AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No.99 of 2019

- Pawan Kashyap S/o Late Krishna Kumar Kashyap Aged About 39 Years R/o Beside Tuteja Furnitures Telipara Road, Police Station City Kotwali Tahsil And District Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh

---- Appellant/Non-applicant

Versus

- Smt. Soni Kashyap @ Lalli Kashyap W/o Shri Pawan Kashyap Aged About 34 Years R/o Near Kumharpara School, Karbala, Road, Tahsil And District Bilaspur Chhattisgarh, Natural Guardian Of Minor Children Namely Kanha@ Vasu Kashyap Aged About 06 Yaers And Doughter Kasher @ Shriyanshi Kashyap, Aged 06 Years, Both Are Children Of Pawan Kashyap, R/o Beside Tuteja Furnitures, Telipara, Road, Tahsil And District Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh

---- Respondent/applicant

For Appellant : Shri Manoj Paranjpe with Shri K. Rohan, Advocate
For Respondent : Shri Parag Kotecha, Advocate

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor
CAV Judgment

Per Manindra Mohan Shrivastava, J.

29/06/2020

1. This appeal is directed against the impugned judgment and decree dated 15-03-2019 passed by the Additional Principal Judge, Family Court, Bilaspur in Civil MJC No.03/2018, by which, the learned Family Court has allowed application of respondent-mother in awarding custody of minor son-Kanha @ Basu Kashyap and daughter-Keshar @ Shreyanshi Kashyap.

2. Respondent-Soni Kashyap filed an application under Section 6, 7 & 8 of Guardians and Wards Act, 1890 (In short “the Act of 1890”), before the Family Court, Bilaspur, for appointment as Guardian of her minor son-Kanha @ Basu Kashyap, aged 8 years and daughter-Keshar alias Shreyanshi Kashyap, aged 6

years on pleadings that the respondent was married to appellant and out of their wedlock, son was born on 01-11-2007 followed by birth of daughter on 09-11-2009. According to the respondent-mother, the appellant-father is drunkard and used to harass and beat her in the name of demand of dowry. On 24-05-2014, the respondent was cruelly beaten up, due to which, she sustained injury and admitted in the hospital. At that time, children were in her maternal house, but the appellant took away the daughter-Shreyanshi in the name of meeting with grandmother. On a report being made in the police station, counseling was arranged between the parties and on assurance given by the appellant that he will take due and proper care, the respondent-mother again came back to the matrimonial house. However, the appellant continued with earlier activities, therefore, she again left the matrimonial house along with her daughter. It was also pleaded that the appellant hided her son somewhere, not known to the respondent. On 21-07-2015, the appellant assaulted her father Lakhan Lal and snatched the daughter away, in respect of which also, a report was made in the police station, since then, the children are with the appellant-father. It was further pleaded that the wife of the elder brother of the appellant has also left her matrimonial house, because of cruelty meted out to her and in the house, only appellant, his elder brother and old aged sick mother were left. The appellant-father and his elder brother are drunkard and they are engaged in dailywage work and therefore, there is no arrangement of proper care and supervision to the children, in absence of capable female member in the family. Overall atmosphere in the matrimonial house is not conducive for good health, development and care of children. Respondent-mother is an educated woman. Appellant-father is not allowing respondent-mother to meet children. Cause of action arose on 19-06-2014 and 21-07-2015, when the children were snatched away and respondent-mother was deprived of her children.

3. In the written statement filed by the appellant-father, allegations made were denied and it was stated that as the parental house of respondent-mother is local, the respondent-mother is frequently visiting her parental house and stayed there. Children have been admitted in the school and appellant-father is taking proper care of children by providing proper education and bearing all their expenses of education. As far as injury on the body of the respondent-mother is concerned, she sustained injury due to fall. Respondent-mother has left the matrimonial house and she is not coming back, thereafter, a registered notice was given to the respondent-mother on 23-06-2014 and despite that, she did not come back. Appellant-father has stated that he is still willing to keep his wife with him, but respondent-mother is not coming back to her matrimonial house on account of trivial dispute. Reports made in the police station are false. The order of interim maintenance in a case arising out of the domestic violence, finally stand in favour of the appellant-father.

