

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**FIRST APPEAL NO. 1118 OF 2014
WITH
CIVIL APPLICATION NO. 573 OF 2015 IN F.A. NO. 1118 OF 2014
WITH
CIVIL APPLICATION NO. 1976 OF 2015 IN F.A. NO. 1118 OF 2014**

Mrs. Firoza Popere ... Appellant
Vs.
Mrs. Usha Dhananjayan ... Respondents

**WITH
CIVIL APPLICATION NO. 2851 OF 2015 IN F.A. NO. 1118 OF 2014
WITH
CIVIL APPLICATION NO. 3730 OF 2015 IN F.A. NO. 1118 OF 2014**

Mrs. Usha Dhananjayan ... Applicant
Vs.
Mrs. Firoza Popere ... Respondent

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Mr. Rajiv B. Chavan, Senior Advocate a/w. Ms. Priyanka B. Chavan
i/b. Ms. Asha Mittal for the appellant.
Ms. Flavia Agnes a/w. Mr. Prasad Shenoy, Advocate for the
respondent.

**CORAM : MRS.MRIDULA BHATKAR, J.
RESERVED ON : OCTOBER 04, 2017
PRONOUNCED ON : NOVEMBER 15, 2017**

JUDGMENT:

. The paternal and the maternal grandmother both have
conflicting claim to be appointed as guardian of a minor girl Zeenat.

2. This First Appeal is directed against the order dated 5th May, 2014 passed by the District Judge, Mangaon, District Raigad, below Exhibit 1 of Civil Miscellaneous Application No. 7 of 2014 preferred by the maternal grandmother/present respondent under Guardians and Wards Act, 1890 for her appointment as guardian of minor girl Zeenat. The facts of the case are summarized as follows:

On 11th May, 2008 Nimmy and Aatif got married. It was a love marriage. Aatif is muslim and Nimmy was hindu. On 8th August, 2008 Nimmy was converted to Islam and was renamed as Bushra. On 2nd March, 2009 Zeenat was born. On 11th March, 2013 Aatif strangulated Nimmy (Bushra) and committed murder of his wife in Dubai. At the relevant time, the child was kept with her paternal mother temporarily, as the deceased mother was to return from Dubai in April to take the child with her. Bushra was cremated at Nandvi (Raigad) as per muslim rites. On 20th March, 2013 the maternal grandmother/respondent took Zeenat to Kerala. On 29th April, 2013 the appellant/paternal grandmother took custody of Zeenat to perform the last rites of Bushra and thereafter she was never returned to the respondent. The maternal grandmother asked for custody of the child. However, it was refused by the appellant. A criminal case was filed with Mangaon police station in June, 2013. The respondent/maternal grandmother filed Habeas Corpus Writ

Petition in this Court for production of the child, which was dismissed, as alternate remedy was available for seeking custody of the child. Thereafter the respondent filed Miscellaneous Application No. 7 of 2014 for custody and guardianship of the minor girl at Mangaon, District Raigad where Zeenat was residing with the appellant/paternal grandmother. On 19th February, 2014, Aatif was convicted and given a death penalty. At present he is in Dubai. The Application under the Guardian and Wards Act, 1890 was contested by the appellant by filing reply. Both the grandmothers claim that they are financially well to take care of the child. Both claim that they can provide better education and environment for the development of the child. The appellant claims that the child being muslim, she should stay in a Muslim family so that she can profess her religion in a proper manner. The trial Court, after considering both the sides, passed the order and appointed the respondent/maternal grandmother as guardian of the minor child. It was directed that the child is to be handed over to the maternal grandmother on or before 21st May, 2014. Hence, this First Appeal.

3. The Appeal is admitted on 15th September, 2014 and directed that the matter is to be heard expeditiously. The order of the District Court was stayed. However, access is given to the

respondent/maternal grandmother for a week during Diwali vacation of 2014 and 15 days in summer vacation of 2015. During Diwali vacation from 19th October to 30th October, i.e., for 10 days Zeenat stayed with her maternal grandmother and the child was returned to her paternal grandmother on 30th October, 2014.

