

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR. JUSTICE M.VENUGOPAL

C.M.A.No.2249 of 2015
M.P.No.1 of 2015

Dr.V.Sridevi

.. Appellant

-Vs-

Dr.C.S.Mani

... Respondent

Prayer: The Civil Miscellaneous Appeal is filed under Section 19 of the Family Courts Act, against the order passed by the IIIrd Additional Family Court at Chennai in I.A.No.3648 of 2011 in O.P.No.3499 of 2009, dated 20.07.2015.

For Appellant : Mr.A.Thiyagarajan,
Senior Counsel
for Mr.L.Chandrakumar

For Respondent : Mr.N.G.R.Prasad
for M/s.Row & Reddy

JUDGMENT

(Judgement of this Court was made by S.MANIKUMAR, J.)

Aggrieved by order dated 20.07.2015 made in I.A.No.3648 of 2011 in O.P.No.3499 of 2009, on the file of the III Additional Family Court, Chennai, the present appeal has been filed.

2. For the sake of convenience, the parties are referred to as father and mother.

3. Facts leading to the appeal are as follows:

Marriage between the parties was solemnised on 23.06.2000, as per the Hindu Rites and Customs and it was registered in the Office of the Registrar, Erode. Out of the wedlock, a male child was born. Differences of opinion arose between them and they lived separately from 26.09.2004. Hence, finding that there is no chance of reunion, the Family Court in F.C.O.P.No.3499 of 2009, dated 10.11.2009, has granted a decree

of divorce by mutual consent. Custody of the child was given to the appellant-mother. Visitation rights were given to the respondent-father, as follows:

"The first petitioner (mother) shall have the custody of male child Siddarth. The second petitioner (father) shall take the child Siddarth from 1.11.2009 to March 2010 at 9 a.m and leave the child back with the first petitioner by 7 p.m on alternative Sundays.

From 1.4.2010 to 30.9.2010 the second petitioner shall take the child Siddarth on alternative Saturday evening at 7.p.m and leave the child back with the first petitioner by 7 p.m on Sunday i.e next day.

From 1.10.2010 the second petitioner shall take the child Siddarth on alternative Friday evening at 7 p.m and leave the child back with the first petitioner by 7 p.m on Sunday.

During summer vacation, the second petitioner shall take the child Siddarth for two weeks and have the custody of the child with him for that period and they are free to travel for an holiday.

During Dusshera vacation, the second petitioner shall take the child Siddarth for three days and have the custody of the child with him for that period.

During festival holidays Pongal and Deepavali, the second petitioner shall take the child Siddarth (Alternative year) on the previous day evening and leave the child with the first petitioner on the evening of the following day.

On the birth day of the child, the second petitioner shall take the child Siddarth on the previous day evening and leave the child with the first petitioner on the following day evening. If the birthday happens to be a school working day, the second petitioner should drop the child at the school in the morning itself."

4. According to the respondent-father, mother had failed to adhere to the terms of mutual consent. Since the child was under her control, she has considerable influence on him. She got married in March' 2010 and from July' 2010 onwards, she did not allow him to see his son. Hence, he was compelled to send a legal notice on 9.8.2010.

5. On 18.09.2010, the appellant-mother sent a reply, stating that father was not visiting the child. Father had no other option, except to file I.A.No.2779/2010 to bring the child, either to Child Care Centre or a common friends place. On 31.01.2011, Family Court directed the appellant-mother to bring the child on 5.2.2011 and on the said date, she brought the child to the Family Court Child Care Centre. It was represented

that she was not against the father, seeing the child, but it was the child, who was not willing to go with the father. According to the respondent-father, in an interview, the child expressed his willingness to meet him and hence, the court directed the respondent to bring the child Siddarth to the Family Court Child Care Centre, on every alternative Sundays.

6. Thereafter, on 29.3.2011 and 10.4.2011 the child was brought to the Child Care Centre. But on 24.4.2011, mother has failed to bring the child and therefore, the matter was adjourned to 25.6.2011. According to the respondent-father, since the behaviour of the child was not natural, the then Presiding Officer decided to refer the parties to visit Dr.Jayanthi, psychiatrist. Mother met the Doctor with the child. The psychiatrist filed her report on 17.08.2011. Respondent-father has filed his objections to the report. Mother wanted long adjournment, as she was going to United States of America and hence, the case was adjourned to 4.11.2011 and thus, the father could not see the child. However, a direction was issued to bring the child to the Child Care Centre on 22.10.2011. But the same was not done, by giving instructions that the child should not be sent, in her absence. The then Presiding Officer sent a counsellor to facilitate the father to visit the child, at the mother's parents house. The child willingly came to the father, when the counsellor requested for the child to be produced, after some hesitation, child's grandmother shadowed the child and the counsellor observed that his heart beat became fast. Then, the father took his son to the car park and spent few minutes with him and handed over gifts to him.

7. After the decree of divorce, on 19.11.2011, I.A.No.3648 of 2011 has been filed by the father, to modify the order, dated 10.11.2009 in O.P.No.3499 of 2009, permitting him to take the custody of his son, Siddarth, with visitation rights to the mother. In the supporting affidavit, respondent-father has contended that the appellant-mother had been brain washing the child, because the child was normal with others and was not normal, when it came to the natural father. All this could have been avoided, if the father had the share in the custody of the child. Then the mother filed a transfer petition, on the ground that the then Presiding Officer was biased. Mother has not allowed the father to see the child, as per the decree and she dragged on the proceedings, by saying that she is busy in her profession. Mother had married a person, who has grown up children and it would not be healthy for his son to be brought up in that atmosphere, where the child would not be able to get the same attention, which the father would give. Absolutely, there is no difficulty for him and his parents to take care of the child and also make arrangements to take him to the school and bring him back. It would not be fair for the child,

Siddarth, to be with the step father, when the natural father is longing to give full attention and care to the child.

8. Denying the averments made in the petition, appellant-mother has contended that the father has no interest to visit the child and he was most irregular in visiting the child. Sometimes, he would not turn up on the scheduled day and he never cared to inform her. For the past three years and more, child Siddarth is reluctant to go and meet the father and in fact, the child refused to go out and talk with him, despite her repeated persuasion to go and meet him and she had no control and influence over the child. She sent a suitable reply, dated 18.9.2010, for the notice issued by the husband on 9.8.2010. In order to harass her, father has filed I.A.No.2779/2010, to bring the child to the Child Care Centre in the High Court Campus or to a common place. She had filed a detailed counter, stating that there is no necessity to modify the terms and conditions of the order.

9. The appellant has further submitted that on 05.03.2011, the then Presiding Officer met the child in the chamber on two occasions. After spending sufficient time with the child, he asked the child to be brought to the Child Care Centre, as an interim arrangement to assess the behaviour of the child, in the presence of his father. The child, on hearing that he should see his father, shed tears. However, as advised by the then Principal Judge, the child was brought to the Child Care Centre on 29.3.2011, 10.4.2011 and 24.4.2011 respectively. On 29.3.2011, the child literally cried on seeing his father, even though she was present. For the next two visits, father was alone with the child in the Child Care Centre, the child was requested to talk and play with his father. However, the then Presiding Officer, took judicial notice of the child's reluctant behaviour with his father, referred the child to a psychiatrist at Children Hospital, Egmore, for psychiatrist test report. After rigorous psychiatrist tests, on personality and diagnostic assessment, the psychiatrist submitted her report to the court directly. The report was apparently in favour of the appellant-mother.

10. Mother has further contended that as she had to go to America to attend to some important medical conference and it was very difficult to bring seven years old child to the court in her absence and hence, the child was sent to her parents' house. Thereafter, she brought the child to the Court on 25.6.2011 and the then Presiding Officer, without giving any opportunity to the child to accustom himself to the court environment, informed the parties that when he asked the child "whether the mother is preventing him from seeing and talking with the father, the child shook his shoulders in the

affirmative". However, the psychiatrist in the report, has clearly mentioned that same, that whenever the child wanted to avoid any question or not interested to answer the question, he used to shake his shoulders. Appellant has contended that the Presiding Officer has mistook the child's body language. The then presiding officer had been very lenient towards the father and his counsel, for the reasons best known to him. Therefore, she was constrained to file a transfer petition.

11. Appellant in her counter affidavit, has further contended that the child never stayed with the father, except as an infant for two months, ie., from 15.7.2004 to 26.9.2004. During the year 2008-2009, the maximum time spent by the father with the child was for about three hours between 10.00 a.m to 1.00 p.m and that too, for very few visits only. The child refused to go with the father from the last week of March' 2009, despite persuasion. Even in the Child Care Centre, the child refused to move or talk with his father. On 3.1.2013, when the Presiding Officer spoke to the child alone in the chamber, the child has clearly informed that he is not interested to talk or move with his father and clearly expressed his willingness in clear language to the court that he wants to be with his mother.

12. Appellant-mother has further contended that she along with her husband and her son, Siddarth, are living peacefully. Her husband's children are studying in Australia and Pondicherry respectively and therefore, her the attention and care are exclusively, towards her son, Siddarth only. It was clearly agreed between the parties that mother should be entitled to have permanent custody of the child and father is entitled only for visitation rights of the child, subject to willingness of the child. If the child is not interested to go or see his father, then he has no legal right to force the child to come and live with him. She also cannot be forced the child to go against his wish and will. Welfare of the child is the paramount consideration for deciding the custody, as well as, visitation rights of the child. The petition to modify the decree of divorce, has been filed only to harass the appellant-mother and hence, she prayed to dismiss the petition.

13. Before the Family Court, father examined himself as PW1 and marked 18 documents, viz., Ex.P1 - Prescription given by Dr.Lekshmi Vijayakumar, dated 8.8.2013, Exs.P2 to P4 - Letters, dated 10.5.2006, 17.5.2006 & 30.5.2006, sent by the wife to the Advocates of the husband, Ex.P5 - Court certified xerox copy of Fair and Decreetal order in O.P.No.3499/2009, dated 10.11.2009, Ex.P6 - Copy of legal Notice sent by the husband to wife, dated 30.4.2012, Ex.P7 - Reply notice by the wife, to the counsel of husband, Ex.P8 - Copy of notice sent by the husband to the advocate of the wife, dated 14.5.2012, Ex.P9 -

Rejoinder notice sent by the wife to the husband, dated 24.5.2012, Exs.P10 & P11 - Personal dairy of the wife, Exs.P12 & P14 - Pendrive, Ex.P13 - Photos of the husband and his family, with minor son Siddarth with parents of the husband, Ex.P15 - Copy of Legal notice sent by the husband to the wife, dated 9.8.2010, Ex.P16 - Copy of notice sent by the wife to the husband, dated 18.9.2010, Ex.P17 - Copy of notice by the husband to advocate of wife, dated 23.9.2010 and Ex.P18 - Copy of legal notice sent by the wife to the husband, dated 7.10.2010. Wife examined herself as RW.1 and marked Ex.R1 - Photo copy of progress report of the child, Siddarth for the period 2010-2011, Ex.R2 - Photo copy of Winner Certificate issued to minor Siddarth regarding football game, Ex.R3 - Photo copy of Winner Certificate issued to Siddarth for basket ball game, Ex.R4 - Photo copy of certificate issued to Siddarth for 7th All India Open Karate Championship and Ex.R5 - Photo copy of Certificate issued to Siddarth during Inter-house cultural 2013-2014.

14. On the averments of the parties, two points, raised by the Family Court, are as follows:

"(1) Whether the petitioner is entitled to get relief as prayed in the petition filed for custody of his minor child Siddarth ?

(2) To what relief the petitioner is entitled?"

15. The IIIrd Additional Family Court, Chennai, in I.A.No.3648 of 2011 in O.P.No.3499 of 2009, dated 20.07.2015, has passed the following orders,

"The factom of dissolution of marriage by mutual consent is admitted by both the parties. In the decree of mutual consent itself both parties agreed for certain terms regarding custody and visitation of the child. Petitioner contented that respondent failed to comply the terms and conditions laid down in the decree, hence petitioner is forced to file petition for visitation right that is to visit the child in the Child Care Centre and even after that petition also respondent failed to permit the petitioner to visit the child as per the order the court hence petitioner is constrained to file this petition. Respondent contented that the child does not want to go with the father as per the terms and conditions of the decree, respondent never stand on the way of the petitioner to visit the child, and with a view to harass the respondent petitioner has filed this petition.

17. This petition is filed to modify the custody and visitation rights stated in the fair and decreetal order for divorce by mutual consent. Since the petitioner has come forward with this petition to

modify the custody and visitation right of the child the welfare of the child is the sole and single yardstick deciding custody of minor children and court has to use such yardstick for assessing merits of parties seeking custody. Respondent contented that contracting second marriage cannot disentitled the respondent having custody of the minor son. It is not denied by the respondent that after divorce by mutual consent she got remarriage and her husband is already having two grown up children. The second marriage of the respondent though a factor that cannot disentitle the respondent to the custody of the child yet is an important factor to be taken into account. It may not be appropriate to place the child in a predicament where they have to adjust with their step father with whom admittedly the child had not spent much time.

18. Both parties admitted that the age of the minor son is 11 years old at present. So the minor child is nearing his adolescent age. If the child of the petitioner is a girl baby then the female child always needs the help of her mother. Whereas in this petition the child is a boy who is at age of 11 years. Usually the boys when they reaches adolescent age they want to share lot of things with their father as a friend and the father also must treat the male child as his friend. Even though respondent contented that the step father of the minor son is taking care of the boy, considering the status of petitioner the and age and the welfare of the minor son petitioner herein also can give equally good education and affection to the minor child. Furthermore being the biological father petitioner can give more comforts to the minor son. It is not denied by the respondent that petitioner is still not getting married. This is the right age of a boy to be under the care and custody of a father. Hence for the aforesaid reasons and considering the paramount welfare of the minor boy it is held that petitioner is entitled to get modification of the order relating to custody and visitation right and point no.1 is answered accordingly in favour of the petitioner.

19. Point No.2.

In the result, petitioner is permitted to take the custody of his minor son Siddarth from the respondent, the respondent herein is directed to handover the custody of minor Siddarth to the petitioner within two months from the date of this order, respondent herein is permitted to visit minor Siddarth on 2nd and 4th Saturday of every month in the

Child Care Centre, Family Court, Chennai between 2.00 p.m to 5.00 p.m, the petitioner herein is directed to bring minor Siddarth to the Child Care Centre , Family Court on 2nd and 4th Saturday of every month between 2.00 p.m to 5.00 p.m and the fair order and decreetal order dated 10.11.2009 in O.P.No.3499/2009 is modified accordingly regarding the custody and the visitation right of minor Siddarth and this petition is allowed accordingly. Both parties do bear their own costs."

