REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5099 OF 2007

Gaurav Nagpal …Appellant

Versus

Sumedha Nagpal ….Respondent

(With Criminal Appeal NO. 491 of 2006)

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of a learned Single Judge of the Punjab and Haryana High Court dismissing the appeal filed by the appellant. Learned District Judge, Gurgaon, had allowed the application filed by the respondent-wife under Section 6 of the Hindu Minority and

Guardianship Act, 1956 (in short the 'Act') alongwith Section 25 of the Guardians and Wards Act, 1890 (in short 'Guardian Act').

2. Matrimonial discords are on the rise at an alarming rate. The sanctity of marriages is under cloud, which in a great way affects the society at large. Individuals can in no way be segregated from the society to which they belong. The cultural heritage of a country is greatly influenced by a pattern of behaviour of individuals and more so in matters of matrimony. Home can be a wonderful place to live. But continuous fights between the partners of a marriage disturb the atmosphere at home and create havoc on the members of a family. One does not need a mansion to lead a happy marital home. The foundation of a happy home is love, sharing of joys and sorrows, and not in that sense bricks and concrete. There should be cementing of hearts and not cementing of floors and walls. Life is a series of awakening. The happiness which brings enduring worth to life is not the superficial happiness that is dependent on circumstances. Ultimately, in the fight between the partners, the victims more often than not are the children. It is unfortunate that in their fight more often on account of egoism the children suffer, more particularly when the child is a girl. It is not uncommon to see that at the time of negotiation of marriage, the boy's

parents shy away because the girl is from a broken family and/or the parents are divorced. The child has practically no role in breaking of the marriage, but he or she suffers. The marital discord sometimes reaches a stage where the parties are unmindful of what psychological, mental and physical impact it has on children. It is worse when there is a single child, be it a boy or a girl. The case at hand is a classic example where the child has become the focus of controversy. Bitter legal fights have been fought and the corridors of several courts including the Supreme Court have been travelled by the parties. Efforts have been made unsuccessfully to bring about conciliation between the parties. The best way to make children good said a learned author is to make them happy.

3. A brief reference to the factual aspects leaving out the maize of unnecessary facts would suffice.

The parties got married on 14.10.1996 and the child from their wedlock was born on 15.11.1997. According to the appellant, respondent abandoned the child on 8.8.1999 but she filed a Habeas Corpus Petition before the Delhi High Court on 25.8.1999. The High Court dismissed the petition on the ground of territorial jurisdiction. Respondent filed a Special Leave Petition against the High Court's order dated 14.1.2000 and also

filed a Writ Petition under Article 32 of the Constitution of India, 1950 (in short the 'Constitution'). This Court permitted interim custody of the 20 months old child with the appellant. The respondent filed a maintenance petition before the Delhi High Court and also a petition for guardianship before a learned Additional District Judge, Jhajjar. The same was later withdrawn and the petition was filed in the District Court, Gurgaon. Appellant filed his reply opposing the application on the ground that the respondent had deserted the child. By order dated 2.5.2002, learned Civil Judge dismissed the application for interim custody holding that any disturbance by changing the custody of the child would traumatize him and shall not be conducive to the welfare of the child and it would affect the mental balance of the child who had developed love and affection for his father and his family members. A Revision Petition was filed by the respondent before the High Court. The High Court granted the visitation rights to the respondent by order 30.9.2002 but continued the interim custody with the appellant. The visitation rights fixed by the Court were in the following terms:

(a) 9 a.m. to 5 p.m. on every last Saturday of the month.

(b) For a week in the aforesaid manner in summer vacations.

(c) One day in Dussehra holidays (9 a.m. to 5 p.m.

(d) One day in Diwali Holidays (9 a.m. to 5 p.m.).

A contempt petition was filed for violation of the terms by the appellant. The learned District Judge, Gurgaon allowed the petition of the respondent and granted custody of the child to the respondent. Appellant preferred an appeal before the High Court against the order dated 6.1.2007. The High Court passed an interim order staying the order of custody to the respondent but continued the order with respect to visitation rights. By order dated 13.7.2007 the appeal filed by the appellant was dismissed. Though the initial order of the High Court was stayed, subsequently by order dated 29.10.2007 the visitation rights were continued.

4. According to the appellant, the order of the High Court is clearly wrong on several counts. The order passed by the High Court dated 9.3.2005 convicting the appellant for contempt of court has also been assailed in Criminal Appeal No.491 of 2006. The Trial Court came to hold that since the child had remained with the appellant for a period of 7 years, he appears to have made every possible effort to obtain the custody of a minor. The learned District Judge took note of the fact that taking of the

child from his father's custody may adversely affect the sentiments and upbringing of the child, but at the same time the child should not be deprived the mother's home.