4. On the basis of pleadings of the parties, the learned family Court framed an issue as to whether grant of custody of children to mother is in their best interest. In support of her case, the respondent-mother has examined herself. Appellant-father examined himself and one more witness. Both the parties also led documentary evidence.

The learned Family Court came to the conclusion that upon consideration of relevant aspects, the best interest of the children would be served in awarding custody to the mother in place of father. It is this order, which is under challenge in this appeal.

5. Assailing legality and validity of the impugned judgment and decree passed by the learned Family Court, learned counsel for the appellant argued that the learned Court below has not properly appreciated the pleadings and evidence while coming to the conclusion that the welfare of the children would

be served under the hands of the mother. It is argued that the parties are governed by Hindu Law and therefore, under the provisions contained under Section 6 of the Hindu Minority & Guardianship Act, 1956 (In short “the Act of 1956”), it is the father, who is natural guardian of Hindu Minor. In the present case, both the children were more than five years of age, and therefore, the father legally recognized to enjoy preferential right of having custody of children, unless it is shown that allowing such custody would not be in the interest and welfare of the children. It is argued that the burden is on the mother to prove otherwise. Merely because, the children are 8 and 6 years of age, against legislative wisdom, it cannot be presumed that the mother would be better guardian in respect of minor son and daughter. Unless mother comes out with clinching evidence that the welfare and interest of the children would be adversely effected in allowing them to continue in the custody of the father, mother cannot raise preferential claim of custody of minor children. Next submission of learned counsel for the appellant is that in view of the settled legal position that it is the welfare of the child, which has to be given paramount consideration, the pleadings and evidence on record lead to inescapable conclusion that the welfare of children is in the hands of the father. The appellant-father is not only financially competent, but he is also taking all necessary care and caution for overall development of the children. Ample evidence has been led to establish that the children are getting proper education in the school and all their needs including mental comfort and company are being taken care of in his house. He would further submit that the appellant's mother is capable of taking full care of children, who are emotionally attached with her. Further submission is that the learned Court below has given undue weightage to financial capacity of respondent-mother, which is almost equal to that of the appellant-father. He would submit that the main thrust of the

impugned order has been that the respondent-mother is more competent as compared to the appellant-father, ignoring relevant statutory mandate under Section 6 of the Act of 1956. Learned counsel for the appellant further argued that the learned Court below has committed serious illegality in not adhering to the mandate of Section 17(3) and Section 17(5) of the Act of 1890 before passing an order of appointment of guardian by granting custody to the mother. The wishes of the children were not ascertained and even though, such a specific prayer was made, on irrelevant consideration, such prayer was refused by illegal order passed on 06-10-2016. Without ascertaining the wishes of the children, passing order of custody in favour of mother, without there being any clinching evidence as to how the father is not suitable, also violates Section 6 of the Act of 1956. Learned counsel for the appellant also argued that the learned Family Court has not analyzed and appreciated the evidence, but has mechanically considered the same without due examination and without assigning any reason to believe or not to believe the evidence led before the parties and therefore, the impugned judgment is not in conformity with the provisions contained under Order 20 Rule 5 CPC. Learned counsel for the appellant argued that right from the beginning, children are with the father only and the evidence proves that the children were studying in the school, where they were admitted by their father not by their mother, as claimed by the respondent-mother. He would also submit that irrelevant consideration regarding disturbed marital status of elder brother has been taken into consideration. Statement regarding appellant being drunkard has been believed without any clinching evidence. In support of his submission, learned counsel for the appellant placed reliance upon the decision of the Supreme Court in the case of ***Dhanwanti Joshi vs. Madhav Unde, Sheila B. Das vs. P. R.***

Sugasree[1], Nil Ratan Kundu and another vs. Abhijit Kundu[2], Gourav Nagpal vs. Sumedha Nagpal[3], Anjali Kapoor (SMT) vs. Rajiv Baijal[4], Vishnu and others vs. Jaya[5], Shaleen Kabra vs. Shiwani Kabra[6]and Jitendra Arora and others vs. Sukriti Arora and others[7].