16. Aggrieved by the abovesaid order, the present appeal has been filed on various grounds.

17. Mr.A.Thiyagarajan, learned Senior Counsel for the appellant submitted that the marriage was solemnized on 23.06.2000, child Siddarth, was born on 11.04.2004. Due to difference between the spouses, appellant left the matrimonial home on 26.09.2004. O.P.No.1674 of 2006, was filed the appellant/mother for divorce. Thereafter, O.P.No.3499 of 2009, was filed for divorce, by mutual consent. On 10.11.2009, a decree for mutual divorce was granted, giving custody to the mother, with weekly visitation rights to the father. In June 2010, the appellant got remarried. I.A.No.2779 of 2010 was filed in October' 2010, to modify the order dated 10.11.2009 and to direct the appellant to bring the child to the Family Court Children Care Centre, Chennai or such other common place, as the Court deems fit.

18. Learned Senior Counsel appearing for the appellant further submitted that the Family Court went miserably wrong in not ascertaining the minor boy's preferences by speaking to him personally. On earlier two occasions, two predecessor Family Court judges called the minor child to the Chambers and ascertained his wishes. On both the occasions, the minor child expressed his disinclination to go with the father. In this connection, the learned Senior Counsel, invited attention to the order passed in IA 2799/2010 dated 19.4.2013.

19. Learned Senior Counsel for the appellant further submitted that the minor child was always consistent, in his preferences, and therefore, it was all the more necessary that the Family Court, ought to have called the boy personally and enquired his wishes, before passing any orders, regarding the change in custody. According to him, the Hon'ble Supreme Court of India time and again in various judgments has consistently taken the view that, it is mandatory for the Family Court/Trial court, to speak to the minor child to ascertain his/her wishes and act accordingly.

20. Learned Senior Counsel further submitted that the Family Court has miserably failed to take note of the Psychometric Evaluation, which would clearly reveal that the Evaluation was done by an expert doctor, appointed by the court in 2011, at the instance of the respondent/father. The evaluation was carried out, in several sittings, individually, with the minor child and with the parents. Psychometric Evaluation were marked as Exs.C1 and C2. According to the learned Senior Counsel, the said Psychometric Evaluation clearly revealed that the minor child is of above average intellect and quite comfortable in his present surroundings. But the Family Court, did not take note of this crucial evidence which by itself, would establish that the minor child was happy and comfortable with the mother and that there was no need for ordering change in custody. The only reason given by the Family Court for ordering change of custody viz., that the boy child would be comfortable with the natural father, rather than with the mother, which according to the learned Senior Counsel for the appellant/mother, is wholly unsound, illogical and baseless finding and that the said finding is without any legal or factual backing. According to the learned Senior Counsel, the Family Court ought to have duly considered and appreciated the expert report of the Psychometric Evaluation, averments in the counter statement of the appellant-mother, and the minor boy's clear preferences as recorded by the Family Court, on two previous occasions.

21. Learned Senior Counsel for the appellant submitted that ordering change in custody, at this point of time will cause mental and emotional stress to the minor child. Accordig to him, right from his birth, minor child was with the appellant-mother, who has nurtured and brought him up. Therefore, giving due consideration to the evidence on record, the order changing the custody, at the age of 12 years, to the father with whom the minor child, never lived, would cause untold mental strain and stress on the child, and that the same would affect the career of the child.

22. According to the learned senior counsel for the appellant even though the child was brought to the family court centre, the child did not interact with the father. Family court judges have seen the child. It is stated that on 05.03.2011, the presiding officer interacted with the child. On 25.06.2011, the presiding officer posed certain questions to the child and subsequently, referred the child for psychological evaluation of the minor Siddharh, then aged 7 years.

23. Taking this Court through the report of the Psychiatrist, Mr.A.Thiyagarajan, learned senior counsel submitted that the said expert has made a categorical conclusion

that appellant/mother, was not interfering or influencing the child. He further submitted that the said expert has concluded on the basis of several tests and that as per the report, minor Siddarth was not prevented by appellant/mother.

24. Mr.A.Thiyagarajan, learned Senior Counsel, took us through the entire report and submitted that child was aware of what he had answered to the queries made by the Psychiatrist and after due psychological evaluation, a detailed report, was submitted to the Family Court. He further submitted that after the report came to be filed, respondent/father filed application in I.A.No.3648 of 2011 to modify the order/decreed dated 10.11.2009 in O.P.No.3499 of 2009 permitting him to take the custody of minor Siddarth with visitation rights to the mother. In the said application, respondent/father contended that, during interview by the presiding officer, the child had expressed that his mother did not want the child to see the father, behavior of the child was not normal, mother was brain washing the child and that is why the psychological evaluation was ordered.

25. Referring to the counter affidavit filed by the appellant/mother, learned Senior Counsel for the appellant submitted that pursuant to the visitation rights, granted to the respondent/father during the year 2008-09, the maximum time spent by the father, with the child, was about 3 hours between 10 am to 1.00 pm and that too, for very few visits only. According to the appellant, the child refused to go with the father from the first week June, 2009, despite persuasion. The child was brought up by the appellant/mother and her family members alone. Even at the Child Care Centre, the child refused to move or talk with the father. On 03.01.2013, the presiding officer spoke to the child alone in the chamber, in the absence of the parties and their respective counsel, to assess the child preference, but the child had clearly informed the judge that he is not interested to talk or move with the father and thus, clearly expressed that he wanted to be with the mother.

26. Mr.A.Thiyagarajan, learned senior counsel further submitted that though the appellant was married to another person, who is a doctor, his children were grown up. Minor Siddarth, her married husband are living peacefully. Elder son of the step father was studying in Australia and the younger one was Pondicherry. At this juncture, he submitted that the younger son was in Nagercoil. Their love, affection and attention was exclusively towards minor son Siddharth and this fact is not disputed. He further submitted that remarriage, by itself, would not disentitle a person from continuing to have the custody of a minor child.

27. In support of his contention that the Presiding Officer had examined Minor Siddarth, Mr.A.Thiyagarajan, learned senior counsel drew the attention of this court, to paragraph No.10 of the order made in IA No.2799/2010 in O.P. No.3499/2010 dated 19.04.2013, wherein, the Presiding Officer has recorded as hereunder:

"Even this court could understand that the boy was not inclined to see his father, when this court had a talk to the boy."

He further submitted that when the Presiding Officer in the year 2013, talked with the child, and ascertained, child was not willing to see his father and thus, there is no change since then.

28. Inviting the attention of this court, to the settled legal proposition of law that paramount interest and welfare of the child, should be the consideration of the courts, while deciding the custody of a child, vis-a-vis, the rights of the parents or others, Mr.A.Thiyagarajan, learned senior counsel submitted without giving due consideration to the above, Family Court Judge, Chennai, has passed the order impugned.

29. Learned Senior Counsel further submitted that unless there are exceptional circumstances, not conducive to the welfare of the child, there is no reason, to tilt the custody of the child to the respondent. Learned senior counsel further submitted that the conclusion of the Presiding Officer, Family Court, as to the age of the boy and should be under the care and custody of the father, cannot be said to be a valid reason. He further submitted that the learned Judge has included a new proposition that usually boys, when he reach adolescent age, they would share lot of things with their father, and the father also should treat the male child as his friend and therefore, custody has to be reversed, is erroneous.

30. According to the learned Senior Counsel, there is no such theory or proposition of law, expressed by the Presiding Officer, Family Court, to order custody to the respondent, in considering the paramount welfare of a male child. He further submitted that the Presiding Officer has failed to consider that mere status of the respondent/father, alone cannot be the reason for reversing custody. According to him, appellant is also a qualified doctor. She can also give good education to the child. Evidence produced before the Family Court would prove that the appellant has provided good education and all comforts. Therefore, the conclusion of the Presiding Officer that being a biological father, respondent can give good education, affection and more comforts, is erroneous, because the same

comfort education and affection, have been given by a biological mother, with whom the Minor child, have been living from the date of birth, till the petition was heard and decided i.e. for nearly 11 years, after the birth of the child.

31. Placing reliance on the decisions in Kumar v. Jahgirdar v. Chethana Ramatheertha reported in 2004 (2) SCC 688; Sheila B. Das v. P.R.Sugasree reported in 2006 (3()) SCC 62; Lekha v. P.Anil Kumar reported in 2006 (13) SCC 555; Mausami Moitra Ganguli v. Jayant Ganguli reported in 2008 (7) SCC 673; Anjali Kapoor v. Rajiv Baijal reported in 2009 (7) SCC 322; Athar Hussain v. Syed Siraj Ahmed reported in 2010 (2) SCC 654; Vikram Vir Vohra v. Shalini Bhalla reported in 2010 (4) SCC 409; Gaytri Bajaj v. Jiten Bhalla reported in 2012 (12) SCC 471, Learned Senior Counsel appearing for the appellant-mother, submitted that the order of the Family Court in I.A.No.3648 of 2011 in O.P.No.3499 of 2009, dated 20.07.2015, requires reversal.

32. Mr.N.G.R.Prasad, learned counsel for the respondent/father submitted that the central question to be considered by this court, is the paramount interest and welfare of the child. According to him, the appellant/mother left the matrimonial home within three months from the date of marriage. Child was in continuous custody with the mother. Attitude of the mother was refusal to allow the visitation rights. Mother/appellant was responsible for the hostile attitude of the child and she was brainwashing the child. Changing the attitude of the child is not in the welfare of the child. He further submitted that the then Presiding Officer met the child in his Chambers, on two occasions and tried to assess the child in the presence of his father, child was really interested to see the father and shed tears.

33. Inviting the attention of this court to the photographs, learned counsel for the respondent/father that child was happy with the father and his grandparents. Taking this court through the entries in the diary of the appellant, Mr.N.G.R.Prasad, learned counsel for the respondent/father submitted that, even before divorce, appellant/mother had made up her mind to bring up the child, only as a single parent and refused to have not only the child rights, as well as father's rights. At this juncture, he invited the attention to the diary extracts, wherein, it is stated to be recorded as hereunder:

"Delivery and a possible divorce. The child may be a distraction. It is difficult to tell. I am of course prepared (since October 2003) about the fact. I will be a single parent caring for my child. He wants C.S.Siddhartha. I refused to have his father."

Referring to the entries in the appellant diary, he further added that the appellant never liked the father, from the

incpetion, but denied visitation rights of the respondent/father.

34. Inviting the attention of this court to the letter, dated 17.05.2006 of the appellant, learned counsel for the respondent/father submitted that the appellant was restricting, even the number of hours of visitation, ie., only for half an hour and in this context, referred to another letter dated 30.5.2006. According to him, with half an hour time, respondent/father, cannot be expected that love and affection, be developed by the child towards his father/respondent and thus the appellant has been preventing the respondent/father from exercising his visitation rights. According to him, the language in the notices of the appellant is nothing but, a premordial right of exercising right of custody of the child, exclusively with the appellant by herself, to the exclusion of father/respondent. According to him, if natural rights of the child, are restricted, by brainwashing, it is not in the best interest of the child.

35. Learned counsel for the respondent/father submitted that the attitude of the appellant/mother, in preventing the father, from exercising his visitation rights, could be deduced and that she has acted, not only detrimental to the interest of the child, but also against the interest of the natural father, and thus created an imbalance between father and child. According to Mr.N.G.R.Prasad, learned Senior Counsel, if the appellant had not violated the custodial rights, or abused her rights over the child, all these things would not have happened. The child would not have changed his attitude and would have continued to have his love and affection of his father, which the father, has.

36. According to Mr.N.G.R.Prasad, learned Senior Counsel, it is a pernicious argument that the child would not have love and affection to his father. Learned counsel for the respondent/father further submitted the need to file I.A. No.3648/2011 in O.P. No.3499/2009, was due to the attitude of the appellant, who denied even the visitation rights, brainwashed the child, due to her undue influence, which has manifested in the attitude and change of the child.

37. Referring to the report of the Psychiatrist, Mr.N.G.R.Prasad, learned counsel for the respondent/father submitted that though the Psychiatrist has examined mother, respondent/father was not examined. Taking this court through the report, learned counsel for the respondent, submitted that the child was not consistent, he was manipulated, gave certain statements and answers, refuted by his mother, in her presence. In this context, he referred to paragraph No.5 of the report of the psychiatrist. It is also his contention that whenever the

child had given some answer, the same was stated to have been refuted by his mother. Thus, according to the learned counsel for the respondent, it could be seen that the mother had constantly checked his answers. He therefore contended that the child had gone to shell and his answers did not reflect, his intelligible preference, to the natural father or to the stepfather. Hence, he contended that this document need not be given weightage, while considering the paramount interest and welfare of the child.

38. According to the learned counsel for the respondent/father, the dominant influence on the child is clearly reflected in the document, and thus the child, had gone to shell, when questions relating to natural father were posed. Reiterating that diary entries made by the appellant, as to how she had intended to bring the child, as a single parent, learned counsel for the respondent/father submitted that in the above background, court has to consider, paramount welfare of the child.

39. According to the learned counsel for the respondent/father, if the natural rights of the child are restricted by brain washing, visitation rights restricted or prevented, then the same is not in the paramount welfare of the child. Appellant has denied not only the right of the child and natural father. She has virtually divorced the child from his father. He further submitted that detailed objections were made to the Psychiatrist's report.

40. Referring to the judgment of the Hon'ble Supreme Court in Gaurav Nagpal vs. Sumedha Nagpal, reported in 2009 (1) SCC 425, learned counsel for the respondent/father submitted that in the said case, the Hon'ble Supreme Court has observed that continued custody would prejudice the mind of the child. According to him, the appellant has not shown, as to how the change in custody is not in the best interest of the child. According to him, the order impugned has reinforced the respondent's right to custody.

41. Placing reliance on the decision in Gaurav Nagpal vs. Sumedha Nagpal, reported in 2009 (1) SCC 425, learned counsel for the respondent/father contended that if there is hostile attitude throughout, court has to consider the said fact, in the paramount welfare of the child.

42. Referring to Section 6 and 13 of the Hindu Minority and Guardianship Act, 1956, learned counsel for the respondent/father submitted that father is the natural guardian of the son. He further submitted that is the appellant is under treatment, for stress, and hypertension.