4. On 16th November, 2014 Zeenat was medically examined at Raigad Hospital. (The report states that the injury is 7 days old). On 17th November, 2015 the child was again medically examined at J.J. Hospital. (The report states that the illness of the child is 10 days old). On 26th November, 2014 a criminal case of sexual assault bearing C.R. No. 1682 of 2014 under POSCO was filed against the maternal uncles Nigel Dhananjay by the appellant in Mangaon Police Station, Raigad. On 17th December, 2014, the case of sexual assault was transferred to Thrissur, Kerala on the ground of territorial jurisdiction for further investigation and was registered under sections 4, 8, 12 of POSCO r/w. section 376(2)(f)(i)(l). The history stated by the victim is that in the vacation, her nani, i.e., Usha Dhananjay took her to Kerala from 19th October, 2014 to 20th October, 2014. After returning from kerala, her dadi, i.e., Firoza Popere noticed wounds around vulva. The child, on query, informed that her nani tied her and gave injection. After giving injection, she

... tied her eyes and then nani and one man named Raju abused her, hit her on private parts. This had happened twice 20 days back. On 30th December, 2014 Zeenat was medically examined in Government Hospital at Thrissur. At that time, consent was given by Firoza. The history was given by the victim that from 19th October, 2014 to 30th October, 2014 at Thanikkudam, by two persons pressed the genital area at unknown time and date. Despite the order of this Court dated 15th September, 2014 in Civil Application No. 3195 of 2014, on 4th May, 2015 the appellant/paternal grandmother refused to handover the custody of Zeenat for three weeks during the summer vacation. On 3rd July, 2015, the Circle Inspector of Police at Peramangalam (Thrissur) filed the report that Case No. 1682 of 2014 under section 376(2) and POSCO Act is false. In November 2015, custody of the minor child for three days was given to the respondent/maternal grandmother. In May, 2016 this court dismissed the Civil Application No. 2851 and held that the custody to be given to maternal grandmother during Diwali vacation; thereafter the custody was given to maternal grandmother during vacation. On 19th May, 2017 the child was again examined by the panel of medical experts at the Trissur Medical College in Case No. 1682 of 2014.

5. On this background of subsequent events pending appeal, the submissions and evidence is to be appreciated. The learned senior counsel submitted that it is necessary to take into account the background of the child where she has stayed and spent 8 years of her life. The child is staying with appellant/paternal grandmother since she was 4 years of age. At the time of leaving for Dubai on 9th September, 2012, Bushra had handed over the custody of her child to the appellant/paternal grandmother and thereafter the child remained in custody with the appellant/paternal grandmother. The learned counsel submitted that the learned Judge has lost sight of very important fact that the child is born muslim, as the mother accepted Islam religion before her birth and this fact is very relevant and material while deciding the issue of Guardianship of the child. The learned counsel has relied on Sections 351, 352 and 353 of Mahomedan Law and also Section 17 of the Guardians and Wards Act, 1890. He argued that the factors which are to be considered while fixing the guardianship of a minor under the Muslim Personal Law and the factors which are to be taken into account by the Court while appointing guardian specified under section 17 of the Guardians and Wards Act are same and consistent. In both the provisions, the age, sex and religion of the minor are material factors in appointing the person as a guardian.

6. The learned senior counsel argued that Zeenat goes to Madarsha in the morning to learn Arabic which is required to understand Quran. She has to perform the religious rites as per the Muslim Religion. She will be pardanashin lady at the age of 15. The muslim customs are required to be taught and inculcated with the child. He argued that the learned trial Judge did not frame issues while deciding the Application but conducted the matter as a summary procedure which is not expected and is illegal. He further argued that the learned Judge did not interview the child. Thus, the preference of the child was not ascertained by the Judge while appointing the respondent as her guardian. The learned Judge has unnecessarily given importance to the criminal background of the son of the appellant, i.e., father of the minor child. Instead he should have considered the status of the appellant, her financial condition and the attachment and bond between the child and the appellant. He submitted that the learned Judge ought to have recorded the evidence before passing order. He pointed out that under section 13, it was necessary for the learned judge to hear the evidence before passing the order. He argued that the financial condition of the appellant is excellent. Her husband Kamaruddin Abdul Rehman Popere is working in Dubai and he is drawing monthly salary of AED 5000. She owns an agricultural field at

village Mandvi. He submitted that the child is continuously speaking Urdu and Hindi. The child is not conversant with Malayam, so if at all the respondent/ grandmother shifts the child to Kerala from Raigad, then the child will have psychological trauma and she will not be comfortable at all. The learned counsel relied on the progress card and other certificates received by the child. He submitted that the progress of the child is excellent. The child is participating in drawing, painting competition and has achieved success and has many friends and relatives. Thus, the child is growing well in the house of her paternal grandmother.

