

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FAMILY COURT APPEAL NO. 146 OF 2018
WITH
CIVIL APPLICATION NO. 233 OF 2018
WITH
INTERIM APPLICATION NO. 1 OF 2019**

Viren Bhagwandas Asher ... Appellant

Versus

Damyanti Hemant Matani ... Respondent

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Adv. Mrs. Manjula Rao with Ms Chhaya Asher i/b. K. Asher & Co. for
the Appellant.

Adv. Mr. Ashish Kamat with Ashwin Bhadang i/b. Priyanka Mehta for
the Respondent.

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**CORAM : A. A. SAYED AND
PRAKASH D. NAIK, JJ.**

**Date of Reserving the Judgment : 27th September, 2019
19th December, 2019
03rd November, 2020**

Date of Pronouncing the Judgment : 6th November, 2020

JUDGMENT : (Per - Prakash D. Naik, J.) :-

1. This appeal is preferred challenging the Judgment and Order dated 19th April, 2018 passed by Family Court, Bandra, Mumbai in Petition No. D-17 of 2015 granting custody of minor child Darsh to respondent.

2. Appellant is the biological father of minor child Darsh. Respondent is the maternal grand-mother of Darsh. Presently child Darsh is aged about 13 years. The Appellant, his wife Bhairavi (daughter of respondent) and their child Darsh are British Nationals. The marriage between the appellant and Bhairavi was solemnised at Mumbai, on 7th April, 2002 according to Hindu vedic rights and ceremonies. The appellant acquired Bachelors degree in medicine from University of Pune. He completed Masters degree in Obstetrics and Gynecology from Pune University whereafter he shifted to U.K. Appellant is working as a Consultant in Gynecology and Oncology at Royal Derby Hospital in Nottingham. Bhairavi is a Gynaecologist. After marriage she was employed at Queens Medical College, Nottingham as Registrar Trainee since 2006. Darsh was born on 20th November, 2007 at Nottingham, U.K. According to the appellant, his wife Bhairavi went into post natal depression in November, 2008. She was under treatment for post natal depression in England from 2008 to 2011. She had relapse and was on sick leave from hospital in October, 2011. Bhairavi came to India with Darsh when he was 3 years old in January, 2012 and resided at Nashik with parents of appellant. Darsh was operated in Lilavati Hospital for undescended testes on 29th March, 2012. Bhairavi had relapse and admitted in local hospital at Nashik in August, 2013. She came with child Darsh

to Dahisar in November, 2013. In June 2014, Bhairavi moved to the house of respondent alongwith child Darsh. Bhairavi thereafter went to Nottingham in January 2015 for medical assessment. Child Darsh was left behind with the respondent. On 5th February, 2015 there was a incident where Bhairavi in fit of mental disturbance attacked the appellant with a kitchen knife and he sustained bruises on his stomach in the scuffle. Bhairavi threw boiling water on the appellant which resulted in severe burns and he was admitted to the hospital. Bhairavi was taken in custody and was kept in detention under the provisions of Mental Health Act, in a hospital where she was receiving treatment. On 18th March, 2015, appellant came to Mumbai to take child Darsh to UK. The respondent refused to handover custody of child Darsh and filed a petition before Family Court at Mumbai.

3. The aforesaid petition before the Family Court was filed under Section 7 and 8 of Guardians and Wards Act, 1890, on 25th March, 2015. The respondent sought permanent custody of Darsh. The appellant was arrayed as respondent. It was also prayed that the appellant and his family members be restrained by permanent order of injunction from removing Darsh from jurisdiction of the Court. Appellant filed his written statement opposing the reliefs prayed in the said petition on 13th April, 2015.

4. The evidence of the witnesses was recorded. Respondent (original petitioner) tendered affidavit-in-lieu of examination-in-chief. She also examined Mrs. Urmila Hamlai and Mrs. Asha Matani as her witnesses. Appellant examined himself as witness by submitting affidavit-in-lieu of examination-in-chief and examined, Dr. Mahesh Bhirud as his witness. All the witnesses were cross-examined by respective parties. The witnesses produced documentary evidence. Written submissions were tendered by both the sides before the Family Court. Both sides relied upon various decisions of the Court in support of their submissions.