43. Inviting the attention of this court to the averments made in I.A. No.2779/2010 in F.C.O.P. No.3499/2009, Mr.N.G.R. Prasad, learned counsel for the respondent submitted that mother has been procrastinating the proceedings, took unnecessary adjournments, did not produce the child, on the pretext of going abroad and did not inform the father/respondent. Her greater influence and dislocation of the child, added pressure on the child to the bonding, towards the natural father. Referring to the intelligent quotient of the child, his answers to the questions posed by the psychiatrist, learned counsel submitted that the child, when posed with questions, relating to natural father, child could not even look at the father, to give reply.

44. Learned counsel for the respondent submitted that the judgments relied on the appellant have to be considered on the facts of each case. According to him, Family Court has taken note of the fact that the mother has forsaken the visitation rights. When emotional bonding was snapped by the appellant, the court has to consider all the facts in toto, in the paramount welfare of the child. For the abovesaid reasons, he prayed to sustain the order impugned.

45. By way of reply, Mr.A.Thiyagarajan, learned senior counsel for the appellant submitted that whatever the respondent has relied on from the diary, had happened before the date of divorce. That was due to tremendous pressure. The photographs were taken in 2005. According to him, the above have no relevance at all. The respondent was permitted to have visitation rights, which he has flouted. He denied the allegation of poisoning/brain washing the child. Referring to Ex.C1 - Psychological report, learned senior counsel submitted that the child is an intelligent boy, and that there was no need to tutor him. According to him, the child is happy with the appellant and family, and in the best interest of the child, the order impugned has to be reversed.

46. Heard the learned counsel for the parties and perused the materials available on record.

47. When granting divorce by mutual consent on 10.11.2009, the Family Court has ordered permanent custody of the child to the mother and visitation rights to the father. After three years, I.A.No.3648 of 2011 has been filed for modification, which has been ordered on 20.07.2015. Reasons assigned for conclusion of the Family Court is that usually boys, when they reach their adolescent age, father would treat the child as his friend. Though a contention has been made by the appellant-mother that she, the child's step-father and the entire family members, are taking care of the child, considering the status

and welfare of the child, Family Court has held the the father can also give food, education and affection to the child. Biological father can give more comforts to the child. Family Court has further observed that respondent is still unmarried. Family Court seemed to have addressed the above issues.

48. Before advertintg into the factual aspects and rival contentions, we deem it fit to consider, what the Courts have held in matters relating to custody of a minor child, when there is dispute between the spouses.

49. In Kumar v. Jahgirdar v. Chethana Ramatheertha reported in 2004 (2) SCC 688, the Hon'ble Supreme Court, while considering the interest of the minor child, vis-a-vis, the mother, who had re-married, on the facts and circumstances of the case, given the custody of the female child, on the advent of puberty, on the ground that, at such an age a female child primarily requires a mother's care and attention. The Hon'ble Supreme Court was of the view that absence of female company, in the house of the father, was a relevant factor in deciding the grant of custody of the minor female child. On the aspect of brainwashing the child, the Hon'ble Supreme Court observed thus,

"12. From the arguments advanced on behalf of the former husband, what we have been able to gather as more important circumstances set up against allowing the wife to retain the custody of the child inter alia are that the wife is remarried to a cricket celebrity and has a style of life which requires frequent foreign tours, exposure to public life and media. There is also a possibility of the child being brainwashed to keep distance from the natural father. On the behaviour of the child during her interviews on two occasions, as has been recorded by the High Court Judges, submission made is that it might have been so due to psychological counselling given to the child. It is stated that during one of her interviews, a psychologist was found to be accompanying her to the court before she, the child, entered the chamber of the Judges for interview. On behalf of the wife, the learned counsel stoutly denied any such happening during hearing in court.

.....

15. After hearing the learned counsel appearing for the parties at sufficient length and having bestowed our careful consideration to the observations and conclusions reached by the Family Court and the High Court in their respective judgments, we do not find any ground to substantially upset the judgment of the High Court containing the arrangements made

therein for the custody of the child and the rights of visitation granted to the natural father.

16. We make it clear that we do not subscribe to the general observations and comments made by the High Court in favour of the mother as parent to be always preferable to the father to retain custody of the child. In our considered opinion, such generalisation in favour of the mother should not have been made. We, however, do not find that the judgment of the High Court is based solely on one consideration that between the two parents, the mother always can claim superior right to retain the custody of the child. The High Court has taken into consideration all other relevant facts and circumstances to come to the conclusion that a female child of growing age needs company more of her mother compared to the father and remarriage of the mother is not a disqualification for it. The conclusion of the High Court seems to be just and proper in safeguarding the interest of the child."

Hon'ble Apex Court considered the case of a female child and at Paragraphs 17 and 18, held as follows:

"17. Without going into the allegations, counter-allegations and misapprehensions expressed against each other, on the paramount consideration of best safeguarding the interest of the child, in our opinion, the judgment of the High Court giving exclusive custody of the child to the mother and visitation rights to the natural father deserves to be maintained with little modification for the following reasons:

1. The child is, at present, 9 years of age and on advent of puberty. This is the age in which she requires more care and attention of the mother. Mother, at this age of the child, deserves to continue to keep the custody of the female child. She is reported to have given up her service and is now leading life of a housewife. The progress report of Aaruni from Sophia High School, Bangalore, indicates that she is very good at studies and has a bright educational career.

2. It is reported that the wife is presently in the family way. The prospect of arrival of the second child in the family of the wife is another circumstance which would be in favour of the present child.

3. The petitioner lives alone with his father. There are no female members living jointly with him although he may have female relations in the city but that would not ensure constant company, care and attention to the female child.

4. The petitioner natural father is a busy stockbroker allegedly carrying on his business with the

aid of online computer but it cannot be said that in the course of his business, he has not to remain out of residence for attending his office and other business engagements.

5. The apprehension expressed against the second husband that he might poison the mind of the child and create ill will towards the natural father is not borne out from the evidence on record. On the contrary, the second husband in his deposition has made statements evincing a very cooperative and humane attitude on his part towards the problem of the estranged couple and the child. We find that apprehension expressed against the second husband is without foundation. The parents of the child have separated by mutual consent without making any vicious allegation against each other. They also agreed under the express terms of the consent decree of divorce to take responsibility of bringing up their child as her joint guardians. This gesture of decency and cooperation in jointly looking after the child has to continue. In this mutual agreement of separated couple, on behalf of the second husband, it is assured to us that he would continue to give his unreserved cooperation and help and would do nothing as to spoil the relationship or intimacy of the child with the natural father.

6. The visitation rights given to the natural father, in the present circumstances, also do not require any modification because with the passage of time, the growing child should eagerly wait for the company of her father as a happy and enjoyable moment rather than treat it as a part of empty ritual or duty. To make visitation rights of natural father effective and meaningful for proper growth of the child, active cooperation of both the parents and her stepfather is expected and we hope it would not be found wanting from any one of them.

7. Since the mother of the child is now married to a famous cricketer, as and when she leaves the country on tour with her husband during school days or vacation period of the child without taking the child with her, instead of leaving the child to the care and custody of some other member of the family, the custody of the child during her absence from her home shall be given to the natural father."

18. With the above observations and modification, we maintain the judgment of the High Court. The two appeals are, thus, disposed of. As all the parties, before us, are highly educated, cultured, of modern outlook, well-off and having so far conducted themselves decently and courteously towards each other,

we hope, in future as well, they will continue the same attitude and conduct for maintaining their cordial relationships and extend full cooperation in safeguarding the interest of the child in the best-possible manner."

50. In *Sheila B. Das v. PR.Sugasree* reported in 2006 (3) SCC 62, in respect of custody of minor girl, after having obtained the custody of a minor girl child, father did not appear to have neglected the minor or to look after all her needs. The child was happy in his company and was doing consistently well in school. Father was financially stable, and also not disqualified, in any way from being the guardian of the minor child. The child also expressed her preference to be with the father, with whom, she felt more comfortable. Court observed that the interest of the minor child, will be best served, if she remained with the father. Therefore, custody of minor female child was given to the father, as per choice of the child, with the observation that child was highly intelligent, and was in a position to make an intelligent choice. Paragraphs 29 to 31 are extracted hereunder:

"29. Having regard to the complexities of the situation in which we have been called upon to balance the emotional confrontation of the parents of the minor child and the welfare of the minor, we have given anxious thought to what would be in the best interest of the minor. We have ourselves spoken to the minor girl, without either of the parents being present, in order to ascertain her preference in the matter. The child who is a little more than 12 years of age is highly intelligent, having consistently done extremely well in her studies in school, and we were convinced that despite the tussle between her parents, she would be in a position to make an intelligent choice with regard to her custody. From our discussion with the minor, we have been able to gather that though she has no animosity as such towards her mother, she would prefer to be with the father with whom she felt more comfortable. The minor child also informed us that she had established a very good relationship with her paternal aunt who was now staying in her father's house and she was able to relate to her aunt in matters which would concern a growing girl during her period of adolescence.

30. We have also considered the various decisions cited by the appellant which were all rendered in the special facts of each case. In the said cases the father on account of specific considerations was not considered to be suitable to act as the guardian of the minor. The said decisions were rendered by the Courts

keeping in view the fact that the paramount consideration in such cases was the interest and well-being of the minor. In this case, we see no reason to consider the respondent ineligible to look after the minor. In fact, after having obtained custody of the minor child, the respondent does not appear to have neglected the minor or to look after all her needs. The child appears to be happy in the respondent's company and has also been doing consistently well in school. The respondent appears to be financially stable and is not also disqualified in any way from being the guardian of the minor child. No allegation, other than his purported apathy towards the minor, has been levelled against the respondent by the appellant. Such an allegation is not borne out from the materials before us and is not sufficient to make the respondent ineligible to act as the guardian of the minor.

31. We, therefore, feel that the interest of the minor will be best served if she remains with the respondent but with sufficient access to the appellant to visit the minor at frequent intervals but so as not to disturb and disrupt her normal studies and other activities."

51. In Sheila B. Das's case (cited supra), the child, a little more than 12 years of age, was examined. After interacting with the child, the Hon'ble Apex Court came to the conclusion that the child felt more comfortable with the father. In the said case, custody was given to the father, as per the choice of the minor girl. Child was provided good education and taken care of, by the father.

52. In Lekha v. P. Anil Kumar reported in 2006 (13) SCC 555, after considering the evidence on record and interviewing the child, the Hon'ble Supreme Court came to the conclusion that for the welfare of the child, custody should be given to the mother and dismissed the original petition of the respondent/father, filed under the Guardians and Wards Act, holding that he is not entitled for the custody of the child. Going through the judgment, we find that the High Court reversed the finding of the trial court and directed to give the custody of the child to the father, without interviewing the child. The High Court also permitted the respondent to take the child to Gulf. After considering the facts and circumstances of the case, the Hon'ble Supreme Court, at Paragraphs 12 to 23, held as follows:

"12. We have carefully perused the orders passed by both the lower courts and of the High Court. The High Court, before setting aside the concurrent finding passed by the courts below, ought to have interviewed the child before coming to a conclusion

that for the welfare of the child the custody should be given to the father. Mr Rajan submitted that since the mother has remarried, she would not devote her time for the welfare of the boy and that in the interest of the child, the child should be given in custody only to the father who is not only healthy but also have other facilities to look after the child, his education and welfare.

13. We are of the opinion that the remarriage of the mother cannot be taken as a ground for not granting the custody of the child to the mother. The paramount consideration should be given to the welfare of the child. As already noticed, at the interview, the boy has expressed his willingness and desire to live only with his mother and was admitted by him that the mother will provide him good education. The mother is also drawing pension of Rs 6000 p.m. and also having land and properties in her name. When the boy says he prefers to live with his mother, we are of the view that it will be beneficial for the boy and his education for a better future. The High Court, in our opinion, erred in allowing the appeal on the ground of remarriage of the appellant without considering the other aspects of the matter. It is a matter of custody of the child and the paramount consideration should be the welfare of the child. It is not in dispute that the boy is living with his mother for the last several years and the separation at this stage will affect the mental condition and the education of the child and considering that the child himself attaches importance to his education if the custody is to be given to the father will now affect his academic brilliance and future.

14. The High Court, in our opinion, ought to have seen that the remarriage cannot be taken as a ground for (sic not) giving custody of the child. There is also no finding by the High Court that the remarriage has adversely affected the mental condition of the minor child.

15. *Sk. Moidin v. Kunhadevi* [AIR 1929 Mad 33 (FB)] was a case of a father, a motor driver, applying for writ of habeas corpus to get custody of his 7-year-aged child. Nobody was available in his house to look after such child. The Full Bench held that the Court has to look to an application under habeas corpus in the interest of the child as being paramount. The Court held that prima facie in the eye of the law, the father is the natural guardian and custodian of the person of his child. But it has been the law for a very long time both in England and in this country

that what a court has to look to on applications under habeas corpus is the interest of the child as being paramount.

16. In Samuel Stephen Richard v. Stella Richard [AIR 1955 Mad 451 : 56 Cri LJ 1192] the High Court in deciding the question of custody held as follows: (AIR p. 452)

"In deciding the question of custody, the welfare of the minor is the paramount consideration and the fact that the father is the natural guardian would not 'ipso facto' entitle him to custody. The principal considerations or tests which have been laid down under Section 17, in order to secure this welfare, are equally applicable in considering the welfare of the minor under Section 25.

The application of these tests casts an 'arduous' duty on the court. Amongst the many and multifarious duties that a Judge in Chambers performs by far the most onerous duties are those cast upon him by the Guardians and Wards Act. He should place himself in the position of a wise father and be not tired of the worries which may be occasioned to him in selecting a guardian best fitted to assure the welfare of a minor and thereafter guide and control the guardian to ensure the welfare of the ward—a no mean task but the highest fulfilment of the dharmasastra of his own country.

It is only an extreme case where a mother may not have the interest of her child most dear to her. Since it is the mother who would have the interest of the minor most at heart, the tender years of a child needing the care, protection and guidance of the most interested person, the mother has come to be preferred to others."

17. In Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka [(1982) 2 SCC 544 : AIR 1982 SC 1276] this Court held as under: (SCC p. 565, para 17)

"17. The principles of law in relation to the custody of a minor appear to be well established. It is well settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

18. According to the Hindu law, the natural guardian of a minor child is the father. In the next place, the guardian of a child is the mother. The very principle of guardianship is that there is a presumption that parents will be able to exercise good care in the welfare of their children if they do not happen to be unsuitable as guardians.