5. Stand of the appellant before the High Court was that the court below had not held that he suffers from any disability in his role as a father and, therefore, there was no comprehensive reason for the Court to direct custody of the child to be entrusted to the respondent. The fact that the respondent was the mother cannot be the sole basis for allowing the petition. While considering the prayer for the custody of the child, several factors including the relationship between the parties and the minor are secondary. It was submitted that the minor was abandoned when he was about one year and nine months old. Thereafter, in the garb of seeking custody several rounds of litigation were unleashed.

6. With reference to Section 6 of the Act it was submitted that the father was the legal guardian and the welfare of the minor child lies with the appellant. He has a large income and resides in a joint family where the minor is taken care of by the appellant, his mother, brother and brother's wife and his three nephews. The warmth of the joint family has led to an all

round development of the child and by taking him away from those surroundings can deprive him of love and affection. The appellant lives in a posh locality and the house is built on nearly 3000 sq. yards whereas the respondent resides with her parents in a two-bed room flat. Apart from that the appellant has a good educational background and since the child has been residing for the last more than seven years with him, the courts should not have directed handing over custody to the respondent.

7. It was further pointed out that the primary focus being the welfare of the child, the respondent should have brought on record as to how with her meagre income she would be able to provide good education to the child. It was pointed out that the child is afraid of his mother and wrenching him from the custody of the father would lead to irreparable mental trauma.

8. So far as the contempt proceedings were concerned it was submitted that the appellant is not a criminal and though certain cases have been lodged against him they are related to some technical violations.

9. The respondent's stand on the other hand was that the appellant had shifted his residence to Bahadurgarh by deception and fraud. From there the

child was snatched from her custody on 1.8.1999. Since that date she has approached various courts to seek custody of the child and for redressal of her grievances. The respondent got order relating to interim custody. For failure to comply with the orders of interim custody, the appellant was convicted by the High Court and sentenced to one month's imprisonment and though the order of sentence has been stayed, the order of conviction still continues to be in force. The appellant's conduct in disobeying the orders passed by the courts discloses that he has no respect or any regard for the rule of law. It was further submitted that the child's welfare cannot be weighed in terms of money, facilities, area of a house or the financial might of either the father or the mother. It was pointed out that respondent had no option but to reside with her parents and is a teacher in Salwan Public School. Merely because she was residing with the parents cannot disqualify her from looking after her child. She may not be as financially sound as the appellant, but that alone cannot disentitle her from the custody of the child. She has stated that she was drawing a salary of Rs.13,000/-p.m. (which is likely to be substantially increased) and was receiving Rs.25,000/- as maintenance pursuant to the order passed by the Delhi High Court and she can look after the financial needs for educating the child. She resides in Gulabi Bagh which is well located and surrounded and there is a park

nearby. The colony has 8-10 parks and it is a better location where the child can be well developed. Therefore, it cannot be said that the respondent resides in an area which is unsuitable to the minor child.

10. It is also pointed out that the appellant has no fixed residence. He shifted from Delhi to Bahadurgarh and then Gurgaon and back to Delhi in a house in Sainik farm where the appellant claims to reside. Same is owned by his brother. It has been a deliberate attempt to poison the mind of the child. Negative facts have been fed into the child's mind against the respondent. It was further submitted that if sufficient time is given the child would overcome any tutored prejudice. Though, there was a claim that the relatives would provide healthy environment to the child, none of them stepped into the witness box and affidavits filed much later cannot be a substitute for the evidence in Court. The High Court took note of Section 13 of the Act which is the foundation for the custody of the child. The welfare of the minor is of paramount consideration. The High Court looking into the materials placed observed as follows:

> "In view of the facts, noticed herein before, the question that exercises this Court's mind is should the child be permitted to stay with a father, who inculcates fear and apprehension in the mind of minor, against his mother and thwarts court orders with impunity. The answer to the above questions, in my

> opinion, must be in the negative. The appellant, cannot wish away his role, in the minor harboring such an irrational fear towards the mother. I am conscious of the fact that directing the custody of the child to the respondent, may result in a degree of trauma. However, the daily trauma the child appears to undergo while being tutored against his mother would be far in excess of the trauma likely to be faced while entrusting to the respondent. The minor child must be allowed to grow up with a healthy regard for both parents. A parent in this case, the appellant, who poisons the minor's mind against the other parent cannot possibly be stated to act for the welfare of the minor."

11. It is submitted that the High Court was not oblivious of the financial status of the respondent. The High Court also found that large area of accommodation and financial affluence cannot be a determinative factor. Therefore, the High Court did not find any scope for interference with the order of the court below.