5. The issue thus relates to the custody of minor child Darsh presently aged about 13 years. As stated above the appellant is the father of minor child and respondent is the maternal grandmother. Presently the child is in custody of respondent. The petition was filed by the respondent before the Family Court on 25th March, 2015 seeking permanent custody of minor child Darsh. The petition has been allowed by the Family Court vide Order date 19th April, 2018 which is under challenge in this appeal.

6. Mrs. Manjula Rao learned Counsel representing the appellant made following submissions:

i) Learned Judge erred in granting custody of child

Darsh to the respondent which is against all the statutes, while denying the legal right of the minor child to be in his own country with his biological and legitimate father.

ii) The Family Court has not given any cogent reasons for arriving at the conclusion that the appellant is not fit and capable person or is not interested in welfare of the minor child Darsh. The Court has not given any cogent reason to handover the custody of the minor child Darsh to respondent, when the appellant who is biological father of child Darsh is alive and in all circumstances capable of looking after the minor child Darsh.

iii) The child Darsh and his parents are permanent residents of U.K. They were residing there. Child Darsh came to India with his mother in January, 2012 who was on sick leave from her job to undergo treatment and was temporary residing in India.

iv) The Family Court failed to consider the provisions of Section 6 of Hindu Minority and Guardianship Act, 1956. Appellant is the natural guardian of minor child Darsh. The said provisions recognises father and mother as natural guardian of the minor child.

v) The Family Court failed to appreciate that the right of parent is not to be interfered unless there are exceptional circumstances. Under no circumstances the child can be taken away from the father unless there are grounds alleging cruelty or immorality of the father. There was no grievance against the character of the appellant.

vi) Appellant came to India as soon as he had recovered from the grievous hurt and burns to take his minor child Darsh with him to U.K. on 18th March, 2015. However, the respondent refused to hand over his son to him and filed a petition in the Family Court for custody of the minor child Darsh.

vii) From January, 2012 till 2013 the minor child Darsh was in Nashik with mother and paternal grand parents and thereafter from October, 2013 at Dahisar with Bhairavi and from June, 2014 with Bhairavi and respondent and subsequently, from 27th January, 2015 to 18th March, 2015 with respondent. Hence, the reasoning of the learned Judge that child Darsh is residing with respondent since October, 2013 and is comfortable with respondent is not correct. It was an error to hold that child Darsh was in sole custody and

company of respondent since October, 2013.

viii) Learned Family Court Judge, has misconstrued the report of the Marriage Counsellor. The report does not contain any statement to show that minor child Darsh does not wish to be with his father at U.K.

ix) Learned Judge ought to have considered that Bhairavi was under employment after birth of son Darsh. A nanny was employed to assist her in looking after the child, the Court however mis-interpreted the employment of nanny services and inferred that the child will be left with nanny in Nottingham.

x) The Family Court did not consider the contention of the appellant that he being a natural guardian of minor child has absolute right to have custody of his own child, particularly, in the absence of mother who has been detained for indefinite time by an order passed by Crown Court of Criminal Justice under the provisions of Mental Health Act, 1987.

xi) Respondent was not aware of minor child Darsh's health until the appellant made an application for access on medical grounds. Learned Judge failed to take into

consideration that the appellant is a Doctor and being aware of minor child Darsh's health, he would be available at all times and in position to take medical decisions to ensure the safety and well being of the minor child, especially, when the child is with the single kidney and peculiar health condition. The evidence of PW-2 and PW-3 examined at the instance of the respondent is hearsay. They have admitted that they had no personal knowledge of the case and unaware about crucial facts of health condition of Darsh.

xii) The reasoning of the Family Court that the appellant was more focussed on his career than his family. Since, he left for Manchester, is not correct. The Family Court ought to have taken into consideration that the appellant was not stranger to minor child Darsh and was very close and enjoys the company of his father and the appellant has been able to take care of his son. The minor child Darsh has been spending quality time with the appellant, whenever he was with him.

