Antariksh. It was, however, observed in the order that an appropriate order would be passed on March 31, 2008, the day on which the matter was ordered to be listed for further hearing. It was stated that till then the custody of Antariksh would remain with maternal grand parents. It was also observed that it would not be necessary to keep Antariksh present in the Court on the adjourned date. On March 31, 2008, the matter appeared on the board and the learned counsel for the parties were heard. The learned counsel for the respondent

prayed for time to file affidavit in reply. It was also stated that the matter was urgent and affidavit should be filed within a very short period. The Court, therefore, observed that let such affidavit-in-reply be filed on or before April 2, 2008 and the affidavit-in-rejoinder be filed on or before April 4, 2008. The matter was adjourned to April 7, 2008. On April 7, 2008, again the Court heard learned counsel for the parties and felt that the matter should be heard finally on a non-miscellaneous day and accordingly the Registry was directed to place the matter in the last week of April, 2008. The matter was, therefore, placed on board for final hearing and it was heard on April 29-30, 2008.

Appellants' submissions

12. The learned counsel for the appellants strenuously contended that both the Courts were wholly wrong in granting custody of minor Antariksh to the respondent. It was stated that the approach of the Courts below was technical and legalistic rather than pragmatic and realistic. It was stated that in such matters, paramount consideration which is required to be borne in mind by the Court is welfare of the child and nothing else. Precisely that has not been done.

13. It was alleged that the respondent and his family members were after dowry and they had tortured Mithu since she could not bring sufficient amount of dowry. She was physically and mentally harassed. She became ill and was admitted to hospital by the appellants. After she was cured, she returned to matrimonial home, but the harassment and cruelty persisted. Even after the birth of Antariksh, the difficulties did not come to an end and as Mithu was unable to bring more money, as demanded by the respondent and his family members, she was killed and criminal proceedings were initiated against the respondent and his mother which are pending.

14. It was further stated that the above incident had given mental shock to minor Antariksh who was also found sick in the house of the respondent when he was of five years of age. The appellants brought Antariksh with them and got him admitted in

A a recognized and well reputed school and he is very well settled. In the circumstances, the Courts ought not to have passed an order directing the appellants to handover custody of Antariksh to the respondent.

B 15. It was also contended that the trial Court which exercised the power under 1890 Act, did not ascertain wishes of Antariksh by calling him, observing that none of the parties asked for such examination and considering his age, such action was not taken. So far as the High Court is concerned, it observed that the child had been 'tutored' to make him hostile towards his C father. According to the counsel, there was nothing to show on what basis the above statement had been made by the High Court and the custody had been wrongly granted to the respondent. The said order, therefore, deserves to be set aside.

D 16. It was also argued that under 1890 Act, in appointing or declaring a guardian of a minor, the Court should keep in mind the welfare of the minor being paramount consideration having regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor. If the minor is old enough to form an independent E opinion or preference, the Court may consider that aspect as well. In the instant case, the trial Court decided the matter on July 15, 2006 when Antariksh was more than six years of age. But neither his wishes were ascertained, nor his preference was even enquired by calling him. It was also submitted that though '*character*' of the proposed guardian has to be taken into account, the F Courts below did not appreciate in its proper perspective the fact that a criminal case was pending against the respondent which related to the death of mother of minor Antariksh involving the respondent himself and his mother and by observing that if G he would be convicted, appropriate action could be taken thereafter. The High Court also committed the same mistake. Both the orders, therefore, are liable to be set aside.

Respondent's submissions

H 17. The learned counsel for the respondent-father, on the

other hand, supported the order passed by the trial Court and confirmed by the High Court. It was urged that both the Courts below considered the relevant provisions of law, the position of the respondent as natural guardian being father of Antariksh and the facts in their entirety and held that there was no earthly reason to deprive him of custody of minor Antariksh. The Courts felt that minor Antariksh also should not be deprived of natural love and affection of his father in absence of mother.

18. According to the counsel, the Courts were conscious of the fact that a criminal case was pending against the respondent and, therefore, observed that if ultimately the respondent would be convicted and sentenced to jail, the appellants herein (grand parents of the child) could move the Court for change of custody. Such an order cannot be said to be illegal or contrary to law and in the exercise of jurisdiction under Article 136 of the Constitution, this Court may not interfere with it.

19. Before we address ourselves to the issue regarding custody of Antariksh, let us consider the legal position.

English Law

20. In Halsbury's Laws of England, Fourth Edition, Vol. 24, para 511 at page 217 it has been stated;

> *"Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration,* and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."
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> (emphasis supplied)

21. It has also been stated that if the minor is of any age to exercise a choice, the court will take his wishes into consideration. (para 534; page 229).

22. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is 'welfare of the child'.

23. In Habeas Corpus, Vol. I, page 581, Bailey states;

> "The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."

24. It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be for the best interest of a child to grant its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

25. In *Mc Grath, Re,* (1893) 1 Ch 143 : 62 LJ Ch 208, Lindley, L.J. observed;

> *The dominant matter for the consideration of the Court is the welfare of the child.* But the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered

as well as its physical well-being. Nor can the tie of affection be disregarded. A

(emphasis supplied)

American Law

26. Law in the United States is also not different. In American Jurisprudence, Second Edition, Vol. 39; para 31; page 34, it is stated; B

"As a rule, in the selection of a guardian of a minor, *the best interest of the child is the paramount consideration*, to which even the rights of parents must sometimes yield". C

(emphasis supplied)

27. In para 148; pp.280-81; it is stated;

"Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence, a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. *In short, the child's welfare is the supreme consideration, irrespective of the* D E F G H

A *rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.*

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may
B be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. *In determining whether it will be for the best interest of a child to award*
C *its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment*".

(emphasis supplied)

28. In *Howarth v. Northcott*, 152 Conn 460 : 208 A 2nd 540
D : 17 ALR 3rd 758; it was stated;

"In habeas corpus proceedings to determine child custody, the jurisdiction exercised by the Court rests in such cases on its inherent equitable powers and exerts the force of the State, as *parens patriae*, for the protection of its infant
E ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity".

29. It was further observed;

F "The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but *the primary purpose is to furnish a means by which the court, in the*
G *exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate*".

H (emphasis supplied)

30. It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child.

Indian Law

31. The legal position in India follows the above doctrine. There are various statutes which give legislative recognition to these well-established principles. It would be appropriate if we examine some of the statutes dealing with the situation. Guardians and Wards Act, 1890 consolidates and amends the law relating to guardians and wards. Section 4 of the Act defines "minor" as a person who has not attained the age of majority. "Guardian" means a person having the care of the person of a minor or of his property, or of both his person and property. "Ward" is defined as a minor for whose person or property or both, there is a guardian. Chapter II (Sections 5 to 19) relates to appointment and declaration of guardians. Section 7 deals with 'power of the Court to make order as to guardianship' and reads as under:

> 7. Power of the Court to make order as to guardianship.-
> (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—
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> (a) appointing a guardian of his person or property, or both, or
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> (b) declaring a person to be such a guardian,
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> the Court may make an order accordingly.
>
> (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.
>
> (3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person

A to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

32. Section 8 of the Act enumerates persons entitled to apply for an order as to guardianship. Section 9 empowers the B Court having jurisdiction to entertain an application for guardianship. Sections 10 to 16 deal with procedure and powers of Court. Section 17 is another material provision and may be reproduced;

C *17. Matters to be considered by the Court in appointing guardian.*-(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

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(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, E if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) *If the minor is old enough to form an intelligent preference, the Court may consider that preference.*

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(5) The Court shall not appoint or declare any person to be a guardian against his will.

(emphasis supplied)

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33. Section 19 prohibits the Court from appointing guardians in certain cases.

34. Chapter III (Sections 20 to 42) prescribes duties, rights and liabilities of guardians.

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35. Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as "1956 Act") is another equally important statute relating to minority and guardianship among Hindus. Section 4 defines "minor" as a person who has not completed the age of eighteen years. "Guardian" means a person having the care of the person of a minor or of his property or of both his persons and property, and *inter alia* includes a natural guardian. Section 2 of the Act declares that the provisions of the Act shall be in addition to, and not in derogation of 1890 Act.

36. Section 6 enacts as to who can be said to be a natural guardian. It reads thus;

> *6. Natural guardians of a Hindu Minor.*—The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—
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> (a) in the case of a boy or an unmarried girl—the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
>
> (b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father.
>
> (c) in the case of a married girl—the husband:
>
> Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—
>
> (a) if he has ceased to be a Hindu, or
>
> (b) if he has completely and finally renounced the world becoming a hermit (*vanaprastha)* or an ascetic (*yati or sanyasi).*
>
> *Explanation.*—In this section, the expressions "father" and "mother" do not include a step-father and a step-mother.

A 37. Section 8 enumerates powers of natural guardian. Section 13 is extremely important provision and deals with welfare of a minor. The same may be quoted *in extenso;*

13. Welfare of minor to be paramount consideration.

B (1) *In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.*

(2) No, person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating
C to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

(emphasis supplied)

D 38. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consis-
E tently with their wishes, wherever possible.

39. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child' and not rights of the parents under a
F statute for the time being in force.

Case law

40. The aforesaid statutory provisions came up for consideration before Indian Courts in several cases. Let us deal with
G few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well-being as paramount consideration.

41. In *Saraswathibai Shripad v. Shripad Vasanji,* ILR 1941 Bom 455 : AIR 1941 Bom 103; the High Court of Bombay stated;
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"It is not the welfare of the father, nor the welfare of the mother that is the paramount consideration for the Court. *It is the welfare of the minor and the minor alone which is the paramount consideration.*"

(emphasis supplied)

42. In *Rosy Jacob v. Jacob A. Chakramakkal,* (1973) 1 SCC 840, this Court held that object and purpose of 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The *power* and *duty* of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

43. The Court further observed that merely because there is no defect in his personal care and his attachment for his children—which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. The Court also observed that children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society 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.

44. Again, in *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka,* (1982) 2 SCC 544, this Court reiterated that only consideration of the Court in deciding the question of custody of minor should be the welfare and interest of the mi-

A nor. And it is the special duty and responsibility of the Court. Mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.

45. In *Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu,* (1984) 3 SCC 698, this Court held that Section 6 of
B the Hindu Minority and Guardianship Act, 1956 constitutes father as a natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. [See also *Elizabeth Dinshaw (Mrs.) v. Arvand M. Dinshaw,* (1987) 1 SCC 42;
C *Chandrakala Menon (Mrs.) v. Vipin Menon (Capt)*, (1993) 2 SCC 6].

46. Recently, in *Mausami Moitra Ganguli v. Jayant Ganguli,* JT (2008) 6 SC 634, we have held that the first and
D the paramount consideration is the welfare of the child and not the right of the parent.

47. We observed;

"The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the
E 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 child
F 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 are predominant consideration. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of
G the welfare of the minor. 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
H 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 al the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

48. In *Kirtikumar Maheshanker Joshi v. Pradip Kumar Karunashanker Joshi,* (1992) 3 SCC 573, custody of two minor children was sought by father as also by maternal uncle. Mother died unnatural death and the father was facing charge under Section 498-A, Indian Penal Code. Children were staying with maternal uncle. Before this Court, both the children expressed their desire to stay with maternal uncle and not with the father.

49. Considering the facts and circumstances and bearing in mind the case pending against the father and rejecting his prayer for custody and granting custody to the maternal uncle, the Court stated;

"After talking to the children, and assessing their state of mind, we are of the view that it would not be in the interest and welfare of the children to hand over their custody to their father Pradipkumar. We are conscious that the father, being a natural guardian, has a preferential right to the custody of his minor children but keeping in view the facts and circumstances of this case and the wishes of the children, who according to us are intelligent enough to understand their well-being, we are not inclined to hand over the custody of Vishal and Rikta to their father at this stage".

A 50. The counsel also invited our attention to decisions of various High Courts. In *Tarun Ranjan Majumdar & Anr. v. Siddhartha Datta,* AIR 1991 Cal 76, the High Court considered Sections 7, 12 and 25 of 1890 Act. It held that when the Court is of the opinion that some order is required to be passed with B regard to custody of a ward, it can be passed considering the welfare of the ward. It was further observed that even if a child is in the custody of one who has no legal right thereto and its welfare is reasonably looked after in a manner in which it should, the legal guardian cannot claim an order of return or recovery of C custody merely on the strength of his legal right or financial soundness.

51. In *Bimla Devi v. Subhas Chandra Yadav 'Nirala',* AIR 1992 Pat 76, the Court held that paramount consideration should be welfare of minor and normal rule (the father is natural D guardian and is, therefore, entitled to the custody of the child) may not be followed if he is alleged to have committed murder of his wife. In such case, appointment of grand-mother as guardian of minor girl cannot be said to be contrary to law.

52. Construing the expression 'welfare' in Section 13 of E 1956 Act liberally, the Court observed;

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

53. In *Goverdhan Lal & Ors. v. Gajendra Kumar,* AIR 2002 Raj 148, the High Court observed that it is true that father is a G natural guardian of a minor child and therefore has a preferential right to claim custody of his son, but in the matters concerning the custody of minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the mi- H

nor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out wishes of the child as to with whom he or she wants to live.

54. Again, in *M.K. Hari Govindan v. A.R. Rajaram,* AIR 2003 Mad 315, the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to 'human touch'. The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

55. In *Kamla Devi v. State of Himachal Pradesh,* AIR 1987 HP 34, the Court observed;

> "(T)he Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other".