12. In support of the appeal, learned counsel for the appellant re-iterated the stand taken before the High Court. It was additionally submitted that the child's reluctance to go with the mother should have been duly considered by the High Court. Apparently, that has not been done.

13. Strong reliance is placed on a decision of this Court in Mausami Moitra Ganguli v. Jayant Ganguli (JT 2008 (6) SC 634) wherein this Court on 12th May, 2008 dismissed the mother's appeal, according to appellant, on identical facts.

14. The Respondent, who appeared in person, highlighted the stands taken by her before the learned District Judge and the High Court. The main plank of appellant's argument is to continue custody with the father. The appellant has managed to retain the custody by flouting the order passed by this Court. It is pointed out by the respondent that for flouting the orders of the Court the appellant has been convicted for contempt of court which is the subject matter of challenge in criminal appeal. It was not the first instance when the appellant flouted the order. It is pointed out that the factual scenario in Mausami Moitra's case (supra) was entirely different. In that case, courts below had analysed the material to conclude that it would be desirable to give custody to the father. The factual scenario is entirely different here.

15. It is to be noticed as done at the threshold that in the present dispute the child has become the victim.

16. It is pointed out by the respondent that she was not aware that the appellant was a divorcee. The first wife was ill treated by the appellant and his relatives on account of alleged meagre dowry. She was eventually ousted from the matrimonial home alongwith a minor child. Since the appellant demanded custody of the child and threatened the respondent, information was lodged at the Police Station. On 1.8.1999 while the respondent was attending to household chores, the appellant whisked away their minor child and sent him to some unknown place at Delhi. The respondent was bundled into a car and kept in illegal confinement at the house of one Sh. Bal Kishan Dang from where she escaped on 8.8.1999. She sent telegrams to various authorities and a formal complaint was lodged with the Police Station, Sarai Rohilla alleging wrongful confinement and kidnapping of the child. In the meanwhile, the respondent's father lodged a complaint with the police at Bahadurgarh. The appellant was arrested and produced before the Court at Bahadurgarh. An application was filed before the Sub-Divisional Judicial Magistrate, Bahadurgarh, requesting the court to hold an inquiry, as to the whereabouts of the minor child. The Magistrate passed an order directing the appellant to produce the child on the next date of hearing. However, as the respondent could not reach the court in time, the

Magistrate granted bail to the appellant and declined the prayer for production of the minor child. Thereafter, the respondent, filed an application for issuance of a writ in the nature of Habeas Corpus before the High Court at Delhi. Despite issuance of notice, the appellant failed to produce the child. Eventually on 11.1.2000, the petition was dismissed for want of territorial jurisdiction. The respondent, thereafter, filed a Special Leave Petition before this Court, as also a writ petition under Article 32 of the Constitution. Both these petitions were dismissed by this Court, directing the respondent, to avail her remedy before the Guardian Court. The respondent, thereafter filed a petition under Section 6 of the Act, praying for the custody of the minor child. The respondent, prayed before the Trial Court that as she was the mother of a minor child and as she did not suffer from any disability, the appellant be directed to hand over the custody of the minor child. It was averred in the petition that though the appellant claimed to be the owner of various companies, he had committed various frauds.

17. The appellant played fraud with the respondent by concealing the fact that he was earlier married to one Alka Nagpal and his marriage broke as he is supposed to have similarly tortured and harassed his wife as was made

out to the respondent. It is the respondent's case that as she was unable to bear the physical and mental agony, Alka Nagpal committed suicide within six months of her marriage. It is also pointed out that the criminal cases involving offences punishable under Sections 498A, 406, 323, 506, 343 and 109 IPC are pending in the CBI Court, Patiala against the appellant and his family members. It is also pointed out that the child was shifted from one school to another at various places in Haryana and Delhi.

18. It was pointed out that the conduct of the appellant was noted by the Local Commissioner of Police in his report on 10.10.2003 who committed repeated defaults in bringing the child on various dates. The High Court noted that fact and came to a conclusion that the appellant had willfully disobeyed the orders of this Court and had poisoned the mind of the child against the mother. It was further noted that the child could only meet the mother with the help of a duty Magistrate.

19. We shall first deal with law relating to custody in various countries.

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)

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).

21. 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'.

22. 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."

23. 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 interests of a child to grant its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

24. 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.
>
> (emphasis supplied)

American Law

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

> "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".
> (emphasis supplied)

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 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 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 its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment***".
>
> (emphasis supplied)

26. In *Howarth v. Northcott*, 152 Conn 460 : 208 A 2nd 540 : 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 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".

It was further observed;

> "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 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".

(emphasis supplied)

27. 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.