6. On the other hand, learned counsel for the respondent-mother, while supporting the order passed by the learned Family Court, submits that the Family Court has very meticulously and elaborately examined the pleadings, oral as well as documentary evidence led by the parties and upon minute scrutiny and marshaling of the evidence, it has arrived at a conclusion that the welfare of the children lies in granting custody to the mother and therefore, it cannot be said that while deciding the case, the learned Family Court has not assigned any reason as mandated by Order 20 Rule 5 CPC. Next submission is that as far as father's statutory right under Section 6 of the Act of 1956 is concerned, it is not absolute. He submits that once it is found that welfare of the children and their best interest lies in granting custody to the mother, the statutory right under Section 6 of the Act of 1956 has to yield to the welfare consideration of children. He would further submit that the learned Court below has not only taken into consideration the financial capacity of both the parties, but also other relevant considerations and upon consideration of the better financial condition, mother being more educated, there being better surrounding and atmosphere in the parental house of mother, father being less educated, having less income and the family atmosphere in the father's house not being conducive for proper development of the children, because of internal dispute and old aged grandmother being at residence and one niece likely to be married

1 (2006) 3 SCC 62
2 (2008) 9 SCC 413
3 (2009) 1 SCC 42
4 (2009) 7 SCC 322
5 (2010) 6 SCC 733
6 (2012) 5 SCC 355
7 (2017) 3 SCC 726

soon, weighed in the mind of the trial Court to grant custody of children in favour of mother. Learned counsel for the respondent further submitted that it is not mandatory in every case to ascertain the wishes of the children. In the present case, learned Court below did apply its mind to the provisions of Section 17 of the Act of 1890 and considered it inappropriate to call personally to interact with the children. He would further submit that in any case, children were interacted by this Court also and both of them have expressed their willingness to reside with their mother. Therefore, only because that the children were not interacted by the trial Court before granting custody to the mother, impugned order is not liable to be interfered with. Learned counsel for the respondent further argued that the respondent-mother, as compared to the father, is financially more competent and more suitable in all respects, therefore, the trial Court has rightly recorded a finding that the paramount consideration being welfare of the children, even though, father is natural guardian under Section 6 of the Act of 1956, it would be in the interest of the children to appoint mother as guardian, by granting custody of her children. He would submit that the father is entitled to visitation rights, which he would be exercising. In support of his submission, learned counsel for the respondent placed reliance on the decisions of the Supreme Court in the case of ***Shyamrao Maroti Korwate vs. Deepak Kisanrao Tekam[8], Roxann Sharma vs. Arun Sharma[9] and Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others[10].***

7. We have given our anxious consideration to the submissions made by learned counsel for the parties and perused records as also the impugned judgment passed by the learned Family Court, awarding custody of the children in favour of the respondent-mother.

---

8 2010 AIR SCW 6107
9 2015 AIR SCW 2925
10 AIR 2019 SC 2318

8. One of the main challenge to the order of grant of custody is that the appellant-father being natural guardian, as provided under Section 6 of the Act of 1956, as of right, he is entitled to custody of children and only when, for some reason, if father is not there, in place of father, custody of children could be granted in favour of mother. The assertion of right under Section 6 of the Act of 1956 cannot be given effect to without due consideration as to what would be in the best interest of the child. In plethora of decisions of the Apex Court, it has been succinctly held and has now become settled principle that in the matter of grant of custody and guardianship, paramount consideration is the welfare of the child. True it is that Section 6 declares father as only guardian and it is only when child is less than five years, it has been declared that the custody of the child would be ordinarily with the mother. But, this right created under the law is not absolute. Every time, when competing claims of the father and mother are brought before the Court in the matter of grant of custody of their children, necessarily, the approach of the Court has to be parens patriae approach. The paramount consideration is the welfare of the child and what is best interest of the child, rather than, who has a better right under the law to bear custody of the child. In such a situation, statutory right of the father have to be given effect to, if that is in the best interest of the child, welfare being the paramount consideration. However, in a given case, upon comparative assessment of oral and documentary evidence on record, the Court reaches to the conclusion that the best interest of the child would be served, if they were allowed to remain in the custody of the mother, notwithstanding, statutory right of the father, as provided under Section 6 of the Act of 1956, it would be the duty of the Court to put the child in the custody of the mother, if that is in the best interest of the child. In this tussle between the right and welfare, right has always to yield to welfare.