Principles governing custody of minor children

56. 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 custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided *solely* by interpreting legal provisions. It is a humane 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 pro-

A cedure 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, B 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 C the final decision should rest with the Court as to what is conducive to the welfare of the minor.

Orders of Courts below not in consonance with law

57. Having given anxious and thoughtful consideration to D the facts of the case and applying well settled principles referred to above, we are constrained to observe that the orders passed by the Courts below are short of the fundamental principles on more than one ground.

E 58. The approach of both the Courts is not in accordance with law and consistent with the view taken by this Court in several cases. For instance, both the Courts noted that the appellants (maternal grand parents) are giving 'all love and affection' to Antariksh but that does not mean that Antariksh will not get similar love and affection from his father. It was also observed F that appellants no doubt got Antariksh admitted to a well reputed school (St. Xavier's Collegiate School, Kolkata). But it could not be said that the father will not take personal care of his son. Both the Courts also emphasized that the father has right to get custody of Antariksh and he has not invoked any G disqualification provided by 1956 Act.

59. We are unable to appreciate the approach of the Courts below. This Court in catena of decisions has held that the controlling consideration governing the custody of children is the welfare of children and not the right of their parents. H

60. In *Rosy Jacob,* this Court stated; A

"The contention that if the husband (father) is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly may at times be somewhat misleading". B

61. It was also observed that the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The father's fitness cannot override considerations of the welfare of the minor children. C

62. In our opinion, in such cases, it is not the 'negative test' that the father is not 'unfit' or disqualified to have custody of his son/daughter is relevant but the 'positive test' that such custody would be in the welfare of the minor which is material and it is on that basis that the Court should exercise the power to grant D or refuse custody of minor in favour of father, mother or any other guardian.

63. Though this Court in *Rosy Jacob* held that children are not mere chattels nor toys, the trial Court directed handing over custody of Antariksh '*immediately*' by removing him from the E custody of his maternal grand-parents. 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 F to custody of minors and tender-aged children have to be handled with love, affection, sentiments and by applying human touch to the problem.

64. At another place, the trial Court noted that a criminal G case was pending against the father but the pendency of the case did not *ipso facto* disqualify him to act as the guardian of Antariksh.

65. The Court stated; "If ultimately the petitioner (father) is convicted and sentenced in that case, the OPs (maternal grand- H

parents of Antariksh) will have the scope to inform the fact to the Court and to pray for change of the Court's decision".

66. The Court made a '*comparative study*' and observed that it had 'no hesitation' in holding that the present and future of Antariksh would be better secured in the custody of his father.

67. It then stated;

"Antariksh should be, therefore, immediately removed from the custody of OPs (Maternal grand-parents) to the custody of the petitioner (father)".

(emphasis supplied)

68. The appellants herein challenged the decision of the trial Court by approaching the High Court. With respect, the High Court also committed the same error by not applying correct principle and proper test of welfare of minor (Antariksh) as the paramount consideration. It, no doubt, referred to the principle, but held that the trial Court was right in handing over custody of Antariksh to the father.

69. The High Court then proceeded to state;

"We have gone through the evidence adduced by both sides and also heard the child in order to decide the question of the welfare of the said child. *During our conversation with the child we have observed with great anxiety that the child has been tutored to make him hostile towards his father.* In this connection it is worth mentioning here that the learned Court below also held that the O.P's wanted to wipe out the existence and identity of father from the mind of the petitioner's son and if it so, then it may be disastrous for the future of the petitioner's son".

(emphasis supplied)

70. We are sorry to say that there is no material on record as to on what basis the above inference was drawn or opinion was formed by the High Court.

71. Now, it has come in evidence that after death of Mithu (mother of Antariksh) and lodging of First Information Report by her father against Abhijit (father of Antariksh) and his mother (paternal grand mother of Antariksh), Abhijit was arrested by police. It was also stated by Nil Ratan Kundu (father of Mithu) that mother of accused Abhijit (paternal grand mother of Antariksh) *absconded* and Antariksh was found sick from the house of Abhijit.