19. The law permits a person to have the custody of his minor child. The father ought to be the guardian of the person and property of the minor under ordinary circumstances. The fact that the mother has married again after the divorce of her first husband is no ground for depriving the mother of her parental right of custody. In cases like the present one, the mother may have shortcomings but that does not imply that she is not deserving of the solace and custody of her child. If the court forms the impression that the mother is a normal and independent young woman and shows no indication of imbalance of mind in her, then in the end the custody of the minor child should not be refused to her or else we would be really assenting to the proposition that a second marriage involving a mother per se will operate adversely to a claim of a mother for the custody of her minor child. We are fortified in this view by the authority of the Madras High Court in *S. Soora Reddi v. S. Chenna Reddi* [AIR 1950 Mad 306 : (1950) 1 MLJ 33] where Govinda Menon and Basheer Ahmed Syed, JJ. have clearly laid down that the father ought to be a guardian of the person and property of the minor under ordinary circumstances and the fact that a Hindu father has married a second wife is no ground whatever for depriving him of his parental right of custody.

20. A man in his social capacity may be reckless or eccentric in certain respects and others may even develop a considerable distaste for his company with some justification but all that is a far cry from unfitness to have the natural solace of the company of one's own children or for the duty of bringing them up in proper manner. Needless to say the respondent husband, in this case, seems to be anxious to have the minor child with him as early as possible in order to look after him properly and to provide for his future education. The feelings being what they are between the respondent and the appellant we think it is also natural on the part of the husband to feel that if the minor child continues to live with his former wife, it may be brought up to hate the father or to have a very adverse impression about him. This certainly is not desirable. Needless to say, this Court is not called

upon to find that the respondent husband has been entirely blameless in his conduct and few occasions referred to in this case and by the boy at the time of interview, it is not the duty of this Court even to ascertain whether the respondent is a responsible and good citizen and a preferred individual. Many people have shortcomings but that does not imply that they are not deserving of the solace and custody of their children.

21. However, in the present case, we have to decide in the interest of the child as to who would be in a better position to look after the child's welfare and interest. The general view that the courts have taken is that the interest and welfare of the child is paramount. While it is no doubt true that under the Hindu law, the father is the natural guardian of a minor after the age of six years, the court while considering the grant of custody of the minor to him has to take into account other factors as well, such as the capacity of the father to look after the child's needs and to arrange for his upbringing. It also has to be seen whether in view of his other commitments, the father is in any position to give personal attention to the child's overall development.

22. As indicated hereinbefore, we have spoken to the child who, in our view, is intelligent and appears to be capable of expressing his preference. In fact, he has in no uncertain terms indicated his desire to stay with his mother. His mother's second marriage, instead of proving to be a disadvantage, has proved to be beneficial for the child who seems to be happy and contented in his present situation and we do not think it would be right to unsettle the same.

23. The High Court committed a grave error in not ascertaining the wishes of the minor, which has consistently been held by the courts to be of relevance in deciding grant of custody of minor children. We are, therefore, inclined to restore the order passed by the Family Court and to give custody of the minor boy to his mother, but as indicated hereinbefore, we do not want the child to grow up without knowing the love and affection of his natural father who too has a right to help in the child's upbringing. We are of the view that although the custody of the minor child is being given to the mother, the child should also get sufficient exposure to his natural father and accordingly, we permit the respondent to have custody of the child from the appellant during Onam and other important festivals and during the school vacation. We make it clear that

the appellant mother shall hand over the child to the respondent father during every mid-summer vacation for about a month without adversely affecting the child's education. The appellant should not also prevent the respondent father from coming to see the child during weekends and the appellant should make necessary arrangements for the respondent to meet his child on such occasions. The appellant should not also prevent the child from receiving any gift that may be given by the respondent father to the child."

53. In *Mausami Moitra Ganguli v. Jayant Ganguli* reported in 2008 (7) SCC 673, the Hon'ble Supreme Court held that the child's welfare is the primary factor in deciding in whose custody the child should be placed. The question in the reported case was, whether the father or the mother, should have the custody of an almost ten year old male child. Child's parents got married on April 18, 1996. On May 28, 1998, a boy, named Satyajeeet was born from the wedlock. However, within a short time, relationship between the spouses came under strain. Wife, who was employed as a teacher, felt that her husband had misrepresented his occupational status to her, was addicted to alcohol and smoking, had contacts with anti-social elements and had physically abused her. After moving out of her marital home leaving her son behind, she filed a suit for divorce against respondent, which was decreed ex-parte on September 12, 2002. Since no appeal was preferred by the respondent therein against the said decree, which attained finality, she then moved a petition on April 5, 2003 under Sections 10 and 25 of the Guardians and Wards Act, 1890 read with the provisions of the Hindu Minority and Guardianship Act, 1956 before the Family Court, Allahabad sought for a declaration in her favour to be the lawful guardian of her minor son and for a direction to the respondent therein to hand over the custody of the child to her. In the said judgment, the Hon'ble Supreme Court discussed the principles, as to which, parent, father/mother, as the case may be, should be granted custody of a child and held thus,

"19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or

obliterate the vital factor of the welfare of the minor.

20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

21. In *Rosy Jacob Vs. Jacob A. Chakramakkal*, (1973) 1 SCC 840, a three-Judge Bench of the Supreme Court in a rather curt language had observed that,

"15.The children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded 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."

22. In *Halsbury's Laws of England* (Fourth Edition, Vol.13), the law pertaining to the custody and maintenance of children has been succinctly stated in the following terms:

"809. Principles as to custody and upbringing of minors. Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the

mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other.

23. Having bestowed our anxious consideration to the material on record and the observations made by the courts below, we are of the view that in the present case there is no ground to upset the judgment and order of the High Court. There is nothing on record to suggest that the welfare of the child is in any way in peril in the hands of the father. In our opinion, the stability and security of the child is also an essential ingredient for a full development of child's talent and personality. As noted above, the appellant is a teacher, now employed in a school at Panipat, where she had shifted from Chandigarh some time back. Earlier, she was teaching in some school at Calcutta. Admittedly, she is living all alone. Except for a very short duration when he was with the appellant, Master Satyajeet has been living and studying in Allahabad in a good school and is stated to have his small group of friends there. At Panipat, it would be an entirely new environment for him as compared to Allahabad.

24. Having interviewed Satyajeet in our chambers for some time, we find it difficult to accept the stand of the appellant that the father does not have sufficient time or resources to look after the welfare of the child. We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression to him.

25. It is also significant to note that during the course of hearing on one of the dates, when we had not yet interviewed Satyajeet, we had suggested that it would be better if the child could stay with his mother for some more time. However, upon hearing us, he started crying and whining and, showed reluctance to go with the mother. Watching his reaction, we dropped the proposal.

26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High

Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained. We feel that the visitation rights given to the appellant by the High Court, as noted above, also do not require any modification. We, therefore, affirm the order and the aforeextracted directions given by the High Court. It will, however, be open to the parties to move this Court for modification of this order or for seeking any direction regarding the custody and well-being of the child, if there is any change in the circumstances."

54. In Mausami Moitra Ganguli's case, the Hon'ble Apex Court considered that the child was studying in a reputed school. Appellant-mother had taken proper care and attention in up bringing of the child, which is one of the important factors to be considered, for the welfare of the child. Child was with the mother right from her childhood, which has resulted into a strong emotional bondage.

55. In Anjali Kapoor v. Rajiv Baijal reported in 2009 (7) SCC 322, wife of the respondent, went for delivery, died after giving birth to a newborn baby, which was premature, and the child was kept in an incubator in the hospital for nearly 45 days. After discharge from the hospital, infant was brought to the residence of the appellant therein, mother-in-law and though respondent-husband was repeatedly requesting the appellant and her family members, to hand over the custody of the child to him, since the appellant was unable to take care of the welfare of the minor child. Since the respondent/father has not taken care of his wife, appellant, mother-in-law has refused to give the child to him. Both the Family Court and High Court gave the custody of the child to the respondent-father. The appellant, mother-in-law has filed the appeal. The Hon'ble Supreme Court considered the vital questions, as to whether the Court has to consider the rights of the parties or the paramount welfare of the child or what should be the tests, consideration thereof. At Paragraphs 15 to 26, the Hon'ble Supreme Court held as follows:

"15. Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. [See Sumedha Nagpal v. State of Delhi [(2000) 9 SCC 745 : 2001 SCC (Cri) 698] (SCC p. 747, paras 2 & 5).]

16. In Rosy Jacob v. Jacob A. Chakramakkal [(1973) 1 SCC 840] this Court has observed that: (SCC p. 847, para 7) "7. ... the principle on which the court should decide the fitness of the guardian mainly depends on

two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors." This Court considering the welfare of the child also stated that: (SCC p. 855, para 15)

"15. ... The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded 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..."

17. In *Elizabeth Dinshaw v. Arvand M. Dinshaw* [(1987) 1 SCC 42 : 1987 SCC (Cri) 13 : 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.

18. At this stage, it may be useful to refer to the decision of the Madras High Court, to which reference is made by the High Court in the case of *Muthuswami Moopanar* [*Muthuswami Chettiar v. K.M. Chinna Muthuswami Moopanar*, AIR 1935 Mad 195] wherein the Court has observed, that, if a minor has for many years from a tender age lived with grandparents or near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance, having bearing upon the question of the interest and welfare of the minor and on the bona fides of the petition by the father for their custody. In our view, the observations made by the Madras High Court cannot be taken exception to by us. In fact those observations are tailor-made to the facts pleaded by the appellant in this case. We respectfully agree with the view expressed by the learned Judges in the aforesaid decision.

19. In *McGrath (infants), Re* [(1893) 1 Ch 143 : 62 LJ Ch 208 (CA)] it was observed that: (Ch p. 148)

"... The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

20. In *American Jurisprudence*, 2nd Edn., Vol. 39, it is stated that:

"... 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."

21. In Walker v. Walker & Harrison [1981 New Zealand Law 257] the New Zealand Court (cited by British Law Commission, Working Paper No. 96) stated that:

"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." (emphasis supplied)

22. Bearing these factors in mind, we proceed to consider as to who is fit and proper to be the guardian of the minor child Anagh in the facts and circumstances of the present case. In this case, the appellant is taking care of Anagh, since her birth when she had to go through intensive care in the hospital till today. The photographs produced by her along with the petition, which is not disputed by the other side would clearly demonstrate the amount of care, affection and the love that the grandmother has for the child having lost her only daughter in tragic circumstances. She wants to see her daughter's image in her grandchild. She has bestowed her attention throughout for the welfare of reminiscent of her only daughter, that is the minor child which is being dragged from one end to another on the so-called perception of judicial precedents and the language employed by the legislatures on the right of natural guardian for the custody of minor child.

23. Anagh is staying with the appellant's family and is also studying in one of the reputed schools in Indore. It must be stated that the appellant has taken proper care and attention in upbringing of the child,

which is one of the important factors to be considered for the welfare of the child. Anagh is with the appellant right from her childhood which has resulted into a strong emotional bonding between the two and the appellant being a woman herself can very well understand the needs of the child. It also appears that the appellant, even after her husband's demise, is financially sound as she runs her own independent business.

24. On the other hand, considering the evidence of the respondent, it seems to us that since he has borrowed money from several persons and since he has a meagre income he may not be in a position to give comfortable living for the child. In spite of notices issued to him, he has not appeared before the Court personally or through his counsel which shows his lack of concern in the matter.

25. It is also brought to our notice that the respondent has got married for the second time and has a child too, and the minor child might have to be in the care of stepmother, specially the father being a businessman, he has to be out of the house frequently on account of his business.

26. Ordinarily, under the Guardian and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute and the courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the appellant grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the appellant to retain the custody of the child.

27. In view of the above discussion, we allow this appeal and set aside the impugned order. We permit the appellant to have the custody of the child till she attains the age of majority."

56. In *Gaurav Nagpal v. Sumedha Nagpal* reported in 2009 (1) SCC 42, appellant-father and respondent-mother married on 14.10.1996 and a child was born to them on 15.11.1997. Initially, in exercise of its power of revision, the High Court by order, dated 30.09.2002, allowed the custody of a child to the appellant-father with visitation rights to the respondent-mother. But as the visitation rights granted to the mother were not complied with, District Court allowed a contempt petition of the respondent-mother and also allowed her application under Section 6 of the Hindu Minority and Guardianship Act, 1956 and

transferred the custody of the child to her. Even though the appellant filed his reply to the maintenance petition, opposing the application, on the ground that the respondent had deserted the child. High Court dismissed the appeal of the appellant-father. The Hon'ble Supreme Court has rejected the arguments of the father that as the minor child was living with him since long, the arrangement should not be disturbed. Relevant portion of the said judgment is reproduced hereinbelow:-

"52. The trump card in the appellant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs....."

57. In *Dr.Nithya Vidyaprakash v. B.Suresh Babu* reported in 2010 (5) MLJ 805, inspite of exhaustive terms of a compromise decree, the parties in the said case sought for varying the terms of compromise. In the said case, the appellant-mother who was having the custody of the child, sought for deletion of visitation rights of father. The respondent/father who had only visitation rights, sought for custody of minor child and sought to set aside the Clause, giving custody to the minor to the mother. Question which came for consideration, was whether the welfare of the minor child, when the parties seek for variation of the terms of compromise, will have to be determined only in the light of the changed circumstances, and the evidence to be adduced by the parties. At paragraphs 27 to 41, a Hon'ble Division Bench of this Court discussed and held as follows:

"27.We have carefully considered the contentions of both Appellant mother and Respondent father. In 2005, at the time when parties have entered into compromise, both Appellant and Respondent were single and their only focus was their relationship towards minor Rahul born out of the lawful wedlock. Now the circumstances have changed. Either the parties are pursuing their career or that some other relationship have set in deviating focus of their love and affection.

28. Before we elaborate upon the changed circumstances, we may also note the conduct of the parties. As pointed out earlier, the Respondent-father was given visitation rights for two consecutive weeks. The visitation rights of the father as per the memo of compromise read as under:

"3) (a) The father shall have access to the child for two consecutive week ends viz., first week end

commencing on Friday evening 6 P.M. till Sunday Evening 6 P.M.

(b) and the second week end will commence on Saturday morning at 8.45 A.M. till Sunday Evening 6 P.M.