7. The learned senior counsel for the appellant relied on following judgments:

- (i) On the appointment of guardian, the judgment of Jammu and Kashmir High Court in the case of Master Aisha & Anr. vs. Bashir Ahamad Haji¹.
- (ii) On the point of summary, he relied on the case of Sayad Shahu vs. Hapija Begam².
- (iii) Gopalrao & Anr. vs. Shrawan & Anr.³.
- (iv) Sunil Gulabrao Satav vs. Balu Karbhari Kutal & Anr.⁴

1 AIR 1987 (J & K) 68
2 ILR Vol. XVII 560
3 1923 Nag. 36
4 2012(1) ALL MR 323

- (v) Fiza Developers and Inter-Trade Pvt. Ltd. vs. AMCI (India) Pvt. Ltd. & Anr.⁵
- (vi) For ascertaining the wishes of the child, the judgment of the Hon'ble Supreme Court in the case of Kirtikumar Maheshankar Joshi vs. Pradipkumar Karunashanker Joshi⁶
- (vii) Louella Fernandes vs Rajan Chawla⁷
- (viii) Judgement of the Supreme Court in the case of R.V. Shrinath Prasad vs. Nandamuri Jayakrishna & Ors.⁸

8. Per contra, the learned counsel for the respondent submitted that the learned Judge has passed a well reasoned order. The evidence was tendered on affidavits. She submitted that the learned Judge has discussed about the relevant provisions of the Mahomedan Law, i.e., Sections 351, 352 and 353 and has held that in default of mother, the custody of the female girl under section 353 is to be given to the mother of the mother. She further submitted that long association does not create ties. Thus, the continuous custody of the appellant/paternal grandmother is not a ground to reject the appointment of respondent as guardian. She submitted

5 (2009) 17 SCC 796
6 (1992) 3 SCC 573
7 2013 (6) Mh. L.J. 469
8 (2001) 4 SCC 71

that the respondent is equally financially well off to look after the child. The learned counsel submitted that weightage is to be given to the subsequent development of tutoring which has occurred in November, 2014. The case of sexual assault is false and bogus. She submitted that the medical report of Thrissur Hospital of the child discloses that the hymen was intact and her statement is recorded under section 164 before the Magistrate on 31st December, 2014. The case is treated as "B Summary", i.e., false. The child is to be handed over to the maternal grandmother. She submitted that these are the pressure tactics used by the appellant so that the respondent/grandmother signs the mercy petition of her son, i.e., father of the child.

9. In reply, the learned senior counsel Mr. Chavan has submitted that Section 353 of the Mahomedan law is not applicable because under section 353, both the grandmothers should be muslim. There is no discussion on Mahomedan Law in the judgment. The learned Judge was not sensitive in deciding the custody. He further pointed out that the respondent/grandmother got married to one Christian man, so the child will face problem in following her religion.

10. Before dealing with the submissions it is useful to reproduce the relevant provisions of Mahomedan Law:

“Section 351. Matters to be considered by 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.

Section 352. Right of mother to custody of infant children

The mother is entitled to the custody of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child unless she marries a second husband in which case the custody belongs to the father.”

Section 353. Right to female relations in default of mother

Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below -

- (i) mother's mother, how highsoever;
- (ii) father's mother, how highsoever;
- (iii) full sister;
- (iv) uterine sister;
- (v) consanguine sister;
- (vi) full sister's daughter;
- (vii) uterine sister's daughter;

- (viii) consanguine sister's daughter;
- (ix) maternal aunt, in like order as sisters; and
- (x) paternal aunt, also in like order as sisters.

On the point whether the proceedings under the Guardians and Wards Act are summary or not:

11. In the case of **Sayad Shahu** (*supra*), the Application for certificate of Guardianship was made under the Guardians and Wards Act, 1890. Her appointment was made under a will. In the said matter, Hapija applied to be appointed as Guardian of minors. However, opponent Sayad Shahu objected on the ground that he has been appointed guardian of the minors and of their property under a will made by deceased Gouskhan, the father of the minors. The District Judge after recording some evidence, refused to take further evidence on the ground that the proceedings were summary and that it was open for the opponent to establish his position in a regular suit and he accordingly granted certificate of guardianship of the minor children in favour of Hapija. Sayad Shahu appealed. The Judge held that when a guardian is appointed under the will, there is special provision under section 5 which relates only to European British subjects, (that is deleted after repeal of the Act of 1951). However, the High Court Judge held that the District Judge has committed error in holding that the proceedings are summary.

12. In the case of **Gopalrao** (*supra*), the opponent Shrawan was appointed by the trial Court as guardian of the minor. Gopalrao and Ajabrao, cousins of deceased husband of the minor, prayed that they are also to be appointed as guardian. The Court held that before appointing one Shrawan, the trial Court should have made a proper enquiry. In the said judgment, reliance was placed in the case of **Sayad Shahu vs. Hapija Begam** that the proceedings under the Guardian and Wards Act are not intended to be summary.