xiii) The reasoning given by the Family Court for denying custody of minor child to the appellant are illogical. The Family Court observed that the appellant was pursuing his

super specialty training in Gynecological Oncology at Manchester which is 90 miles from his house at Nottingham and to come weekdays to be with his family. This fact is considered adverse for granting custody to the appellant. The Family Court ought to have appreciated that it cannot be said to be wrong doing to deprive him to custody of minor child. The Court failed to take into consideration that the appellant was present with child Darsh for his crucial surgery at Lilavati Hospital in Mumbai on 27th March, 2012. In August, 2012 he came to India and resided with minor child Darsh and Bhairavi for three months in 2013 at Nashik. The Court also failed to notice that the appellant had allowed minor child Darsh to stay with Bhairavi in India until she was ready and fit to resume her work in U.K.

xiv) Due to peculiar problem the minor child Darsh was operated at early age of 24 months at Queens Medical College Hospital, Nottingham and advised revisional surgery at appropriate age. Appellant's wife Bhairavi was on maternity leave after birth of minor child Darsh and resumed her job in same hospital when the child Darsh was few months old, which was part time. In November 2008, Bhairavi was on duty, the staff of hospital noticed that during work Bhairvai's

behaviour was not normal and she was found hallucinating and having delusions. The hospital authority admitted her in their hospital for observation and treatment and informed the appellant accordingly. Bhairavi was suffering from post natal depression (with psychotic symptoms). After treatment Bhairavi resumed her work from 2009 and was allowed to work part time. In October, 2011 while she was working at the hospital in Nottingham, her behaviour was not normal and hence she was admitted for treatment and diagnosed as suffering from schizo affective disorder and treated by psychiatric team of Queens Medical Centre, the same hospital where she was serving. She was advised to proceed on sick leave till her complete recovery. She was under treatment of Doctors of Queens Medical College Hospital from 2008 to 2011. After she was discharged from the hospital in October, 2011, she was under observation and treatment. Minor child Darsh attended play school and nursery in Nottingham in 2009 to 2011. In December, 2011 Bhairavi expressed her desire to come to India for change and reside with appellant's parents in Nashik. Bhairavi and Darsh came to India in January, 2012. They resided with appellant's family in Nashik. Darsh attended school for higher Kinder Garden in Nashik.

xv) Appellant visited India in March, 2012. It was decided to get the Darsh operated for undescended testes. He was operated at Lilavati Hospital, Mumbai on 29th March, 2012. In August, 2013 Bhairavi showed signs of abnormal behaviour. She was admitted in hospital under Doctor Bhirud by her maternal aunt. Appellant came to Nashik from Nottingham, during hospitalisation of Bhairavi. In October, 2013 Bhairavi decided to move to Mumbai. She stayed at flat purchased by her and appellant with Darsh. During that period Darsh attended school at Dahisar. Thereafter, Darsh was admitted to Arya Vidya Mandir at Juhu when she moved to the house of respondent at Andheri. The appellant visited India and lived with Bhairavi and Darsh at Nashik in 2012 and 2013. Bhairavi and minor child Darsh had visited U.K. in October, 2014. In 2015 Bhairavi visited U.K. for medical assessment. Minor child Darsh was left behind at Mumbai with respondent for schooling, as Bhairavi was returned to Mumbai after medical assessment. Bhairavi and appellant were at Nottingham in February, 2015 Bhairavi in fit of sudden rage and anger, lost her mind and threw boiling hot water on appellant and attacked him with a knife. Appellant suffered from grievous hurt, and injuries of burns. Bhairavi was under

arrest. Appellant was admitted for injuries. Bhairavi was sent to Arnold Lodge a secure mental institution in May, 2015 under treatment. Appellant thereafter came to India to take his son with him to Nottingham. However, respondent denied him custody of Darsh and filed petition before the Family Court. From this it can be inferred that the appellant was always attached to Bhairavi and Darsh and never neglected them.