(c) During the third week end, the child will be retained by the mother

(d) During the gap between the end of second week and the commencement of the first week and, the father shall have the right to take the child on a Wednesday directly from the School and retain the child till 7 P.M.

4) During vacation i.e., quarterly, half yearly and summer vacations, the father shall have the custody of the child for the first half of the holiday and the mother will have custody for the second half of the holidays.

5) The father undertakes to pickup the child and also drop him back at the agreed timings."

29. As per the above terms of compromise, the Respondent - father shall have the child for two consecutive week ends. It is also clear from the terms of compromise that between the end of second week and the commencement of first week, the father shall have the right to take the child on Wednesday directly from the School and retain the child till 7.00 P.M. As per the terms of compromise, the Respondent was exercising his visitation rights without much difficulty till the Appellant moved to Secunderabad. After securing job in Secunderabad, the Appellant had taken the child also along with her to Secunderabad, of course, after intimation to the Respondent. When parties have arrived at the compromise and a decree was passed by the Court, when the child was moved out of jurisdiction of the Court, the Appellant ought to have informed the Family Court about moving the child out of jurisdiction of the Court. But that was not resorted to. The conduct of the Appellant in moving the child out of the jurisdiction of the Court without informing the Family Court, Coimbatore is not appreciable.

30. Respondent father has gone a step further in flouting the terms of compromise by his conduct of acting in clear violation of terms of compromise. As per terms of compromise, during vacation, in quarterly, half yearly and summer vacation, the father shall have the custody of the child for the first half

of the holidays and mother will have custody for the second half of the holidays from Hyderabad. As per the terms of compromise, the Respondent has taken the minor child Rahul on 25.4.2009 for the first half of the holidays. As per the terms of compromise decree, the Respondent should have handed over the minor to the Appellant on or before 17.5.2009, but the Respondent failed to do so, and thereby violated the terms and conditions of compromise decree. Not stopping with that, in the year 2009, the Respondent has also admitted the minor child Rahul in a School in Coimbatore and retained the child with himself, which is in clear violation of terms of the compromise decree. Retaining the custody of child is clear violation of the terms of compromise. Efforts of the appellant to take back the child by sending telegram and lodging police complaint ended in vain.

31. In the above circumstances, the Appellant had filed I.A.No.636 of 2009 to initiate contempt proceedings against the Respondent for violating the orders of the Court. She has also filed I.A.Nos.637 of 2009 and 638 of 2009 seeking for cancellation of the visitation rights of the Respondent and also for appointment of Advocate Commissioner to take the custody and hand over the child. Even when the matter was pending in the Family Court, the Respondent filed C.R.P.NPD.Nos.1598 and 1599 of 2009 seeking for custody of minor child and obtained an order of interim stay of operation of I.A.No.700 of 2007. In our considered view, the interim order cannot justify the unlawful retention of the minor child. The conduct of the Respondent in retaining the custody of the child is in violation of terms of compromise and is despicable. The Court has to take serious note of the high handed act of the Respondent in retaining the minor child in clear violation of the terms of compromise.

32. We are of the view that both parties seem to be acting contrary to the terms of compromise. Both of them do not seem to be inclined to honour their commitment as per the terms of compromise. After recording of compromise, situation and circumstances have changed. As pointed out earlier, the Respondent has re-married one Nikethana on 20.1.2006 and girl child was born to Respondent out of second marriage on 18.10.2006. With a view to expand his business, now admittedly the Respondent is widely travelling and he has also admittedly put up office in Chennai. In fact,

according to the Appellant, the Respondent has shifted his residence to Chennai.

33. After hearing the matter on 4.3.2010, we have posted the matter to 15.3.2010 for orders and directed the parties to be present in the Court along with minor Rahul. Immediately, thereafter on 8.3.2010, the learned counsel for Appellant made a mention before us stating that the Appellant has certain marriage proposal and that the Appellant wants to file an affidavit in this regard and requested the matter to be listed on 9.3.2010. On such request, the matter was again listed on 9.3.2010 under the caption "for being mentioned". The learned counsel for Appellant took an adjournment and on 10.3.2010 he filed the affidavit of the Appellant. In the affidavit, the Appellant has stated that she has received a marriage proposal from a Doctor settled in United Kingdom and the said Doctor has also agreed to support her endeavour to have her minor son Rahul to grow up with the Appellant. According to the Appellant, the prospective groom is also from the same profession and that he is a permanent resident of United Kingdom and considering the well being of Rahul as well as her own future she has conveyed her consent to marry Dr.Kishore Krishnamurthy shortly and in that event she has to relocate herself along with Rahul at United Kingdom. The learned counsel for the appellant has submitted that the Court may take into consideration the subsequent developments and pass suitable orders having regard to the subsequent developments.

34. On 11.3.2010, the Respondent filed response stating that affidavit filed by Appellant relates to a future event, which cannot be treated as part of enquiry and the consent of the person, who had proposed to marry the Appellant "to support her endeavour to have her son grow up with her" relates to a future event, which is not yet materialised and merits of such future event, which is not yet materialised, cannot be examined by the Court. The learned counsel for the Respondent also submitted that the proposal of the Appellant to marry a resident of United Kingdom and consequent relocation of Appellant along with minor Rahul to the United Kingdom is outside the scope of clauses incorporated in joint memo of compromise originally recorded by the Family Court. Learned counsel for the Respondent also submitted that removal of minor child from India to United Kingdom would amount to virtually depriving the father from exercising his visitation rights.

35. That respondent has remarried and his second wife had given birth to a girl child is a changed circumstance. In such changed circumstance, can the Respondent exercise the visitation rights as per compromise decree is a question of fact to be determined. Affidavit filed by the Appellant regarding her proposal to re-marry and re-location to United Kingdom is a development subsequent to the Family Court passed the common order on 29.4.2009. The welfare of the child has to be examined vis-a-vis the changed circumstances and the subsequent developments.

36. In the light of the changed circumstances, we are of considered view that parties are to be heard. Earlier, while disposing I.A.Nos.700 of 2007 and 56 of 2009, the Family Court has passed the order based on the affidavit evidence rather than asking the parties to adduce oral evidence. As pointed out earlier, at the time when the compromise was recorded between the parties in 2005, both of them were just separated and single and their only focus was minor child. Now the Respondent has re-married and the Appellant also has a proposal for re-marriage. The welfare of the minor will have to be determined in the light of the changed circumstances. In our considered view, the welfare of child could be determined only if the parties adduce oral and documentary evidence, which would enable the Court to assess the situation to determine the interest and welfare of the minor child.

37. After passing of decree in terms of compromise, the Family Court does not become functus officio, but continues to exercise jurisdiction in monitoring the welfare of the child. In the light of changed circumstances, both parties now seek variation of the terms of compromise. In such view of the matter, common order of the Family Court, Coimbatore dated 29.4.2009 made in I.A.Nos.700 of 2007 and 56 of 2009 in G.W.O.P.No.1 of 2005 has to be set aside and the matter has to be remitted back to the Family Court for consideration of the matter afresh in the light of the evidence to be adduced by the parties.

38. Insofar as the custody of the child, as we pointed out earlier, in clear violation of terms of compromise, the Respondent father had taken the child in 2009 for first half of the holidays and retained the child thereafter. The respondent father has gone to the extent of admitting the child in the school in Coimbatore and retaining the child. The conduct of the father is in clear violation of terms of compromise and we express strong disapproval of the conduct of

Respondent-father. However, it was stated before us that the child has annual examination scheduled from 25.3.2010 and the child was in Coimbatore for the past one year. In such circumstances, even though we strongly disapprove the conduct of the Respondent-father, we are not inclined to immediately disturb the status quo (custody) of the child till the Family Court determines the matter afresh.

39. In the result, the common order of the Family Court in Family Court, Coimbatore dated 29.4.2009 made in I.A.Nos.700 of 2007 and 56 of 2009 in G.W.O.P.No.1 of 2005 is set aside and both the applications are remitted back to the Family Court for consideration of the matter afresh to determine the welfare of the minor child in the light of the changed circumstances and in the light of the well settled principles. The Family Court shall afford sufficient opportunities to both parties to adduce oral and documentary evidence and consider the matter afresh and pass appropriate orders. Insofar as the custody of child, the present status quo shall continue till the disposal of the matter afresh by the Family Court. The Family Court shall complete the above exercise within a period of two months from the date of receipt of copy of this order. Both the parties are directed to cooperate with the Family Court for disposal of the matter within the said time frame. The Appeal and revisions shall stand disposed of on the above terms. However, there shall be no order as to costs. Consequently, the connected miscellaneous petitions are closed."

58. In *Athar Hussain v. Syed Siraj Ahmed* reported in 2010 (2) SCC 654, the appellant therein married the daughter of 1st respondent therein, as per the Islamic rites and customs. Two children were born out of the wedlock. Wife of the appellant therein died after thirteen years of marriage and within a year he married again. Maternal grandfather, maternal aunt and uncles of the minor children, respondents therein, girl aged 13 years and boy aged 5 years, initiated proceedings, under Sections 7, 9 and 17 of the Guardian and Wards Act, 1890 for appointment as guardians. They also filed application under Section 12 of the Act r/ w Order 39 Rules 1 and 2 CPC, praying for interim protection of the persons and properties of the minor children and also for an injunction order restraining the appellant from interfering or disturbing the custody of the minor children. Family Court passed an interim order restraining the appellant from interfering with the custody of the children with the respondent. Appellant challenged the order. Family court vacated the interim order of injunction. High Court set aside the said

order and passed certain directions. In the reported case, the Hon'ble Apex Court noticed that the child was reluctant to go with the father. On that aspect, the Hon'ble Apex Court, at paragraph No.24, observed thus,

"24. Though when the children's father is not unfit otherwise he shall be the natural guardian, a child cannot be forced to stay with his/her father. According to the High Court, merely because the father has love and affection for his children and is not otherwise shown unfit to take care of the children, it cannot be necessarily concluded that the welfare of the children will be taken care of once their custody is given to him. The girl had expressed a marked reluctance to stay with her father. The High Court was of the opinion that the children had developed long-standing affection towards their maternal grandfather, aunt and uncles. It will take a while before they develop the same towards their stepmother. The sex of the minor girl who would soon face the difficulties of attaining adolescence is an important consideration, though not a conclusive one. She will benefit from the guidance of her maternal aunt, if custody is given to the respondents, which the appellant will be in no position to provide. Further, there is a special bonding between the children and it is desirable that they stay together with their maternal grandfather, uncles and aunt."

59. On the aspect, as to whether there are compelling reasons to change custody of the child, the Hon'ble Apex Court, at Paragraph Nos.36 and 37, observed thus:

"36. The appellant placed reliance on R.V. Srinath Prasad v. Nandamuri Jayakrishna [(2001) 4 SCC 71 : AIR 2001 SC 1056] . This Court had observed in this decision that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children. In that decision, while granting interim custody to the father as against the maternal grandparents, this Court held: (SCC pp. 76-77, para 10)

"10. ... The Division Bench appears to have lost sight of the factual position that at the time of death of their mother the children were left in custody of their paternal grandparents with whom their father is staying and the attempt of Respondent 1 was to alter that position before the application filed by them is considered by the Family Court. For this purpose it was very relevant to consider whether leaving the minor children in custody of their father

till the Family Court decides the matter would be so detrimental to the interest of the minors that their custody should be changed forthwith. The observations that the father is facing a criminal case, that he mostly resides in USA and that it is alleged that he is having an affair with another lady are, in our view, not sufficient to come to the conclusion that custody of the minors should be changed immediately."

(emphasis supplied)

What is important for us to note from these observations is that the court shall determine whether, in proceedings relating to interim custody, there are sufficient and compelling reasons to persuade the court to change the custody of the minor children with immediate effect.

This extract is taken from *Athar Hussain v. Syed Siraj Ahmed*, (2010) 2 SCC 654 : (2010) 1 SCC (Civ) 528 at page 665

37. Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in *Mausami Moitra Ganguli v. Jayant Ganguli* [(2008) 7 SCC 673 : AIR 2008 SC 2262]. This Court held: (SCC pp. 679-80, para 24)

"24. ... We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression to him."

After taking note of the marked reluctance on the part of the boy to live with his mother, the Court further observed: (*Mausami Moitra* case [(2008) 7 SCC 673 : AIR 2008 SC 2262], SCC p. 680, para 26)

"26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained."

(emphasis supplied)

60. In *Vikram Vir Vohra v. Shalini Bhalla*, reported in (2010) 4 SCC 409, the Hon'ble Supreme Court held that welfare of child is the paramount importance in matters relating to child

custody and may have primacy even over statutory provisions. Child custody being a very sensitive issue, custody orders are always considered, as interlocutory orders capable of being modified keeping in mind needs of the child. Such orders even when based on consent can be varied if welfare of child so demands. After personally interviewing the child aged about 7 years to ascertain his wishes, the Hon'ble Supreme Court held as follows:

"10. We have also talked with the child in our chambers in the absence of his parents. We found him to be quite intelligent and discerning. The child is in school and from the behaviour of the child, we could make out that he is well behaved and that he is receiving proper education. The child categorically stated that he wants to stay with his mother. It appears to us that the child is about 8-10 years of age and is in a very formative and impressionable stage of his life. The welfare of the child is of paramount importance in matters relating to child custody and this Court has held that welfare of the child may have a primacy even over statutory provisions (see *Mausami Moitra Ganguli v. Jayant Ganguli* [(2008) 7 SCC 673], p. 678, para 19). We have considered this matter in all its aspects.

11. The argument of the learned counsel for the appellant, that in view of the provisions of Section 26 of the Act, the order of custody of the child and the visitation rights of the appellant cannot be changed as they are not reflected in the decree of mutual divorce, is far too hypertechnical an objection to be considered seriously in a custody proceeding. A child is not a chattel nor is he/she an article of personal property to be shared in equal halves.

12. In a matter relating to the custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child.

13. In *Rosy Jacob v. Jacob A. Chakramakkal* [(1973) 1 SCC 840] a three-Judge Bench of this Court held that all orders relating to the custody of minors were considered to be temporary orders. The learned Judges made it clear that with the passage of time, the Court is entitled to modify the order in the interest of the

minor child. The Court went to the extent of saying that even if orders are based on consent, those orders can also be varied if the welfare of the child so demands.