9. In the case of ***Rosy Jacob v. Jacob A. Chakramakkal***[11], it was held that controlling consideration governing custody of the children is welfare of the children and not the right of the parents.

10. In the case of ***Ms. Githa Hariharan and another vs. Reserve Bank of India and another***[12], Their Lordships held that in the words “the father and after him, the mother”, the word after 'need not necessarily mean 'after the lifetime'. In the context, in which, it appears in Section 6(a) it means “in the absence of, the word “absence” therein referring to the father's absence from the care of minors property or person for any reason whatsoever. It was explained that if the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the parents, the later is put exclusively in charge of the minor or if father is physically incapable for any reason whatsoever, the father can be considered to be absent and the mother being a recognized natural guardian, can act on behalf of the minor as the guardian. Finally, it was held that such interpretation will keep the statute within the constitutional limits otherwise the words “after” if read to mean disqualify to act as guardian during the lifetime of father, the same would violate one of the basic principles of gender equality.

11. The principle that paramount consideration being welfare of the child, statutory right of guardianship must yield to welfare aspect was considered elaborately by Their Lordships in the Supreme Curt in the case of ***Gourav Nagpal*** (supra), taking into consideration English and American Law and following principle applicable in the India with reference to statutory right prescribed under Section 6 of the Act of 1956 as also the provisions contained in the Act , as below:-

---

11 (1973) 1 SCC 840
12 AIR 1999 SC 1149

English Law

29. 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.

(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).

30. 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'.

31. 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.

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.

32. 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

33. 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)

34. 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)

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.

35. 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.

36. 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.

37. 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.

* ** **

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

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

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

39. 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.

40. 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;

(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.

41. 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)

42. 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.

43. 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.

44. 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.

45. 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)

46. 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.

47. Again, in Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka MANU/SC/0149/1982MANU/SC/0149/1982 : [1983]1SCR49 , 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.

48. 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.

49. In Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu MANU/SC/0184/1984MANU/SC/0184/1984 : [1984]3SCR422 , 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.)

50. 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.

51. 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.

”

12. In another decision in the case of ***Anjali Kapoor (SMT)*** (supra) also, similar view was expressed, as below:-

> 17. “In Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw and Anr. (AIR 1987 SC 3), this Court has observed that whenever a question arises before Court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.”

13. In the case of ***Nil Ratan Kundu and another*** (supra), the applicable principle was explained thus:-

> 44. In Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu, (1984) 3 SCC 698, this Court held that Section 6 of 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; Chandrakala Menon (Mrs.) v. Vipin Menon (Capt), (1993) 2 SCC 6].
>
> 48. 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 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. Construing the expression `welfare' in Section 13 of

1956 Act liberally, the Court observed;

"8. ...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 as its physical well being".

(emphasis supplied)

49. In Goverdhan Lal & Ors. v. Gajendra Kumar, AIR 2002 Raj 148, the High Court observed that it is true that father is a 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 minor 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.

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

"13.... the 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

52. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to 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 procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more

important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor."