xvi) Appellant came to India on several occasions from U.K. but was denied access of his minor son Darsh and he was constrained to file several access applications before the Family Court, Bandra. Respondent visited U.K. in May, 2015 and met Bhairavi at Arnold Lodge and minor child Darsh was left at Mumbai.

xvii) Minor child Darsh was required to be operated for his ailment of undescended testes. Appellant filed an application for interim custody on medical ground supported by medical records. The application preferred by the appellant was rejected by the Family Court. Appellant moved the High Court which granted permission to take minor child for surgery to U.K. in 2016. After filing affidavit/undertaking, the

respondent was directed to handover the custody of Darsh to appellant. Respondent failed to handover the child. Appellant in turn had to cancel the appointment scheduled by him with the Doctors in United Kingdom for examination and surgery of the minor child Darsh. He was required to file contempt petition in the High Court. Respondent challenged order of High Court before Supreme Court. On receipt of expert opinion the Supreme Court by Order dated 17th August, 2016 permitted minor child Darsh to travel to U.K. for medical treatment. While the child was at Nottingham the appellant approached the authorities to permit him to meet his mother. He was taken to meet Bhairavi. Darsh attended Kimberly school at Nottingham for Grade-4. He excelled in his academics. Child Darsh was handover to respondent on 1st July, 2017 as per the undertaking submitted by the appellant to the Hon'ble Supreme Court.

xviii) The Family Court has failed to take into consideration the evidence of the appellant and his witness in proper perspective. The Court overlooked the cross-examination of the respondent and her witnesses.

7. Learned Counsel for the appellant relied upon the

following decisions in support of her submissions:

- 1) *Decision of Karnataka High Court dated 3rd July, 2019 in the case of M.P Krishnamurthy V/s. Arun Shri.*
- 2) *Decision dated 27th February, 2014 passed by Bombay High Court in the case of Amol Pawar V/s. State of Maharashtra and others.*
- 3) *Decision dated 28th June, 2019 passed by Bombay High Court in W.P. 1324 of 2019 in the case of Ganjendra Rathod V/s. State of Maharashtra and others.*
- 4) *Judgment dated 6th February, 2019 passed in Criminal Writ Petition No. 5214 of 2018 by the Bombay High Court in the case of Shekhar Tiwari V/s. State of Maharashtra and Others.*
- 5) *Judgment of the Supreme Court dated 6th May, 2019 passed in Criminal Appeal No. 838 of 2019 in the case of Tejaswini Gaud and others V/s. Shekhar Tiwari and Others.*
- 6) *Gohar Begam V/s. Suggi @ Nazma Begam and Others AIR 1960 SC 93.*
- 7) *Shivkumar Tiwari V/s. Smt. Shivrani Bai and Ors.*

AIR 1966 MP 189.

8) *S. Bikramjit Singh V/s. Smt. Iqbal Kaur AIR 1974
PUNJAB AND HARIYANA 124.*

9) *Dr.Snehalata Mathur V/s. Mahendra Narai AIR
1980 RAJASTHAN 64.*

10) *Pravatkumar Saha V/s. Dilip Pramanik AIR 1997
326.*

11) *Mrs. Shilpa Agarwal V/s. Viral Mittal and Anr.
2009 AIR SAW 7694.*

12) *Deepa Shashi Kumar and Anr. V/s. Satish Kumar
AIR 2012 KERLA 69.*

8. Learned Counsel for the respondent advanced submissions in support of the Judgment and Order passed by the Family Court. Written submissions were also tendered on behalf of the respondent. The summary of his submissions are as under:

a) There is no infirmity or illegality in the impugned Judgment and Order passed by the Family Court. The order is based on cogent reasons. The Court has taken into consideration all the aspects. The Court has relied upon the evidence of witnesses and the documents on record. There is no reason to

interfere in the findings arrived at by the Family Court. The welfare of child Darsh has been taken into consideration by the Court. While concluding the same, the Court has appreciated the evidence on record.