28. 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 Act, consolidates and amends the law relating to guardians and wards. Section 4 of the said 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 of Guardians Act) relates to appointment and declaration of guardians. Section 7 thereof 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—

(a) appointing a guardian of his person or property, or both, or
(b) declaring a person to be such a guardian,

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 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.

29. Section 8 of the Guardians Act enumerates persons entitled to apply for an order as to guardianship. Section 9 empowers the 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;

"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.

> (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, 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)

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

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

31. The 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.

32. 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—
>
> (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;
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> (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.

33. 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.

(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 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)

34. 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, consistently with their wishes, wherever possible.

35. 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 statute for the time being in force.

36. The aforesaid statutory provisions came up for consideration before Courts in India in several cases. Let us deal with 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.

37. In *Saraswathibai Shripad v. Shripad Vasanji,* ILR 1941 Bom 455 : AIR 1941 Bom 103; the High Court of Bombay stated;

> *"*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)

38. 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.

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

40. 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. 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, 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.

41. In *Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu,* (1984) 3 SCC 698, this Court held that Section 6 of the Act 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; *Chandrakala Menon (Mrs.) v. Vipin Menon (Capt)*, (1993) 2 SCC 6].

42. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical

values have also to be noted. They are equal if not more important than the others.

43. The word 'welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. 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.

44. The trump card in appellants' argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He can not be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments.

45. The conclusions arrived at and reasons indicated by the High Court to grant custody to the mother does not in our view suffer from any infirmity.

It is true that taking the child out of the father's custody may cause some problems, but that is bound to be neutralized.

46. Learned counsel for the appellant submitted that the child's education is of paramount importance and the father is spending good amount of money for providing him excellent education, and the mother does not have the financial affluence as the appellant claims to have. But that can be taken care of if father is asked to pay the educational expenses of the child in addition to the maintenance being paid to the respondent. But at the same time it cannot be overlooked that the father needs to have visitation rights of the child.

47. In partial modification of the order passed by the District Judge and the High Court, we direct that the visitation rights shall be in the following terms:

(1) During long holidays/vacations covering more than two weeks the child will be allowed to be in the company of the father for a period of seven days.

(2) The period shall be fixed by the father after due intimation to the mother who shall permit the child to go with the father for the aforesaid period.

(3) For twice every month preferably on Saturday or Sunday or a festival day, mother shall allow the child to visit the father from morning to evening. Father shall take the child and leave him back at the mother's place on such days.

48. The appeal is dismissed subject to aforesaid modifications. Costs fixed at Rs.25,000/-.

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49. Though we find that the order of the High Court does not suffer from any infirmity but taking into account the fact that we have dismissed the connected Civil appeal relating to the custody of the child, while upholding the finding of guilt for disobeying the Court's order and committing contempt of Court, we restrict the sentence to the period already undergone.

50. Before saying omega, we propose to make some general observations. It is a disturbing phenomenon that large number of cases are flooding the courts relating to divorce or judicial separation. An apprehension is gaining ground that the provisions relating to divorce in the Hindu Marriage Act, 1950 (in short the 'Marriage Act') has led to such a situation. In other words, the feeling is that the statute is facilitating breaking of homes rather than saving them. This may be too wide a view because actions are suspect. But that does not make the section invalid. Actions may be bad, but not the Section. The provisions relating to divorce categorise situations in which a decree for divorce can be sought for. Merely because such a course is available to be adopted, should not normally provide incentive to persons to seek divorce, unless the marriage has irretrievably broken. Effort should be to bring about conciliation to bridge the communication gap which lead to such undesirable proceedings. People rushing to courts for breaking up of marriage should come as a last resort, and unless it has an inevitable result, courts should try to bring about conciliation. The emphasis should be on saving marriage and not breaking it. As noted above, this is more important in cases where the children bear the brunt of dissolution of marriage.

50. One must not lose faith in humanity. It is an ocean; if a few drops of the ocean are dirty, the ocean does not become dirty. If nothing ever went wrong in one's life, he or she would never have a chance to grow stronger. One should never forget that today well lived makes every yesterday a dream of happiness and tomorrow a vision of hope. Marital happiness depends upon mutual trust, respect and understanding. A home should not be an arena for ego clashes and misunderstandings. There should be physical and mental union. Marriage is something, Ibsen said in "The League of Youth" you have to give your whole mind to. If marriages are made in Heaven as Tennyson said in Ayloner's Field, why make matrimonial home hell is a big question.

51. The appeals are dismissed subject to the aforesaid modifications.

……..J.
(Dr. ARIJIT PASAYAT)

……..J.
(G.S. SINGHVI)

New Delhi,
November 19, 2008