13. In the case of **Sunil Gulabrao Satav** (*supra*), after death of the mother, the custody was with the grandfather, i.e., father of the deceased mother. Thereafter, an application was made by the father of the minor. The Single Judge of this Court held that it is the duty of the Court to frame proper issues. So the matter was remanded.

14. In the case of **Fiza Developers and Inter-Trade Pvt. Ltd.** (*supra*) the proceedings were under the Arbitration and Conciliation Act and the Hon'ble Supreme Court held that the object of framing of issues is to focus upon questions on which evidence is required to be led by the parties and also to give indication to the parties on whom the burden of proof lies.

On preference of the child-

15. In the case of **Master Aisha** (*supra*), the child was 7 years old. The High Court held that the trial Court should ascertain the wishes of the minor as to with whom he wanted to live. The process of growth and development is to be made the manner which gives him education, physical, psychological and moral welfare and does not allow him to go astray in such a manner so as to lose the values in life which are essential for the development of a good man.

16. In the case of **Kirtikumar Maheshankar Joshi** (*supra*), a claim was made by the father and maternal uncle of the children of 10 to 12 years under the Guardian and Wards Act, 1890. The father was prosecuted under Section 498A of the Indian Penal Code, 1860. The children started residing with the maternal uncle. The father filed a claim. The Judges talked with the children to assess their state of mind and found that the custody of the children was not to be handed over to the father though father has preferential right. Considering the age of the children, the Court held the children are intelligent to understand their well-being and so they were handed over to some other person.

17. In the case of **Louella Fernandes** (*supra*) the Division Bench of this Court has held that first set of circumstances relate to the minor and the second set of circumstances relate to the character, position and fitness of the proposed guardian. These two sets of circumstances are to be read together and not in isolation. In that case, there was an unnatural death of Hindu woman leaving behind a girl child. The father of the child was in jail charged for murder. The facts are similar to the present case. The child was in the care and protection of maternal grandparents. So paternal aunt filed Guardianship Petition. The mother was not converted to Christianity during her life time. In the said case, the maternal grandfather was appointed as guardian. The child was born in a family where the father professed Christianity and mother was Hindu. So, the child was born in Christian family and due to that, though the child was considered as Christian, the mother remained Hindu and hence, the intention of the mother not to opt for conversion was taken into account.

18. In the case of **R.V. Shrinath Prasad** (*supra*), the mother died in, apparently, a case of suicide. The maternal grandfather filed the Petition for custody. That Application was allowed. It was held that the custody was not to be disposed of hastily and parties to be given

reasonable opportunity to place their material on record. The custody, being a sensitive issue, can never be final but a change can be made in the paramount interest of the child.

19. If at all the order passed by the learned trial Judge is found perverse or is inconsistent with the legal principles or it is contrary to the welfare of the child, then that order requires to be set aside. In the present case, the main objections raised by the counsel for the appellant are that the trial Court has erroneously treated this as a summary proceedings which is not permissible under the law but should have recorded evidence and the factor of religion is overlooked by the Judge. I have referred the above the ratio laid down by the different High Courts on the point of procedure laid down by the Court while deciding the Application for guardianship. In the present case, evidence is not recorded. The Court has decided the Application on the basis of the affidavits and documents filed by both the parties and submissions made by their respective counsel. The entire facts were before the Court. The recording of evidence is required only if the Court finds disputed questions of fact which require to be examined and secondly, if at all the party prefers application to lead evidence and if the Court rejects it, then it may amount to deviation from the procedure and the matter is to be

remanded for recording of evidence. In the present case, the appellant did not even move an application before the trial Court to lead evidence. Once the appellant chose to proceed without examining the witnesses, then it cannot be said that the Court has violated the procedure. It is made clear that in Appeal also, the party can move an application under Order 41 Rule 27 of the Code seeking permission to lead evidence at the appellate stage. However, no such application was made before this Court. Under such circumstances, the submissions that only because the trial Court did not record evidence and it was treated as summary proceedings, therefore, the order is to be set aside and the matter to be remanded cannot be accepted.

20. On account of very peculiar facts, this case places itself apart from other cases. The ratio laid down in the above cases are the guiding principles to decide the issue of guardianship. The facts of the present case and the case of **Louella Fernandes** (*supra*) are similar except a fact that the mother in the case of **Louella Fernandes** did not convert herself to the other religion unlike in the present case. The marriage between Nimmi and Aatif, i.e., parents of Zeenat was a love marriage and within 3 months from marriage, Nimmi opted to profess Islam and she was renamed as Bushra.