b) Appellant although being father of Darsh is not entitled for custody for being irresponsible and choosing his career as priority over his family including minor child Darsh and his wife Bhairavi. Bhairavi was suffering from post natal depression from 2007 after birth of minor child Darsh. It is the case of the appellant that despite continuous medication and being under psychotic treatment Bhairavi's health deteriorated in 2010. In such situation, in May, 2010 the appellant made an application to pursue a course in Manchester for a period of two years. The super specialty course at Manchester began in and around 2011. The appellant left infant child Darsh aged three years and his wife Bhairavi who had deteriorating health issue. The appellant against the wishes of his wife Bhairavi, left her and infant child Darsh at Nottingham to pursue his career. They were left in the hands of nannies. He had shown complete irresponsible and reckless behaviour towards his child and wife. In his examination-in-chief the appellant admitted that Bhairavi's mental condition was deteriorating in the year 2010 and in such

circumstances, he had left for Manchester to pursue a speciality course for a period of 2 years.

c) Appellant was visiting his wife and child only over weekends from January, 2011 to November, 2011 and during such time, the infant child was kept with his mother having psychological illness. Appellant instead of leaving his course in Manchester and taking care of his family chose to send his minor child and wife to India to recuse himself from his responsibility as father and husband. From January, 2012 to January 2015, the appellant never attempted to get his wife and child back to U.K. and accepted admission of child Darsh in schools in India. His action makes it evident that he did not want his wife and child to be with him in Nottingham U.K. In his cross-examination, the appellant has accepted that he pursued his course in Manchester between January, 2011 and 2013. He also admitted that he had taken admission of child Darsh in school at Mumbai in November, 2013. Appellant is extremely busy doctor as per his own evidence. He was hardly around minor child Darsh after his birth. He was initially dependent on respondent to take care of child Darsh and requested her to be there in Nottingham, and after the respondent returned to India child Darsh was in the hands of nannies. Admittedly, child Darsh was away from the

appellant from age of four and was only with his mother and respondent. In absence of Bhairavi, there was no close relative to take care of Darsh in Nottingham, U.K. Respondent looked after all his needs.

d) Respondent was always concerned with welfare of child and has been with and around child Darsh since inception. It is an admitted case that the respondent was with Bhairavi before birth of Darsh and subsequently, after Darsh was born, Bhairavi visited Mumbai and stayed with respondent for four months in February, 2008 to May, 2008. At the request of appellant and Bhairavi, respondent visited Nottingham to take care of Darsh from February, 2009 to July, 2009. She was required to return to India for two weeks, on account of expiry of visa. However, she again visited the Darsh, Bhairavi and appellant from August, 2009 to January, 2010. She stayed with the child for one year in U.K. Since, January, 2012, Darsh has always been in India till date. From November, 2013, Darsh alongwith Bhairavi was residing at Dahisar with respondent. Thereafter, from April 2014 to January 2015 Darsh was residing with respondent at Andheri. From January, 2015 till date, child Darsh has been in exclusive custody of respondent and she has taken care of all his needs including providing education in one of the best educational

institute in Mumbai. Child Darsh has stayed with respondent more than his natural parents.

e) In her affidavit in examination-in-chief, the respondent has stated the duration of her visits in U.K. from 2007 to 2010 and since 2015, the respondent has been taking care of all the needs of child Darsh including education, curricular activities. She ensured that Darsh goes to one of the best educational institution in India and is presently studying at Arya Vidya Mandir and excelling in his education. She has stated the manner in which she is taking care of the child Darsh. Her cross-examination, does not bear out any statement whereby it could be alleged that she has not ensured the welfare of the child. Appellant in his evidence has not brought out any circumstances whereby it can be suggested that the respondent has overlooked the welfare of the child.

f) Respondent is financially secured, the details of the same were disclosed in her evidence. Pleadings alongwith the evidence bear out that the respondent is financially secured and also ensured that the minor child is brought up with all family values alongwith his personal and intellectual well being. The child has excelled in his education with overall growth by

participating in extra curricular activities.