72. In our considered opinion, on the facts and in the circumstances of the case, both the Courts were duty bound to consider the allegations against the respondent herein and pendency of criminal case for an offence punishable under Section 498A, IPC. One of the matters which is required to be considered by a Court of law is the '*character*' of the proposed guardian. In *Kirit Kumar,* this Court, almost in similar circumstances where the father was facing the charge under Section 498-A, IPC, did not grant custody of two minor children to the father and allowed them to remain with maternal uncle. Thus, a complaint against father alleging and attributing death of mother and a case under Section 498-A, IPC is indeed a relevant factor and a Court of law must address to the said circumstance while deciding the custody of the minor in favour of such person. To us, it is no answer to state that in case the father is convicted, it is open to maternal grand parents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and appropriate order ought to have been passed.

73. 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.

74. In our considered opinion, the Court was not right. Apart from statutory provision in the form of sub-section (3) of Section 17 of 1890 Act, such examination also helps the Court in per-

A forming onerous duty, in exercising discretionary jurisdiction and in deciding 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
B custody cases, wishes of the minor should be ascertained by the Court before deciding as to whom custody should be given.

75. Before about a century, in *Anni Besant (Mrs.) v. G. Narayaniah & Anr.,* 41 IA 314 : AIR 1914 PC 41, under an agreement, custody of two minor sons was with the mother who was
C staying in England. The father who was residing in Madras, instituted a suit for custody of his sons asserting that he was the natural guardian of the minors and was entitled to have custody of both his sons. The trial Court decreed the suit which was confirmed by the High Court.

D

76. The Judicial Committee of the Privy Council held that under the Hindu Law, the father was the natural guardian of his children during their minority. But it was stated that the infants did not desire to return to India and no order directing the defendant mother to send minors to India could have been lawfully
E made by an Indian Court.

77. Upholding the contention, allowing the appeal and dismissing the suit, their Lordships observed that it was open to the plaintiff-father to apply to His Majesty's High Court of Jus-
F tice in England for getting custody of his sons. *"If he does so the interests of the infants will be considered, and care will be taken to ascertain their own wishes on all material prints."* (emphasis supplied) Since it was not done, the decree passed by both the Courts was liable to be set aside.

G 78. We may, however, refer at this stage to a submission of the learned counsel for the respondent-father. Referring to *Thrity,* the counsel contended that this Court held that the Court is not bound to interview the child. In that case, this Court did not interview the minors and did not ascertain their wishes. It
H was, therefore, submitted that it cannot be said that non-exami-

nation of Antariksh or failure to ascertain his wishes by the trial Court was illegal or unlawful and vitiated the order. A

79. We are unable to agree with the learned counsel. We have closely gone through *Thrity.* Reading the decision as a whole makes it amply clear that on the facts of the case, this Court felt that calling minor children frequently in a Chamber by Judges was not proper and such interviews really disturbed them rather than giving them a respite and relief. B

80. This Court reproduced some of the observations of learned Judges of the High Court who had interviewed the minors. The Court also considered sub-section (3) of Section 17 of 1890 Act and the power of the Court to interview a minor child with a view to consider his/her preferences and observed; C

> "We may, however, point out that there cannot be any manner of doubt as to the Court's power of interviewing any minor for ascertaining the wishes of the minor, if the Court considers it so necessary for its own satisfaction in dealing with the question relating to the custody of the minor". D

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

> "*In the facts and circumstances of this case we are however, not inclined to interview the minor daughter, as we are satisfied in the present case that the minor is not fit to form an intelligent preference which may be taken into consideration in deciding her welfare.* We have earlier set out in extenso the various orders passed by the various learned Judges of the Bombay High Court after interviewing the minor and the learned Judges have recorded their impressions in their judgments and orders. The impressions as recorded by the learned Judges of the Bombay High Court, go to indicate that the minor has expressed different kinds of wishes at different times under different conditions. *It also appears from the report of the Social Welfare Expert that these interviews cast a gloom* F G H

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

(emphasis supplied)

G 82. From the above observations and particularly the italicized portion, it is abundantly clear that in peculiar facts and circumstances of the case, this Court was satisfied that calling a minor girl and interviewing her several times had not only not served any useful purpose but had the effect of creating further
H depression and demoralization in her mind.

83. In the instant case, on overall considerations we are convinced that the Courts below were not right or justified in granting custody of minor Antariksh to Abhijit-respondent herein without applying relevant and well-settled principle of welfare of the child as paramount consideration. The trial Court ought to have ascertained the wishes of Antariksh as to with whom he wanted to stay. A B

84. 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 grand-parents 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-respondent herein. C D

85. For the foregoing reasons, the appeal deserves to be allowed and is accordingly allowed. The application filed by the respondent Abhijit for custody of his son Antariksh is ordered to be dismissed. In view of the facts and circumstances of the case, however, there shall be no order as to costs. E

K.K.T. Appeal allowed.