The child was born to a muslim couple. Thus, today undoubtedly, religion of Zeenat is Islam and she is to be acquainted with the principles and teachings of Islam. Her introduction with Holy Quran and her offerings and prayers to Allah are integral part of her religion. So, she should be aware and also taught about her religion. Under Hindu and Mahomedan Law, the father controls and dominates the religion of the child. In India, most of the states follow patriarchal system. The Guardian and Wards Act which was enacted in 1890 has not undergone much changes by our legislature. Chapter 2 of the Act is about appointment and declaration of guardian wherein under section 17, the lawmakers have laid down the factors which ought to be considered by the Court while appointing guardian.

21. Looking into section 17 of the Guardian and Wards Act, 1890 in threadbare is thus essential.

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 minor is old enough to form an intelligent preference , the court may consider that preference.

(4) [* * *]

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

22. Section 17 is divided in 5 sub-sections. Sub-section (4) is deleted. Sub-section (1) of Section 17 highlights that the Court shall, subject to provisions of the said section, be guided by the principle of welfare of the minor and while doing so, will be consistent with the law to which the minor is subject. It means, the Court shall take a view consistent with the personal law of the child under which the child is governed.

23. In sub-section(2) of Section 17, the legislature has given the list of the factors which are the determinant to decide guardianship. It is divided in two sets. In the first set, the Court has to consider factors related to age of the minor , i.e., whether minor is an infant, a kid, a child or a teenager. The Court has also to consider the sex, i.e., whether minor is a male or female. Due to biological changes in the body of a girl child, she normally needs care and help of female

member in the family. The religion of the minor is also a determining factor. In the second set, the Court has to consider the character and capacity of the proposed guardian and the nearness of the kin to the minor. The Court has also to take into account, the wishes of the deceased parents and also existing and previous relations of the proposed guardian with the minor and his property.

24. Sub-section (3) of Section 17 states that the Court may consider the preference given by minor, i.e., choice of minor if the minor is old enough to perform an intelligent preference. Thus, it is not only the mere preference but it should be sensible and proper preference.

25. Sub-section (5) is a negative guideline to the Court that no person should be appointed as a guardian against his will.

26. On this backdrop, let me advert to the present set of facts. Here both the parties are having same nearness to the minor. Both are the grandmothers; one is paternal and the other is maternal. However, the child had stayed for nearly all the time and longer period with her paternal grandmother. She has school and friends at the place where her paternal grandmother stays. The child is with

her since 6 months prior to the death of child's mother. As stated earlier, the law recognizes the religion of the father as the religion of the minor. Under Article 25 of the Constitution, the constitution framers have guaranteed the right of religion as the fundamental right. Being democratic country, an individual after attaining majority, may decide to renounce a religion to which he/she belongs by birth or may convert himself/herself in any religion of his/her choice or may choose to be non-religious. Such option is always available in secular India. Thus, Section 17 of the Guardian and Wards Act is consistent with the fundamental right under Article 25 of the Constitution. Though a fact of religion is to be taken into account by the Court while deciding guardianship, this is not the sole determinant which should cloud all other aspects. The welfare of the child depends on the number of factors, which are not defined anywhere in any Act including Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956.

27. "Welfare of the child" is nevertheless the paramount consideration while handing over the custody or appointing the guardian. The term "welfare of the child" has many facets, unfolded layers and, therefore, it is left to the understanding and wisdom of the Court. The welfare of the child is a bundle of facts, which the

Court has to take into account; it would entail broadly, health, hygiene, nourishment, education, shelter, economic condition, love and affection etc. There may be some other circumstances, which are also to be taken into account while considering the welfare of the child. Thus, though the welfare of the child is a umbrella word, sometimes a particular circumstance becomes the decisive factor.

28. The paternal grandmother of Zeenat, i.e., appellant is muslim. So as argued by the learned senior counsel Mr. Chavan, the appellant would definitely be a proper guardian so far as criterion of religion is concerned. It is correctly argued and mentioned in the affidavit of the appellant that Zeenat is learning arabic so that she will be able to read verses of Quran. Similarly, she will be pardanashin lady after attaining 15 years of her age, so the training to follow Islam is necessary and which is possible and available under the guardianship of paternal grandmother. While reading Section 17, I am of the view that sub-section (1) lays down a major statement wherein it is made loud and clear that though the religion by which the child is governed is to be taken into account, the welfare of the minor is the paramount consideration. Thus, the religion is one of the determinants and is not the only determinant.