g) Darsh is medically fit and no such ground is made out which would enable the appellant to seek his custody on medical ground to take minor child to U.K. No medical evidence is led by the appellant dealing with the fact that the child requires medical treatment and the same is available only in U.K., and for such reason the appellant should be given custody of the child. The child was initially operated in U.K. then in Lilavati Hospital at Mumbai and subsequently at U.K. Despite that child Darsh has been residing in India from January, 2012. He was taken to U.K. only once in 2017 for surgery. In recent visit in May, 2019 the hospital which conducted surgery in 2017 has conveyed that the child is healthy and does not require review for atleast 4 years.

h) Appellant in his evidence has admitted that he had sent Bhairavi alongwith child Darsh in 2012 and thereafter, allowed surgery in Lilavati Hospital in 2013. Appellant being doctor was aware of medical facilities to minor child Darsh in India and allowed him to reside in India from 2012. In recent letter dated 28th May, 2019 issued by National Health Service, it is certified that child Darsh is healthy and does not require a review for 4 years. Hence, no ground is made out to handover the custody of

minor child Darsh to the appellant. Child Darsh is in continuous custody with respondent and thus, he cannot be uprooted from the custody of the respondent and taken to U.K.

i) Bhairavi was not treated well by appellant. She was forced to work. While she was at Nashik, shock treatment was given to her which was not necessary.

9. Learned Counsel for the respondent relied upon the following decisions:

1) Shakuntala Sonawane V/s. Narendra Khaire 2003 (3) Mh.L.J. 484.

2) Gaurav Nagpal V/s. Sumedha Nagpal 2009 (1) SCC 42

3) Nilratan Kundu V/s. Abhijeet Kundu (2008) 9 SCC 413.

4) Anjali Kapur V/s. Rajiv Bajjal 2009 (7) SCC 322.

10. We have heard learned Counsel for the parties. We have scrutinised the contents of the petition filed before the Family Court, written statement, the evidence of witnesses as also the Judgments cited before us. The following points arise for determination in the present Appeal:

Points for Determination

- | | | |
|----|---|-----------|
| 1. | Whether welfare of child Darsh is with the appellant or respondent. | Appellant |
| 2. | Whether custody of child Darsh is to remain with the respondent. | No |
| 3. | Whether the findings of the Family Court can be sustained. | No |
| 4. | What order ? | As below |

11. In examination-in-chief, the respondent (petitioner before the Family Court) has stated as follows:-

The appellant and his family were initially based at Nashik having their own hospital. Appellant left for U.K. for his further studies and his wife Bhairavi joined him subsequently and the relations between the appellant and Bhairavi were cordial. During the pregnancy of Bhairavi, the respondent visited Nottingham. The behaviour of appellant with Bhairavi and the respondent was cordial. Respondent returned to India after delivery of Darsh. Subsequently, Bhairavi came to India with son Darsh in 2008 and stayed with respondent. Thereafter Bhairavi left for U.K. with son Darsh. She was pressurised to take up a job. Mother of appellant had come to U.K. for few days. Bhairavi took up Job at Queens Medical Hospital. Bhairavi had to exert herself. Respondent was told to stay with them

at Nottingham. Respondent on reaching Nottingham learnt that Bhairavi was required to be admitted in hospital due to post pregnancy depression. Respondent stayed at Nottingham for 6 months to take care of child and house in the absence of Bhairavi and appellant. She came to India and again joined them, till January, 2010. The psychiatrist of Queens Medical Hospital had advised that as Bhairavi had gone into post pregnancy depression it would be better that she continues to consult psychiatrist. Appellant left Bhairavi and son Darsh for higher education to Manchester in January 2011. Appellant was career oriented without bothering that his wife Bhairavi was working and undergoing psychiatric sessions and also taking care of the child. Respondent's daughter Poorvi visited Nottingham. Appellant had employed 3 Nannies. Appellant insisted that Bhairavi stay at Nashik and manage hospital as his mother was aged and has not able to cope up with affairs of the hospital. Bhairavi bought flat in Dahisar. Appellant on his own gave medication to Bhairavi. Bhairavi stayed at Nashik and assisted her mother-in-law. In 2013, appellant came to India. He stayed at Nashik with Bhairavi. Appellant left for U.K. with an intention not to return to India. Bhairavi was given shock treatment. Appellant visited India in October, 2013. In November, 2013 Bhairavi and Darsh started residing with respondent. Darsh was admitted in school at Dahisar.