14. In the case of ***Shyamrao Maroti Korwate*** (supra), the aforesaid principles were reiterated, as below:-

14. "Though father is the natural guardian in respect of a minor child, taking note of the fact that welfare of the minor to be of paramount consideration inasmuch as the respondent-father got married within a year after the death of his first wife-Kaveri and also having a son through the second marriage, residing in a rural village, working at a distance of 90 kms and of the fact that the child was all along with the maternal grand-father and his family since birth, residing in a Taluka Centre where the child is getting good education, we feel that the District Judge was justified in appointing the appellant maternal grandfather as guardian of the minor child till the age of 12 years."

15. In a recent judicial pronouncement of the Supreme Court in the case of ***Tejaswini Gaud*** (supra), the aforesaid principles of keeping in forefront welfare of the child, rather than legal right of the guardians to have custody, was reiterated as below:-

25. "Welfare of the minor child is the paramount consideration:- The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child."

16. In the light of the authoritative pronouncements, there could be no scintilla of doubt that it is the welfare and best interest of the child which has to be given paramount consideration and not the statutory right of the father or the mother or any such person, under a legislative enactment.

17. Another important submission made by learned counsel for the appellant is that before taking decision in the matter, learned Court below ought to have

ascertained the wishes of the child. The child at the relevant time, when case was filed, were six and eight years of age. Section 17 of the Act of 1890 deals with the matters to be considered by the Court in appointing guardian. The provision reads as below:-

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

While sub section (1) contains provision engrafting well accepted principle that it is the welfare of the minor which shall be guiding factor. Under sub section (2), it has been provided that the Court shall have regard to the age, sex and religion of the minor and 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. Sub section(3) incorporates further guidelines that if minor is old enough to form an intelligent preference, the Court may consider that preference. Sub section(5) says that the Court shall not appoint or declare any person to be a guardian against his will.

18. It would thus be seen that amongst various considerations incorporated in Section 17, one of the consideration is that the Court may consider preference

of the minor provided the minor is old enough to form an intelligent preference.

19. Learned counsel for the appellant referred to the decision in the case of ***Sheila B. Das*** (supra), in that case, the Supreme Court has considered it proper to ascertain the wishes of minor. In this connection, reference has already been made to another decision in the case of ***Nil Ratan Kundu and another*** (supra), highlighting the relevance and importance of interacting with the child to ascertain their wishes as mandated under Section 17(3) of the Act of 1890.

20. The provision contained under Section 17 broadly provides the matters to be considered by the Court in appointing guardian. One of the provision is that the Court may consider preference also which the minor has. However, the caveat is that the minor should be old enough to form an intelligent preference. Ordinarily, the statutory mandate has to be followed and unless the minor is too young, an attempt should always be made by the Court to interact with the child, so as to ascertain their wishes, but only after due satisfaction that the minor is old and enough to form an intelligent preference. In the present case, the children are six and eight years of age. Ideally speaking, the learned Family Court ought to have interacted with the children, but then, it is not necessary that in every case, only on that ground, order of custody has to be interfered with on the basis of technical violation, if the wishes of the child have been ascertained during appellate proceedings and the wishes of the child goes with the party, in whose favour, order has been passed by the Court. On facts of the present case, position on record is that the minor children were interacted by us in chamber and we are satisfied that after interacting with the children that they are inclined to reside with their mother rather than opting to go with the father. This interaction was made by us in presence of their respective counsel of the parties. Therefore, only on the ground that the Court below in ascertaining the wishes of the children, in terms of the provision contained under Section 17(3)

of the Act of 1890, we are not inclined to interfere with the order impugned. Even though, we are not inclined to hold that the Family Courts are under a duty to take all measures to arrive at just decision with regard to welfare and best interest of the child. The parens patriae approach, therefore requires that the Family Court should always make an endeavour to interact with the child to ascertain their wishes, their emotional bondage, desires, difficulties and emotional constraints. This would only help the Court to arrive at just and proper decision in the matter of appointment of guardian, which best serves the interest of the child.