29. In the case of **Sheila Umesh Tahiliani vs. Soli Phirozshaw Shroff & Ors.**, reported in AIR 1981 Bom. 175, the Single Judge of this Court while dealing with the similar issue of guardianship where a Parsi mother after death of her Parsi husband embraced Hindu religion and claimed for guardianship of her child, held that “In the society in which we live, religion is a matter of one's personal faith and conversion cannot be regarded as a disqualification for the custody of the minor so long as the guardian is capable of providing a congenial, comfortable and a happy home for the minor”.

30. In the case of **Gaurav Nagpal**, reported in 2009(1) SCC 42, the Supreme Court while explaining the term “welfare of the child” has stated that mature and humane approach is required when conflicting demands are made by the parties. In the said judgment, the Supreme Court, dealing with Section 13 of Hindu Minority and Guardianship Act, 1956, explained that 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.

31. The learned counsel Ms. Agnes has heavily relied and argued on the case filed by/on behalf of Zeenat against

respondent/maternal grandmother and her maternal uncles under POSCO and the Indian Penal Code for the offence of child rape in the Court of Thissur, Kerala. In reply, Mr. Chavan has pointed out that in the order under challenge dated 5th May, 2014 passed by the learned District Judge, these facts were not before the learned Judge and these were not the considerations to decide the custody. But the learned Judge has unnecessarily given weightage to the criminal background of the father and has refused the custody. The learned Judge has erred in holding that the provisions of the Act are having overriding effect over the personal laws in view of the welfare and benefit of minor Zeenat. He has wrongly read Clause 352, 353 of the Mahomedan Law and did not consider section 17 in proper perspective. Persuasively Mr. Chavan argued that the incidents which have taken place after the impugned order and during the pendency of First Appeal should not be given any weightage; the criminal Court would deal with the said matter.

32. Let me deal with this aspect. The criminal record of the father is taken into account as one of the major circumstances by the learned Judge of the trial Court while deciding the issue of guardianship. However, it is made clear that only because one member in the family has committed murder, the entire family need

not carry the stamp of being criminal, but the safety of the child should be a weighing factor on the mind.

33. Mentally both the grandmothers are capable of taking care of Zeenat. At present, she is comfortable with her paternal grandmother as she has stayed there for a longer period. The comfort zone of the child is also required to be considered. Whether the maternal grandmother can give her such comfort zone? The learned counsel for the respondent/maternal grandmother has made a statement that the respondent has dropped the idea to go to Kerala, but she is going to stay in Dombivali, so there will not be changed of language, medium and other conditions. It is categorically denied that the respondent /maternal grandmother had performed second marriage with Christian person. The maternal grandmother has initiated the application for guardianship and she is ready to provide a good quality of education. Thus, the respondent/maternal grandmother is also offering the similar comfort zone to Zeenat.

34. Admittedly, the alleged sexual assault, molestation occurred after the impugned order was passed. As per the record, the incident of molestation has taken place during the mid-term vacation

when the custody of the child was given to the maternal grandmother for 15 to 18 days. This Court is fully aware that when a criminal case is registered, then the Criminal Court which is the competent Court has to decide and give verdict in the said matter. However, in the present case, the criminal case and safety of the child being a major issue and there is a basic necessity to refer to and discuss the circumstance of criminal case while deciding the guardianship. The allegation is very serious and cannot be ignored. After 15/16 days of temporary custody in vacation, the baby was handed by the maternal grandmother to paternal grandmother on 1st October, 2014.

35. Zeenat was medically examined first time at Raigad Hospital on 16th November, 2014. The report is as follows -

- (i) redness over right and left thigh near groin and vulva;
- (ii) contusion over right thigh region near groin;
- (iii) tenderness at local side;
- (iv) Gynaecologist opinion – Baby is irritable. Hymen is not intact, hence internal examination cannot be done. So, for expert opinion about internal examination of vagina, baby is transferred to Higher Centre.

36. Hence, the baby was examined at J.J. Hospital, Mumbai. The medical examination report of Zeenat at J.J. Hospital on 17th November, 2014 is as under-

- (i) Hymen torn at 6 O'Clock
- (ii) Congestion
- (iii) labia minora congestion
- (iv) No bleeding
- (v) redness on right inner thigh region
- (vi) suspected rash
- (vii) adviced skin reference
- (viii) No fresh external injury over body

Thus 20 days after the alleged incident in Summary of the injuries shows-

- (i) Congestion
- (ii) tenderness over genitals
- (iii) Hymen torn at 6 O'Clock

37. She was again medically examined third time at Government Hospital, Thrissur. The medical examination report of Zeenat of Government Hospital, Thrissur on 30th December, 2014 is as follows:

- (i) pubic region, perineum and thighs – blackish skin augmentation of upper thighs
- (ii) Vulva- unhygienic with evacuations;
- (iii) Hymen - intact;
- (iv) Fourchette & Posterior commissure – WV

(v) Vagina – WV

The observation made was that the child was not cooperative for local examination.