14. The aforesaid principle has again been followed in *Dhanwanti Joshi v. Madhav Unde* [(1998) 1 SCC 112] .

15. Even though the aforesaid principles have been laid down in proceedings under the Guardians and Wards Act, 1890 these principles are equally applicable in dealing with the custody of a child under Section 26 of the Act since in both the situations two things are common; the first, being orders relating to custody of a growing child and secondly, the paramount consideration of the welfare of the child. Such considerations are never static nor can they be squeezed in a straitjacket. Therefore, each case has to be dealt with on the basis of its peculiar facts.

16. In this connection, the principles laid down by this Court in *Gaurav Nagpal v. Sumedha Nagpal* [(2009) 1 SCC 42] are very pertinent. Those principles in paras 42 and 43 are set out below: (SCC p. 55)

"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."

That is why this Court has all along insisted on focussing the welfare of the child and accepted it to be the paramount consideration guiding the court's discretion in custody order. (See *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka* [(1982) 2 SCC 544 : AIR 1982 SC 1276] , AIR p. 1289, para 17.)

17. In the factual and legal background considered above, the objections raised by the appellant do not hold much water.

18. Now coming to the question of the child being taken to Australia and the consequent variations in the visitation rights of the father, this Court finds that the respondent mother is getting a better job opportunity in Australia. Her autonomy on her personhood cannot be curtailed by the Court on the

ground of a prior order of custody of the child. Every person has a right to develop his or her potential. In fact a right to development is a basic human right. The respondent mother cannot be asked to choose between her child and her career. It is clear that the child is very dear to her and she will spare no pains to ensure that the child gets proper education and training in order to develop his faculties and ultimately to become a good citizen. If the custody of the child is denied to her, she may not be able to pursue her career in Australia and that may not be conducive either to the development of her career or to the future prospects of the child. Separating the child from his mother will be disastrous to both.

19. Insofar as the father is concerned, he is already established in India and he is also financially solvent. His visitation rights have been ensured in the impugned orders of the High Court. His rights have been varied but have not been totally ignored. The appellant father, for all these years, lived without the child and got used to it.

20. In the application dated 9-5-2008 filed before the Additional District Judge, Delhi, the mother made it clear in Para 12 that she is ready to furnish any undertaking or bond in order to ensure her return to India and to make available to the father, his visitation rights subject to the education of the child.

21. This Court finds that so far as the order which had been passed by the High Court, affirming the order of the trial court, the visitation rights of the appellant father have been so structured as to be compatible with the educational career of the child. This Court finds that in this matter judicial discretion has been properly balanced between the rights of the appellant and those of the respondent. In that view of the matter, this Court refuses to interfere with the order passed by the High Court.

22. The appeal is dismissed with the direction that the respondent mother, before taking the child to Australia, must file an undertaking to the satisfaction of the Court of the Additional District Judge 1, (West), Delhi within a period of four weeks from date. No order as to costs."

61. In *Gaytri Bajaj v. Jiten Bhalla* reported in 2012 (12) SCC 471, the Hon'ble Supreme Court held that an order of custody of a minor children is required to be made by court treating the interest and welfare of minor to be of paramount importance. Further held that it is not the better right of either of the

parent, to custody, but the desire, interest and welfare of minor which is crucial and ultimate consideration that must guide determination required to be made by court. In the said case, the Hon'ble Supreme Court held that the children having expressed their reluctance to go with mother, even for a short duration of time or to meet her, any visitation right to mother would be adverse to the interest of children. In the said circumstances, it has held as follows:

"12. The law relating to custody of minors has received an exhaustive consideration of this Court in a series of pronouncements. In *Gaurav Nagpal v. Sumedha Nagpal* [(2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1] the principles of English and American law in this regard were considered by this Court to hold that the legal position in India is not in any way different. Noticing the judgment of the Bombay High Court in *Saraswatibai Shripad Ved v. Shripad Vasanji Ved* [AIR 1941 Bom 103] , *Rosy Jacob v. Jacob A. Chakramakkal* [(1973) 1 SCC 840] and *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka* [(1982) 2 SCC 544 : 1982 SCC (Cri) 505] this Court eventually concluded in paras 50 and 51 that: (*Gaurav Nagpal case* [(2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1] , SCC p. 57)

"50. That 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 *Mausami Moitra Ganguli case* [*Mausami Moitra Ganguli v. Jayant Ganguli*, (2008) 7 SCC 673], the court has to give 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 and 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."

13. The views expressed in paras 19 and 20 of the

Report in Mausami Moitra Ganguli v. Jayant Ganguli [Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673] would require special notice. In the said case it has been held that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. It was the further view of this Court that the question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. Similar observations of this Court contained in para 30 of the Report in Sheila B. Das v. P.R. Sugasree [(2006) 3 SCC 62] would also require a special mention.

14. From the above it follows that an order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956 is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. What must be emphasised is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the court.

14. From the above it follows that an order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956 is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. What must be emphasised is that while all other factors are

undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the court.

15. In the present case irrespective of the question whether the abandonment of visitation rights by the wife was occasioned by the fraud or deceit practised on her, as subsequently claimed, an attempt was made by this Court, even by means of a personal interaction with the children, to bring the issue with regard to custody and visitation rights to a satisfactory conclusion. From the materials on record, it is possible to conclude that the children, one of whom is on the verge of attaining majority, do not want to go with their mother. Both appear to be happy in the company of their father who also appears to be in a position to look after them; provide them with adequate educational facilities and also to maintain them in a proper and congenial manner. The children having expressed their reluctance to go with the mother, even for a short duration of time, we are left with no option but to hold that any visitation right to the mother would be adverse to the interest of the children. Besides, in view of the reluctance of the children to even meet their mother, leave alone spending time with her, we do not see how such an arrangement i.e. visitation can be made possible by an order of the court.

16. Taking into account all the aforesaid facts, we dismiss these appeals, affirm the impugned orders [(2008) 106 DRJ 651] , [Jiten Bhalla v. Gaytri Bajaj, (2009) 111 DRJ 292] passed by the High Court of Delhi and deny any visitation rights to the petitioner and further direct that the children would continue to remain in the custody of their father until they attain the age of majority."

62. Though reasons have been assigned by the learned Family Court Judge, which we shall discuss in the latter part of this judgment, both the learned counsel appearing for the parties, took us through the entire pleadings and evidence recorded in the proceedings, which this Court deems it fit to consider in the best interest of the child.

63. Inter-se rights of the parents to have custody of the child, based on examination of their evidence, is not a matter to be considered by the Courts, in the matter of custody of the child, but it is the paramount interest and welfare of the child. Keeping in mind, the above principle, on the facts and circumstances of this case, this Court deems it fit to consider, as to whether the Family Court has considered evidence of the

psychiatrist, and evidence adduced by the parties; whether the Family Court has given due consideration to the child's wishes and preferences; whether the child has been brought with all comforts; whether the child is living in a disadvantageous position, in the absence of father and would continue to live; whether there is violation of visitation rights; whether such violations affected the child; whether variation of visitation rights in future would affect the child. On the whole, is there a change in circumstances, warranting change in custody and ultimately, keeping in mind, the paramount interest and welfare of the child, who should be given the custody of the child.

64. I.A.No.2779 of 2009, is dated 28.10.2010. Material on record shows that the child was brought to the Court/Child Care Centre on 05.02.2011, 29.03.2011 and 10.04.2011. According to the respondent-father, mother did not produce the child. As she was going to America, case was adjourned to 04.11.2011. However, a direction was given to the appellant to produce the child on 22.10.2011. She did not produce the child. Father went to the house of the appellant's mother, along with a counsellor. Child was produced with hesitation.

65. Per contra, the appellant-mother has stated that on 25.06.2011, the Presiding Officer told the parties that when asked as to whether the appellant was preventing the child from seeing and talking with the father, the child shook his shoulders in the affirmative. Mother has stated that the Presiding Officer has mistook the child's body language. According to the appellant, on 03.01.2013, the Presiding Officer spoke to the child to assess the child's preference, but the child clearly informed him that he is not interested to talk or move with the father. On 19.04.2013, in I.A.No.2779 of 2010 in F.C.O.P.No.3499 of 2010, the Presiding Officer has categorically recorded that the child was not willing to talk to his father.

66. According to the respondent/father, in 2010, the child went into tears, and the child longed for love and affection of his father. But the mother has denied the same, and added that, as an internal arrangement, child was permitted with the father. On 19.04.2013, the Presiding officer has recorded that the boy was not inclined to see his father, when he had a talk to the boy. But the fact remains that only after considering the rival submissions of the parties, allegations of brainwashing and denial of visitation rights, the Presiding Officer wanted to have a psychological evaluation report and thus, sought for an opinion.

67. Keeping in mind the decisions of the Hon'ble Supreme Court in repeated judgements, cited supra, let us consider, as to whether, the Court below has applied with the principles of law, to the facts and evidence.

68. Contention of the respondent/father is that there was a previous examination of the child, by the Presiding Officer and he observed that the child was prevented by the appellant-mother, which she has denied. On the contra, it is the submission of the learned counsel for the appellant that the Presiding Officer, during his interaction, has observed that the child was not willing to talk to his father. That apart, the Presiding Officer has obtained the opinion of an expert, but failed to consider the same.

69. Notwithstanding the individual opinion of the Presiding Officers, we deem it fit to observe that the opinion by an expert on the psychological report of the child, should have been considered, for arriving at a decision, as to what, in the best interest of the child, is the paramount consideration. Expert opinion having been called for, by the Court, cannot be simply ignored. In the case on hand, there is no reason, as to why, the Family Court, which had called for a report, did not consider the same, for reversing custody.

70. Expert opinion, by the psychiatrist is opposed on the ground that the respondent/father has not been examined. Dehors the objections made by the respondent-father, we deem it fit to extract the opinion of the expert and objects. Ex.C1, Psychological report, reads thus:

From
Dr.V.Jayanthi
Head of the Department
Child Guidance Clinic
Institute of Child Health & Hospital for Children
Halls Road, Egmore, Chennai - 600 008.

To
Thiru.T.C.S.Raja Chockalingam, B.Com, B.L
Principal Judge,
Family Court, Chennai - 104.

DIS No.950/2011 dated 21/07/2011

Sir,

Sub: Psychological Evaluation of minor by Master Siddharth aged 7 years.

Ref: I.A. 2779/2010 and I.A. 380/2011 in OP.3499/2009- Dr.C.S.Mani - Peittioner Dr.V.SriDevi- Respondent.

I have interviewed the petitioner Dr.C.S.Mani, the respondent Dr.V.Sri Devi and also their son Master.Siddarth on different dates during the past 3 weeks.

Dr.Sangeetha Madhu, Asst. Professor of Psychology, Child Guidance Clinic, Institute of Child

Health and Hospital for Children, Chennai - 8, did a psychometric evaluation by administering a few psychological tests and her report is enclosed herewith.

Based on the above clinical and psychometric evaluation, I have come to the following conclusions.

1. Master.Siddharth is a boy of above average intellectual capacity and his IQ falls in his superior range. He was quire aware of the prevailing situation regarding the court case about his father's visitation rights.

2. It did not appear that Siddharth had been prevented by the respondent/mother to see his biological father. He very clearly stated that his mother was not interfering (or) influencing him in this regard.

3. The boy did not accept that he had any inherent love and affection with the petitioner/father. He categorically stated that he did not want to see his father, talk to him over the phone (or) go out with him, when asked whether his father can visit him at his maternal grand parent's house he simply shrugged his shoulders. When questioned about the implication of that gesture, he said that it meant 'No' as an answer.

4. Both his verbal and non-verbal expressions had clearly indicated that he had intelligent preference to express his wishes and his mother has never tutored him. Whenever I tried to talk about his biological father, he went into a shell, refused to look at him and showed his displeasure non-verbally. His mother, infact told me to convince and encourage him to go out with his biological father if 'I' as an expert felt that it was for the betterment of the child.

5. During the examination, the boy was found to be manipulative, gave certain statements/answers which were refuted by his mother in his presence for e.g., He told me that his step father was not working anywhere at present. When confronted, he changed the statement and said, his step father works only during the week ends. When I told him that I will go and verify fact in the Cancer Institute, he said, his step father works during weeks days too. During the evaluation period, I noticed that the boy had a tendency to give certain statement and answers, which he changed when confronted on certain other issues too.

6. In the Psychometric Testing, the Sentence Completion Test which is projective in nature showed that the boy wants his son - biological father to

instruct him to perform the tasks and his weakness is his affection for his mother.

7. I had individually interviewed the biological parents, and in my opinion the parenting style of the respondent/mother is not uncondusive to the welfare and future of the child."

Ex.C2 - Psychometric Evaluation, reads hereunder:

Name of Patient: Master.Siddharth	2 August 2011
D.O.B. : 11.04.2004	S.No.392
Age : 7 years 4 months	

PSYCHOMETRY TESTING

TESTS RESULTS

On CPM (Coloured Progressive Matrices):

Total Score	- 33
Percentile Rank	- 95
Grade	- 1
Description	- "Above Average Intelligence"

PERSONALITY AND DIAGNOSTIC ASSESSMENT

On CAT (Children's Apperception Test): The stories indicate that he has a strong need for achievement. He tends to have perfectionistic tendency and obsessive symptoms. He has fear of failure, is sensitive to criticism and has fear of rejection. He tends to identify with his mother and has sees her as a strong attachment figure. He tends to have need for approval and acceptance.