21. Much argument has been advanced by both the sides with regard to efforts taken by the father and mother both in taking care of their children, particularly their educational needs and making necessary arrangements for their studies by getting them admitted in schools. On this aspect, the evidence of both the parties leaves no manner of doubt that the parents whether it be father or mother are concerned about the educational needs of their children. However, the Court below having taken into consideration the evidence on record reached to the conclusion that as compared to the father, children's best interest and welfare would be the better served, if they are placed under the custody of the mother. To arrive at this conclusion, learned Court below has taken into consideration the financial condition of the mother, which is better than that of father. True it is, in view of the several decisions placed before us, financially superiority cannot be the sole criterion, nevertheless, it is one of the considerations in deciding the matter relating to appointment of guardian. Evidence has come and has also been admitted by the appellant in his cross-examination that he is in employment and earning Rs.8,000/- per month. On the contrary, evidence of the appellant himself, he is working on dailywage basis and earning Rs.3,000/- to Rs.4,000/- per month. The Court below has also

taken into consideration this fact that mother is more educated as compared to father. On this aspect, evidence on record duly justifies the finding of the learned Court below. One of the important consideration weighing in the mind of the Court was that the atmosphere in the house of the mother is more conducive and emotionally comfortable for care of the minor children. The evidence, which has come on record and already admitted in evidence of the appellant is that his mother is old aged one and that his elder brother has a dispute with his wife and she left the house. There is one niece, who is also going to be married soon and if we compare with the company of the children with their own mother, it would certainly better keep the children in guardianship of the mother and would definitely provide them better mental comfort and care as compared to that in the house with an old lady. Taking into consideration the evidence that both the appellant and respondent move out in connection of their job, in the final analysis, the mother certainly would be in a better position to provide all necessities towards all round development of the children. After all paramount consideration of welfare of the children, is the guiding force for the Courts. We consider it apposite to refer to the observations made by the Supreme Court in its decision in the case of ***Dhanwanti Joshi*** (supra), as below:-

> 22. We shall next consider the point which solely appealed to the Family Court and the High Court in the present proceedings namely that the respondent is financially well- off and can take care of the child better and give him superior education is USA. Lindley, L.J. in Re. vs. McGrath (Infants) 1893 (1) Ch. 143 (148) stated that:
>
> "....the welfare of the child is not to be measured by money alone nor by physical comfort only. The word 'welfare' must be taken in its wides sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."
>
> 23. As to the "secondary" nature of material considerations, Hardy Boys, J. of the New Zealand Court said in Walker vs. Walker & Harrison (See 1981 N.Z.Recent Law 257) (cited by British Law Commission, working Paper No. 96

Para 6.10)

> "Welfare is an all-encompassing word. It includes material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents"

22. One of the argument raised by learned counsel for the appellant is that the learned Court below has not assigned proper reasons for arriving at a conclusion and there has been no assessment of evidence but only reproduction of evidence. After perusing the finding of the learned Court below, we cannot accept this submission. Learned Court below has taken into consideration all the relevant aspects, scrutinized the evidence, admissions, contradictions as also what has been stated by the witnesses on various aspects and therefore, it cannot be said that the judgment does not contain reasons for recording a finding in terms of the provisions contained under Order 20 Rule 5 CPC.

23. One of the submissions made by learned counsel for the appellant was that during trial, the appellant intended to bring on record more evidence, though, at later stage, the same was rejected without due consideration. According to learned counsel for the appellant, in the interest of justice, considering that the matter related to appointment of guardian of children, such additional evidence ought to admitted, rather than mechanically rejecting the same.

24. Having gone through the contents of the application and the material evidence, which is sought to be brought on record, in our opinion, no injustice is caused to the appellant. On all relevant aspects, the balance tilts towards the mother rather than the father. We also interacted with the children for

ascertaining their wishes. In our considered opinion, we are not inclined to interfere with the impugned judgment and decree passed by the learned Court below on such grounds.

25. In the result, we do not find any good ground to interfere with the impugned judgment and decree passed by the Court below. The appeal fails and hereby dismissed. Let appellate decree be accordingly drawn.

SD/-
(Manindra Mohan Shrivastava)
Judge

SD/-
(Vimla Singh Kapoor)
Judge