Injuries on the body (if any) - No injuries

Scientific examination findings - WV

Opinion - ?

38. In the case of guardianship and custody, day-to-day development and the change of circumstances ought to be taken into account by the Court deciding the Application for guardianship. This is the First Appeal. Hence it is the continuation of the Suit or Application. In the present case, the father is held guilty for the murder of his wife. He is awaiting the death sentence and has filed mercy petition before the Dubai Court. The appellant is the mother of the culprit. Naturally, she wants to save her son at any cost. It was argued by the respondent/maternal grandmother that the criminal case filed by the appellant is with ulterior motive to bring the maternal grandmother to the terms of negotiation. If the mother of victim, Nimmi forgives the murderer, then the Court may take a lenient view in mercy petition and death sentence can be avoided as per the law of Dubai. Such situation may be possible, however, no importance can be given at this stage to such hidden agenda. Yet

the fact of criminal case of rape on a child filed by the paternal grandmother is itself to be examined from a proper perspective, as it involves a very different angle. If the entire sequence of the three physical examinations of the child, lodging of the FIR is taken into account, then this Court can see the only fact that the child had undergone a tremendous physical as well as mental trauma.

39. I have interviewed the child personally on this issue. A child cannot be sent to a house where there is slightest apprehension of molestation. The physical assault necessarily follows mental trauma and thus, where physical as well as psychological health of the child is in danger, then handing over the custody of child to maternal grandmother does not arise. However, there are continuous persuasive counter arguments pointing out certain important circumstantial and physical facts placed before the Court to show that such criminal case is false. Therefore, I found that it is the demand of this peculiar set of facts and circumstances to assess prima facie the medical reports and the facts and to confirm whether the child is really in danger of sexual molestation or these are false allegations. The criminal court will take its own course to arrive at a conclusion of guilt. However, this Court also has to undergo the exercise of analyzing these facts to arrive at the truth in the interest

of safety, security and mental health of the child, as the circumstances, relief claimed and remedy available are all entangled with each other.

40. The child had to undergo internal medical examinations thrice when she was 6 to 8 years old which shocks the conscience of this Court. Her first medical report expresses doubt, her second medical report is positive and third medical report is negative. The time gap and manner in which the FIR was given also raise prima facie some questions. In fact the medical reports show that the hygiene of her private parts was not good. On 11th November, 2014 the appellant filed Civil Application (St.) No. 29386 of 2014 in the Bombay High Court for modification of the order of access, however, that was not pressed. There is no reference of alleged sexual abuse of the child during 15 to 31st October, 2014 in the said Civil Application.

41. Besides these documentary as well as factual record, I interviewed the child. I have recorded my observations as follows:

“Today the child Zeenat Popere was interviewed by me in presence of my (female) Private Secretary and Sheristedar from 5.35 p.m. to 6.35 p.m. The child was friendly, looking happy, ready to interact. She talked about her school friends (Alisha and Maliya), her favourite food, her

ambition in life, about her relatives. She told that she is staying with her mama (grandmother), Halima didi (college student), Safia kala (who is now married) and choti dadi.

2. When the conversation was diverted towards her grandmother whom she called as Nani, she became tensed and told that she did not like her Nani. When I asked her why she does not like her Nani, she gave two reasons; firstly, her Nani shouts at her; and secondly, few years back Nani took her to a doctor on the pretext that she was taking her to a shop and then, nani blind folded her and the doctor gave injection on her forearm and also on her private part. Then, I asked her how many persons are staying at Nani's house, to which she answered that her two Mamus (uncles), namely, Nijal Mamu and Raiju Mamu are staying with Nani. I asked her whether she like her Mamus. At that time, she immediately said "No". Then I asked the reason for this. She told that both the Mamus had bad intention to touch her. I asked her what is meant by bad touch. She told that her Nijal mamu removed her nicker and did all sorts of things i.e., "Meri sath kuch bhi kartha tha". So, I asked her "kuch bhi" means what. At that time, she answered that Nijal Mamu pinched her on my thighs and her thighs have become black. So, I specifically asked her that besides pinching, whether he has done anything to her private parts. So told "No" but she told that Raiju Mamu used to lick her private part (chattha tha). I asked her how many times it was done to her, she told only once and it was long back.

3. She told me specifically that she does not want to go to her Nani's house. Both the grandmothers and other persons including lawyer of the respondent were called in the chamber. At that time, she refused to talk with her Nani.”