On Sentence Completion Test (SCT):

- ◆ He tends to be optimistic and hopeful
- ◆ He wants his (non biological) father to instruct him to perform tasks
- ◆ He considers his mother to be his weakness (affectionate towards to her)
- ◆ He enjoys being with his friends
- ◆ He enjoys playing cricket and relay
- ◆ He tends to be sensitive to criticism and rejection

Multiple Intelligences

Naturalistic Intelligence

- ◆ I like to recycle/reuse things
- ◆ I watch news about saving our environment

- ◆ I like magazines and books about nature
- ◆ I like climbing pretty mountains and camp out
- ◆ I like products and ideas that will protect our environment

Musical

- ◆ My voice sounds good when I sing
- ◆ I can tell when a song is on a wrong key or out of pitch
- ◆ I listen to music a lot

Intrapersonal

- ◆ I want to learn more about myself
- ◆ I can cheer up after a setback like getting low marks or losing a favourite toy
- ◆ I have a hobby that only I do alone
- ◆ I know about myself and also what my strengths and weaknesses are

Bodily/Kinesthetic

- ◆ I play at least one sport or physical activity regularly
- ◆ I cannot sit one place for a long time
- ◆ I like to use my hands to make a model building or do crafts
- ◆ I get very good ideas when I am running or jogging
- ◆ I like to spend my free time outdoors

Early School Personality Questionnaire (ESPO):

- ◆ Cool, reserved, impersonal, detached, formal aloof
- ◆ Emotionally stable, mature, faces reality, calm
- ◆ Phlegmatic, undemonstrative, deliberate, placid, inactive
- ◆ Obedient, mild, accommodating, submissive, conforming
- ◆ Enthusiastic, heedless, cheerful, expressive, happy-go-lucky
- ◆ Expedient, disregards rules, self-indulgent
- ◆ Bold, venturesome, uninhibited, spontaneous, unafraid
- ◆ Tender-minded, intuitive, over protected, sensitive, refined
- ◆ Vigorous, goes readily with group, zestful, given to action
- ◆ Forthright, natural, artless, open, native
- ◆ Self-assured, secure, feels free of guilt,

- untroubled, self-satisfied
- ◆ Tense, frustrated, overwrought, has high drive

Test Findings:

Master.Siddharth's Psychological assessment indicates

- ◆ Above Average Intelligence (Percentile - 95)
- ◆ His strengths include naturalistic, musical, intrapersonal and kinesthetic skills
- ◆ Mild anxiety features
He may benefit from anxiety reduction techniques and parental counselling.

SANGEETHA
9.8.2011

71. Adjustment of the child with the step father with whom the child did not spend much time is one of the observations of the Family Court. Let us consider what the child before the Psychiatrist has stated about the stepfather.

"During the examination, the boy was found to be manipulative, gave certain statements/answers which were refuted by his mother in his presence for e.g., He told me that his step father was not working anywhere at present. When confronted, he changed the statement and said, his step father works only during the week ends."

72. Let us also consider how the child has reacted to the questions, posted by the Psychiatrist,

"Both his verbal and non-verbal expressions had clearly indicated that he had intelligent preference to express his wishes and his mother has never tutored him. Whenever I tried to talk about his biological father, he went into a shell, refused to look at him and showed his displeasure non-verbally. His mother, infact told me to convince and encourage him to go out with his biological father if 'I' as an expert felt that it was for the betterment of the child."

73. Child during examination by the Psychiatrist has stated that the stepfather should instruct him to perform the child's tasks. He considers his mother to be his weakness (affectionate towards him). He tends to identify with his mother and sees her as a strong attachment figure. Child did not not say anything adverse against the step father. Child does not appear to show any disinclination towards his step father nor from the report of the Psychiatrist, there is any material to arrive at a

conclusion that the child was in a disadvantageous position.

74. The psychiatrist in her report has categorically opined that the child has intelligible preference to express his wishes and the mother never tortured him. True that the psychiatrist has observed that child had gone into shell, when questions were posed about his biological father, but the psychiatrist has also observed that the child refused to look at him and showed his displeasure non-verbally. When the psychiatrist in her opinion has categorically concluded that the child has intelligible preference to express his views, Court is not a better expert, to assess the child, by once again examining the child.

75. Expert has clearly opined that the child is aware of the court proceedings and visitation rights of his father. Observation of the expert has been recorded in Paragraphs 2 to 4. Psychiatrist has reported that when questions were posed, regarding the workplace of his stepfather, child's answers were not clear. Ultimately, the psychiatrist has offered her opinion, that after going the physical emotion of the child, the parenting style of the mother is not uncondusive to the welfare of the child.

76. Let us consider the submissions of the learned counsel for the respondent/father, on the attitude of the mother that she had already decided to snap the love and affection of the father, with his child, from the beginning. Diary entries, relied on by the respondent, are as follows:-

"1st January 2004

"Since midnight i.e. New year, I am repeatedly reminding myself of the impending hurdles I am to face this year. Delivery and a possible divorce. The child may be a distraction It's difficult to tell. I am, ofcourse prepared (since Out 2003) about the fact I will be a single parent caring for my child."

26th June 2004

The problem surfaces again - that time it's the mistakes - he wants. C.S.Siddhartha - I refuse to have his father's - for my son. I also tell Mani that he is ashamed to tell his people that he has let his wife have her initials in front of their son's. He again insists that it be one cooking at Alwarpet. I make my stand clear and also tell him that if he is to keep on harping at the same issues, I do not wish to continue the relationship.

I also add the 'depression factor'. In anquish I call madam, Pemmi. I feel better after speaking to them.

30th June 2004

My weakness. Short Temper, inadjustability (more

by choice). adamancy."

77. It is a fact that the appellant has recorded in her diary that the child would be brought up, as a single parent but that cannot be treated as the basis for forming an opinion that the appellant even at the earliest point of time had decided to prevent visitation rights of the respondent. Those entries were written in the year, 2004. Mutual decree for divorce was granted on 10.11.2009, with visitation rights.

78. Contention that the mother had already expressed her desire to bring up the child, as a single parent and thus, written in her diary, cannot be a reason, to deny custody to the mother, for the reason that she no longer remains to be a single parent. After divorce in 2009, she got remarried in the year 2010. Child Siddarth has been brought by the mother and stepfather, maternal grand parents, all along.

79. In so far as the denial of visitation rights and letters exchanged between the parties, that on 10.05.2006, the appellant had written a letter to the learned counsel for the respondent, even before filing of the petition for divorce by mutual consent, but stated that the custody of the minor child will be with her. Expressing opinion over custody of the child will be with the mother, would not amount to denial of visitation rights. As mother, she is entitled to state so. In her letter dated 10.05.2006, she has stated that the respondent can have visitation rights once in a week for half an hour.

80. In the subsequent letter dated 17.05.2006, sent by the appellant to the learned counsel for the respondent, she has stated that, "as far as the visitation rights are concerned she has suggested that the respondent may visit the child once in a week for a duration of half an hour. Timing can be fixed after discussion. In the said letter, she has also made it clear that the respondent did not visit the child from September 2004 to July 2005. She has denied the allegation that the respondent was made to wait outside." For brevity, the relevant portion of the letter dated 17.05.2006, is reproduced:-

"Further I wish to inform you that your client did not visit the child from September 2004 to July 2005. From July 2005 he was making sporadic visits - approximately once a week. These visits would last about half an hour and they were all done in an absence. Now after you have issued the legal notice dated 13.02.2006, he is making daily visits and sometimes twice a day. These visits are also in my absence. Of late, in the last 3 weeks he forcibly takes take the child out of the house to shops (bakery, bookstores etc), that are located about one

kilometer from my house, against the will of my parents. As far as your statement that your client is made to wait for hours outside and that we create ugly scenes, I totally deny the same. He never informs me or my parents about his proposed visits and always takes us by surprise."

81. In the third letter dated 30.05.2006, the appellant has stated as hereunder:-

"The visitation rights can be once a week for a period of half an hour. My understanding of the 'visitation' rights is that you may visit the child at the place that the child is presently residing - in this case at my parent's house at a specified time of the week and for a fixed period. It does not entail you to take the child out of the house, particularly against the will of my parents, who are in-charge of the child in my absence ie, when I go to work. Ever since my last reply to your lawyer dated 17.05.2006, which has been duly received on 18.5.06, I have made a record of your visits to my parent's house. They are as follows:

"18.05.06 Visit at 6.20 pm, take the child out for a walk, return at 7.30 pm despite being told by the nurse not to take the child out. Nurse accompanies the child.

20.05.06 Visit at 5.30 pm, informed that the child is asleep, you leave

21.05.06 Visit at 10.40 am, take the child out in the car to the shop Odyssey at Adyar, despite being told by the nurse not to do so, for a period of 1 hour, 20 mts. Nurse accompanies the child.

23.05.06 Visit at 5.15 p.m.-nurse inform you that the child is asleep, you leave saying that you will return.

24.05.06 Visit the child at 5.30 pm, take the child out to the beach in the car, despite being told by the nurse that you should not take the child out. Nurse accompanies the child.

27.05.06 Visit the house at 5.15 pm, nurse tells you that the child is asleep. You leave

28.05.06 Visit the child at 10.40 am, despite being told that the child should not be taken out you take the child to the Children's park and the Cancer Institute, in the car for a total period of 2 hours and 20 minutes. Nurse accompanies the child.

From the above record you will yourself see that all your visits are unscheduled. Besides you are taking the minor child out of the house wherein he and myself are presently residing since September 2004. Each time

you are being told not to take the child out of the house but you do not pay any notice to the same. The order fact is that almost all your visits are made when I am not present in the house.

In the present situation I have not yet received any reply to my notice dated 17.05.06. I request you to restrict your visits to once a week, for a period of half an hour, and not take the child outside the premises of my parents' house pending court settlement regarding visitation rights."

82. From the correspondence it could be seen that the respondent has been visiting the house of the appellant's parents with whom she was living with the child and that according to the appellant, visits by the respondent were without information and that the child was taken out of the house. Emotional feelings of the father/respondent to be with the child is understandable that he wanted to spend more time with his child. But whatever the appellant has recorded in her diary, are before the parties decided to file a joint petition for divorce, by mutual consent. Merely because the appellant had suggested in her letters, sent for visitation rights, restricting the time, once in a week, for half an hour, before the filing of the joint institution by mutual consent for divorce, it cannot be concluded that the appellant has intended to snap the relationship of father and son, once in for all.

83. Visitation rights have been granted in the order dated 10.11.2009 in F.C.O.P.No.3499/2009. It is the contention of the respondent that visitation rights have been denied, child was brainwashed, normal with others, and not normal with the biological father. Appellant has remarried in June' 2010. Therefore the respondent has filed I.A.No.2779/2010 in O.P.No.3499/2009, at paragraph Nos.5, 7 and 8 of the appellant, the respondent has contended as follows:-

"5. I was visiting the child promptly and taking him out. He was very fond of me. I was keenly interested in the welfare of the child. I gave all the affection that he needed. But being more under the custody of the mother, the Respondent herein had greater influence on the child. She started brain washing the child. She took him abroad and his whereabouts were not kept updated. All other forms of communication during the non-visiting days were deprived. She even kept back from me the information that she had some other person in mind whom she married immediately after the mutual Divorce Decree was ordered in F.C.O.P.No.3499 of 2009 on 10.11.2009. The dislocation of the child to a new place had added further pressure to the bonding towards towards the

natural father.

7. But after the divorce proceedings the boys attitude changed. It could not be explained in any other way other than that the Respondent herein (mother) is influencing the child. It is not an healthy attitude. This was because the child was spending more time the mother. Conciliatory approaches asking her brother or herself to bring the child to some common place was vehemently resisted putting aside the welfare the the child concerned to have a balanced upbringing.

8. I submit after July 2010 the Respondent herein (mother) kept me away from the visitation rights. I therefore sent a legal notice dt. 9.8.2010 stating she got married to someone who had got two grownup children and my child Siddarth would not get proper attention, it would not be conducive to the growth of the child. I initially insisted for my visitation rights and also for the complete custody of the Child. The respondent sent a belated reply dt. 18.09.2010 denying all those allegations and stated she would not bring the child to any other place other than her mothers place from where I could take the child."

84. In I.A.No.2779/2010 in F.C.O.P.No.3498/2008, filed on 28.10.2010, the respondent has sought for a modification of the order dated 10.11.2009, to the effect directing the appellant to bring the child to the Family Court, Children Care Centre in High Court. He has stated that after July' 2010, she kept him away from the visitation rights and therefore, he sent a legal notice, which was replied on 18.09.2010. There are no documents to indicate that he had visited the child from 2006 till July' 2010.

85. On the aspect of denial of visitation rights, respondent though his lawyer's notice dated 30.04.2012 has stated as hereunder:

"On 26.04.2012 as an interim arrangement you had agreed that our Client can come to your mothers house at Sastri Nagar and take the child Siddarth at 9 a m and you would come to his house and take the child back at 5 p.m on 29.04.2012. Though our Client had his own misgivings about it because on earlier occasions also when our Client came to your Mothers place you had stated that the child is not coming out to go with the father. That is why he filed the above Petition and the Principal Family Court Judge directed you to produce the child before the Child care centre. The Child was produced twice and our Client spend sometime with the child. Thereafter

counselling was done and in order to a delay matter you had applied for transfer of the case. As a result the child has been kept away from our Client for several months. Our Client had agreed to come and take the child at your mother's place on 29.04.2012 because you had specifically agreed that the Child would be sent on that date. But contrary to your assurance before the Family Court on 29.04.2012 at 9 am when our Client came to your mother's place, you told our Client that same old story that the child is not willing to come. Our Client states that because of the prolonged custody of the child with you, you had brain washed the child and that is not a good development for the child. Therefore our Client filed a custody petition for which you had taken time for counter.

As an interim measure you had agreed to our client taking the child on 29.04.2012 and on the subsequent occasion you promised to bring the child to our client's place. Our client states that your attitude on 29.04.2012 is clearly a breach of your agreement and the order passed by the Court on 26.04.2012 that too on the basis of your consent. Our Client states that you are behind the child not going to the father. This would clearly amount to contempt of court's order.

Please take notice that our Client will be filing a Petition for directing you to implement the order dt 26.04.2012 by producing the child before the Court and also seek custody of the child giving you visitatorial rights.

Please take notice that your conduct is clearly in breach of the conditions you agreed to in the order dt. 10.11.2009 passed in FCOP 3499 of 2009 regarding visitatorial rights."

86. For the above, the appellant has sent a reply dated 11.05.2012, as here under:

"With reference to the allegation that your client had doubt in his mind about the said arrangement, my client wish to state that your client is very well aware of the fact that the child would not come along with your client because he distanced himself from the child ever since March 2009. Even on those occasions the child was brought to the child care centre at the instance of the then Presiding Officer, the child bluntly refused to talk with your client and not even looked at him/In spite of the fact that your client was alone with the child in the

Child Care Centre. The following facts would reveal the real reason behind the child's resistance:-

a) It is an admitted fact that the child has never lived with the father except as an infant for 2 months i.e., from 15-7-2004 to 26-9-2004.

b) during the year 2008-2009, the maximum time spent by the petitioner with the child was for about 3 hours between 10.00 a.m to 1.00 p.m. that too for few visits only.

c) The child refused to go with the father from the last week of March, 2009 despite persuasion.