42. Incidentally, earlier on 16th November, 2015 I had an occasion to interview the same child on the point of access between two grandmothers. At that time, I have recorded my finding in this way:

“Today, the child of 5 to 6 years old is produced before me in Chamber. The child is continuously crying. She speaks more in Urdu. However, she is referring to sexual assault by her maternal uncle and she says that she was taken to a Doctor and was given injection. She says that her private part gets black whenever she plays because of sexual assault committed by her maternal uncle.

It appears from her talk that the child is completely tutored. Sexual assault was committed in October 2014 when access was given to her maternal grandmother by the order of this Court. I am of the view assuming the child is sexually abused, private part never gets blackened after one month or more than one month if the child plays. Thus, she is completely tutored and it appears that she is brought

up in an unhealthy atmosphere. In all fairness, access to maternal grandmother is to be facilitated today itself. Child's belongings are to be handed over to the maternal grandmother. I am informed by the maternal grandmother that the maternal uncle is not staying with her at present and he is in Dubai and he will not visit during her access period i.e., on 16th November, 2015 to 19th November, 2015. The child will stay with the maternal grandmother at Dombivli and she will not be shifted to any other place. On Friday, the 20th November, 2015 at 2pm, the child will be brought to the Chamber and the paternal grandmother will take the child back. The same arrangement i.e., 50% access, shall continue further in all the vacations, till the appeal is finally decided. I must mention here that the paternal grandmother shall not try to contact the child during this period.”

43. It is to be noted that while interviewing her for the second time, I have kept the first finding out of my mind and like a blank slate I tried to understand what had happened to her. The child had stayed with her maternal grandmother for 15 days and thereafter also in 2014 she stayed with her for few days and no complaint is

made by the child. The children imagine and sometimes tend to pretend. Considering all the circumstances, I am of the view that Zeenat is unable to give intelligent preference and is tutored and tend to imagine the sexual acts.

44. If the allegations are apparently false, then what is its effect? They are very much related to the body of the child. Lodging an apparently false case of rape is a very serious thing. Allegations against each other by the parties claiming the guardianship may not disqualify them for appointment of guardian but one cannot use a child as a pawn to settle the score against another. To make the child aware of possible sexual assault or misbehaviour is one thing and to exploit her sexuality to blacken the face of the opposite party and bring it to disrepute is very objectionable and does not fit in the parameters of the "welfare of the child". Hence, there is an attempt to create malice in the mind of the child against the family of her deceased mother. She is the most unfortunate child who has lost the love of both her father and mother and is shuttling between her two grandmothers.

45. The right to live with dignity, the right to preserve childhood and the human rights of the child are contemplated within the Fundamental Right to Life under Article 21 of the Constitution of

India. Though the Constitution grants the Right to Religion under Article 25, under such circumstances, Article 21 stands on a higher pedestal than the right of religion. In fact, all the religions have noble principles and thoughts wherein human dignity is revered. No religion teaches that the child be exposed to vices, dishonesty and falsity. The child is innocent, rather innocence is itself inseparable from the child. Thus, the welfare of the child very much includes protection of innocence of the child. To be innocent is itself the fundamental right of the child. If at all the child is staying in such an unhealthy atmosphere, then it is bound to crush her innocence and will scuttle her normal mental growth, as she will be a victim of continuous malice, false allegations, vengeance etc.

46. After considering all the necessary parameters of the welfare of the child, I maintain the order passed by the learned District Judge, Mangaon, District Raigad appointing the maternal grandmother as guardian of minor child Zeenat with further directions as follows:

- (a) The custody of Zeenat is to be handed over to maternal grandmother immediately.

- (b) The maternal grandmother shall stay with the child Zeenat at Dombivili and not to shift to Kerala or outside the State of Maharashtra without the permission of the Court.
- (c) The maternal grandmother shall make immediate arrangement for admission of Zeenat at school for the second term. The child is to be shifted to the new school in the month of December/January or with special permission may be allowed to appear her in school in Mangaon for the annual examination.
- (d) By way of abundant precaution, the maternal uncles not to stay in the house with Zeenat till the criminal trial gets over.
- (e) The child is to be sent to her paternal grandmother on Ramzan Id, Bakrid Id, Moharam and other religious occasions. For other special circumstances, with the permission of the Court, access may be granted.
- (f) The paternal grandmother is to be given 50% access in the summer vacation.

47. In view of the above, First Appeal is disposed of.

48. In view of disposal of the First Appeal, Civil Applications stand disposed of accordingly.

(MRS.MRIDULA BHATKAR, J.)