From the above facts it is evidently clear that your client distanced himself from the child for more than three long years. The child is now aged about 8 years. It is common knowledge that a grown up child cannot be thrust in the hands of the father like an infant. If the boy refuses or reluctant to go with the father, the mother is helpless and absolutely there is no meaning in blaming the mother for the boy's act. My client states that at most my client can orally persuade the child to go with the father but when the child is adamant, mother is helpless and she has no right to compel the boy to go against his wish. It is relevant to state here this is not the first time the child Siddarth refused to go with the father - As a matter of fact ever since March 2009, the child is very firm in not going with the father in spite of my client's sincere persuasion. It is common knowledge that affection cannot be thrust on a person or child as well as it cannot be plucked away. This fact your client still fails to understand and repeatedly making allegation that my client brain washed the child."

87. The Presiding officer has suggested psychological evaluation of the child. When I.A. No.2779/2010 was pending, after the report, dated 09.08.2011, the respondent has filed I.A.No.3648 of 2011 in O.P.No.3499 of 2009, on 19.11.2011, praying to take custody of minor Siddarth, with visitation rights to the mother. In her counter affidavit to I.A.No.3648 of 2011, the appellant has denied the contention that the child cried. For brevity, portion of the same is extracted:

"The child on hearing that he should see his father shed tears. This proves that the child was really not interested to see his father but agreed for the same more out of compulsion than desire. The respondent submits that the court has not passed any specific order as alleged by the petitioner and it is only an arrangement to ascertain the real truth about the petitioner's allegation that the mother is

preventing the child from going with the father and also to ascertain whether the child is really interested to see the father. As advised by the then Principal Judge, the child was brought to the Child Care Centre on 29-3-2011, 10-4-2011 and 24-4-2011. On the first day of the visit i.e., on 29-3- 2011 child literally cried on seeing the father even though mother was present. On the subsequent two visits i.e., on 10-4-2011 and 24-4-2011 father alone was with the child in the Child Care Centre. Even though father alone was there, the child refused to talk or play with the father. In fact, the respondent requested the then Judge to make surprise visits to assess the child's behaviour with the father. Accordingly, the then Judge Thiru.Meenakshi Sundaram made surprise visits to the Child Care Centre and took Judicial note of the child's reluctant behaviour with the father. The further allegation that the respondent did not allow the petitioner to see the child is false."

88. On 19.04.2013 in I.A.No.2799 of 2010 in O.P.No.3499 of 2010, the Family Additional Judge passed the following order.

"Of course as per the order for the mutual consent F.C.O.P.No.3499 of 2009 visitation rights was given to the petitioner. The petitioner himself has stated that the child has changed his attitude after divorce. Even this Court could understand that the boy was not inclined to I see his father, when this court had a talk to the boy. But this court having considered that the petitioner being the father and considering the circumstances direct the respondent to bring her son to the Children Center. Family Court Premises from 11. a.m to .1.00. p.m on 2nd Sunday and 4th Sunday of every month, so that the petitioner could able to see and talk to him. Thus the point is answered accordingly.

89. On the contention of the learned counsel for the respondent/father that the child was induced and brainwashed, which resulted in the attitudinal change, we have already considered what the Presiding officer has recorded, while examining the child. Psychiatrist has conducted various tests, for three weeks, interviewed the biological parents and given a report. Even taking it for granted that the child was in the exclusive custody of the mother/appellant, from the reading of the report, in its entirety, there cannot be any conclusion that the custodial rights of the mother have been abused, adverse to the visitation rights of the father, nor the child's rights were wholly snapped. Before the Psychiatrist, the child has categorically stated that he did not want to see or talk to his father.

90. From the above, it could be seen that the child was not inclined to see his father, when the court asked the child to talk to his father. On the aspect of brainwashing and tutoring, in the report of the psychiatric dated 17.08.2011, the expert has clearly stated that the child was not prevented by the mother to his biological father. Mother was not interfering or influencing him, in this regard. The child did not accept, that he had any inherent love and affection with the father. From the report it could be seen that when the child was posed with questions relating to work of his step father, he had given wrong answers and thereafter changed.

91. Though the psychiatrist has observed that the child was manipulative, that would not be a conclusive proof to arrive at a conclusion that the mother had brainwashed him. During the examination, child has categorically stated that the mother had not prevented him from seeing the father. He has also stated that mother did not interfere or influence the child. Contention of the respondent is that he was not examined by the psychiatrist, but she has opined that parenting by the mother is not uncondusive to the welfare and future of the child, which according to the respondent, is erroneous. Examination is not for the parties. But the expert has clearly recorded that she has interviewed both biological parents. As observed earlier, expert opinion sought for and obtained by the Court, cannot be brushed aside.

92. In the case on hand, the change in circumstances which required the respondent/father, file a modification petition for reversal of custody are denial of visitation rights of the mother, snapping the child's rights to his natural father, undue influence over the child due to long custody and in sum and substance, brainwashing the child. Taking the child outside the jurisdiction of the court without information to him or to the court and protraction of the proceedings. Answer of the appellant is that visitation was without information, taking the child outside by the father was not permitted. Contra submission of the appellant/mother, is that the respondent father did not visit the child, besides the child did not go with the father, and the appellant did not stand in the way of the father visiting the child, and in particular, she cannot force the child to be with the father, when the child did not, chose to do so.

93. Family Court has observed that when a male child reaches the adolescent age, he wants to share a lot of things with the father as a friend, and that the father must treat him as his friend. We deem it fit to consider, as to what the child with a reasonable intelligible quotient has decided and expressed in his clear terms. General propositions would not be a deciding

factor, in the matter of deciding custody of a child. Keeping in mind the principles of law laid down by the Hon'ble Supreme Court, in various decisions, paramount interest and welfare of the child, court has to consider what the child has also expressed.

94. For reversing the custody to the father, Family Court, has concluded that, it is the right age of a male child to be under the care and custody of the father. Family court has also stated about the status of the respondent/father. Though tender age and gender, are some of the factors to be taken into account while ordering custody to the mother or father, as the case may be, even then, the court has to consider as to whether it would be in the paramount interest and welfare of child, financial position of the mother, the need to provide education, physical comforts, well being of the child, family circumstances of the parents, and such other factors. Age of the child Siddharth, at the time of decree for divorce by mutual consent was 7 years. He is living with his mother and her parents, for nearly 12 years.

95. Status appears to be have been one of the reasons for changing custody of the child. Going through the material on record, we find no change in the status of the rival parties. Both are doctors by profession.

96. Contention of the respondent/father that by denying visitation rights, the appellant has created an imbalance between the child and his father, cannot be accepted. There may be aberrations of visitation rights, but giving due consideration to the conduct of the child and wishes on his preferences, based on the intelligible quotient assessed by the psychiatrist, it is clear that the child was not interested to see and talk to him, when the child was examined by the psychiatrist in the presence of father. It should also be noted that the psychiatrist has taken sufficient time to study the psychiatry of the child.

97. Generalisation in favour of the mother or the father, as the case may be, has not been approved by the Hon'ble Supreme Court. Expected company of the father, with his son, appears to be one of the factors taken into consideration by the Family Court. Education and sports activities of the child indicate that that the child has been given comforts and nurtured, paying due attention to the best interest of the child. In the case on hand, finding of the Family Court that being a biological father, respondent can give good education, affection and more comforts, cannot be accepted, for the reason, both are professionals, Doctors and well placed. Therefore, finance cannot be a reason for change of custody.

98. True that the child was in the custody of the mother, her parents, her husband, step father. All along, he has been brought up in the company of the above. Whether shelving by the child, to certain queries, posed by the psychiatrist, would itself give rise to a conclusion that the child was brainwashed and tutored, the vital evidence of the psychiatrist, in her conclusion is that, "it did not appear that Siddharth had been prevented by the mother to see his biological father and that the boy has clearly stated that his mother was not interfering or influencing him in this regard.

99. Whether the child has any inherent interest, love and affection, towards his natural father, it would be seen from the report, to the query, as to whether, he can visit him, at his maternal grandparent's house, the child has answered thus,

"3. The boy did not accept that he had any inherent love and affection with the petitioner/father. He categorically stated that he did not want to see his father, talk to him over the phone (or) go out with him, when asked whether his father can visit him at his maternal grandparent's house he simply shrugged his shoulders. When questioned about the implication of that gesture, he said that it meant 'No' as an answer."

100. As regards intelligible preference between the rival parties, the psychiatrist has clearly opined that the child expressed his wishes. Choice of the child does not appear to be in favour of the respondent-father.

101. In Lekha's case (cited supra), though the father therein has contended that the mother, who got remarried, would not spend her time, for the welfare of the child, the Hon'ble Apex Court has rejected the said plea, that mere remarriage is not a ground to deny custody. The Hon'ble Apex Court has categorically observed that at the time of interview, the boy has expressed his willingness and desire to live only with his mother, and when the boy says, he prefers to live with his mother, the Apex Court was of the view that it would be beneficial for the boy and his education, for a better future. One of the issues raised in the present appeal before us, regarding remarriage of the appellant with a person with two children and that therefore, custody to be given to the father. Following Lekha's case, we reject the said contention.

102. In Lekha's case, the Hon'ble Apex Court has also considered that child therein was living with his mother for several years and separation will affect the mental condition and education of the child. On the facts and circumstances of the case, the Hon'ble Apex Court also observed that,

"It is not in dispute that the boy is living with his mother for the last several years and the separation at this stage will affect the mental condition and the education of the child and considering that the child himself attaches importance to his education if the custody is to be given to the father will now affect his academic brilliance and future."

103. Dr.Nithya Vidyaprakash's case, relied on by the learned counsel for the respondent-father, cannot be cited as a precedent to decide custody of child, as the Court, after considering the material on record, opined that aspect of custody can be decided only after recording evidence and thus, remitted the matter back to the family Court.

104. Similar to the contentions made in the present appeal, in Vikram Vir Vohra's case, the child had been to Australia and there were variations in the visitation rights. Addressing the said aspect, the Hon'ble Supreme Court, at Paragraph 18 of the judgment, observed as hereunder:

"18. Now coming to the question of the child being taken to Australia and the consequent variations in the visitation rights of the father, this Court finds that the respondent mother is getting a better job opportunity in Australia. Her autonomy on her personhood cannot be curtailed by the Court on the ground of a prior order of custody of the child. Every person has a right to develop his or her potential. In fact a right to development is a basic human right. The respondent mother cannot be asked to choose between her child and her career. It is clear that the child is very dear to her and she will spare no pains to ensure that the child gets proper education and training in order to develop his faculties and ultimately to become a good citizen. If the custody of the child is denied to her, she may not be able to pursue her career in Australia and that may not be conducive either to the development of her career or to the future prospects of the child. Separating the child from his mother will be disastrous to both.

105. In the case on hand, the child has expressed his reluctance to interact with the father. Decisions rendered in Athar Hussain's case and Gaytri Bajaj's case are applicable to the facts on hand.

106. Giving due consideration to the facts of each case, relied on by both parties before us, we are of the view that the decisions cited, are in favour of the appellant-mother and thus,

applied.

107. Keeping in mind the paramount welfare of the child and giving due consideration to the entire material on record, this Court is of the view that the Family Court, has erred in allowing the I.A.No.3648/2011 in O.P.No.3499/2009 by directing change in custody of the minor boy without any material change in the circumstances, which is against the welfare of the child. Family Court has failed to appreciate the minor's express wishes, his best interest and welfare, while reversing custody.

108. Evaluation proves that the minor boy is happy and comfortable in his present surroundings viz, with the appellant/mother. Therefore, any alteration of custody would be detrimental to the interest of the minor boy. Family Court ought to have seen that the mother has been bringing up the minor boy by providing him good education, involvement in sports and other activities, for the all round development of the boy. In such circumstances, as rightly contended, abrupt change of custody would upset the proper growth of the minor.

109. Family Court has failed to take note of the minor boy's disinclination and reluctance to even meet and interact with the respondent (father) and in such circumstances compelling the minor boy to be in the custody of the father would be against the minor's interest. Family Court has not given clear, cogent or convincing reasons for ordering change in custody of the minor boy, except on a premise that minor son's interest would be better served in the custody of father.

110. Family Court ought to have seen that the Hon'ble Supreme Court and this Hon'ble Court, have clearly and consistently held that it is the welfare of the minor child which is of paramount importance in granting custody or in changing the custody already granted. Family Court ought to have appreciated the fact that a boy of nearly 12 years who has all along been living with the mother, cannot be forced to live with his biological father, against his wishes. Such an arrangement would go against the interest of the minor.

111. One of the reasons assigned in the affidavit, filed in support of the petition in I.A.No.2779 of 2010, in FCOP No.3495/09, is that the appellant has remarried and that it would not be conducive to the growth of the child. In the light of the decisions of the Hon'ble Supreme Court referred to by the Learned Senior Counsel for the appellant, remarriage is not a bar, for the custody of the child. Besides on the facts and circumstances of this case, both the children were grown up. One was in Australia, and the other outside Madras. Family Court ought to have seen that appellant's remarriage has not affected

or impaired the minor's life or studies or comfort in any manner. On the other hand evidence on record show, the minor is comfortable with the non-biological father. In such circumstances ordering change of custody is unwarranted.

112. Presumption of the Family Court that a boy will be comfortable with his father in adolescent age does not have any basis and such generalised conclusion is unwarranted and not supported by any evidence. Family Court ought to have seen that excepting for two months i.e, just after his birth in April 2004 (when he was an infant) the minor boy had never lived with the respondent/father. Family Court ought to have seen that the minor boy has been in the care not only of the appellant but also of her family members viz., mother, brother and his family, who have brought up the child from his birth with mutual love and affection. Sudden removal of the child from the present custody would be disadvantageous for the growth of the boy. Exs.R1 to R5 would support the conclusion.

113. From the above material, there is no concrete reason to consider the appellant, as ineligible for the custody of the child. Having obtained the custody of the child, through an order, dated 10.11.2009 in F.C.O.P.No.3499/2009, the appellant has not neglected the interest of the minor child, nor the minor child has been unhappy. Minor child has expressed a strong bonding with the mother. Aberration in the visitation rights, has not affected the child. Interest of the minor child would be best served, if the custody is with the mother.

114. For the foregoing reasons, impugned order is set aside. The Civil Miscellaneous Appeal is allowed. No costs.

skm

Sd/-
Assistant Registrar (CS III)

//True Copy//

Sub Assistant Registrar

To
The Presiding Judge,
III Additional Family Court,
Chennai.

+1cc to Mr.L.Chandra Kumar, Advocate, SR.No. 42984

C.M.A.No.2249 of 2015

Kak (25/06/2019)