Subsequently, he was admitted in a reputed school namely, Arya Vidya Mandir at Juhu. Bhairavi shifted at the residence of respondent at Andheri, as the school was giving admission to the student only to residents in the proximity of school. Darsh was doing well in his study. Bhairavi was required to go to London. During her stay at Nottingham she cohabited with the appellant. On 6th February, 2015, appellant informed her that Bhairavi was arrested by police. Since appellant did not support Bhairavi, she could not get bail. Respondent was in regular touch with appellant telephonically and continuously pleaded that he should amicably resolve the dispute and get Bhairavi released from judicial custody as even her son Darsh needed his mother. He threatened respondent that he would be taking minor child Darsh with him to U.K. Respondent was looking after minor child Darsh and taking care of him. Her another daughter poorvi is residing with her. She is physiotherapist. Respondent is an educated women. She has retired as Head Mistress after putting 35 years of service in the school. Her children are educated. She has inculcated same values of education in Darsh. He is doing extremely well in his academics and other activities. She is financially sound. She is capable of taking care of Darsh. The atmosphere is conducive for physical, mental and intellectual growth of Darsh. He has been showered with all love and affection by respondent and her daughter

Poorvi and cousins of Darsh.

In the cross-examination, respondent stated that in 2011 her daughter Poorvi was divorced on 3rd May, 2015. She had gone to London and lived in hotel. At that time, Darsh was in Mumbai. Appellant was in Nottingham and Bhairavi was at Leicester. Bhairavi was in police custody. She had a talk with Reshma Toprani who is her relative. She did not make attempt to know what problem Bhairavi was facing, through Reshma. Reshma had informed that Bhairavi was arrested by police. Bhairavi had obtained British citizenship. Before delivery and after delivery Bhairavi and appellant used to come to Mumbai. She had never filed any complaint against appellant and his family members. Bhairavi came to India in December, 2011 or January, 2012. Bhairavi was required to be motivated as she used to go silent. Bhairavi was taken to hospital at Mumbai. She had attended birthday of Darsh at Nashik. She was invited for naming ceremony and mundan ceremony Darsh. One Jaishree Chitalia was employed to cook and for cleaning house of Bhairavi. Employer of Bhairavi had referred her to a doctor for post delivery depression treatment. Bhairavi stayed at Dahisar for 6 months. Before that she was living at Nashik. She was there for 9 to 10 months. Darsh was going to school. Bhairavi was helping her mother-in-law in her hospital. The flat at Dahisar is in the name of

Bhairavi. Her name is added later. She had not contributed in purchasing the said flat. An amount of Rs. 1,30,000/- might have been credited in the account of Rishikesh. Two cheques dated 1st March, 2014 were issued from the joint account of appellant and Bhairavi for maintenance of the flat. For 2 to 3 times Bhairavi had gone to U.K. for health assessment registration. Her psychiatrist examined her and submitted report of Bhairavi to the concerned authorities. For some days her sister and her husband were present when Bhairavi was admitted in hospital at Nashik. She did not go to meet Bhairavi. Poorvi had gone to U.K. In 2011, her daughter and parents of appellant and others had gone holiday trip by ship cruise. Appellant used to come to meet Bhairavi and Darsh to India once in a year. Bhairavi has gone to London twice with Darsh. From the application of the appellant she came to know that Darsh was required to be operated for undescended testes. She did not enquire about precautions required to be taken after the operation. He was operated for the first time in London. At that time, Bhairavi was discharged. Her treatment is going on. Bhairavi's health progress is good. Darsh met his mother Bhairavi. Bhairavi will have to meet son. Appellant has more medical knowledge.

12. The second witness examined at the instance of the respondent before the Family Court Mrs. Urmila Hamlai in her

affidavits-of evidence stated that she is sister of the respondent. She had disclosed about visit of Bhairavi in U.K. after marriage, birth of Darsh etc. Bhairavi was forced to take up job. During Bhairavi's stay at the house of respondent, the relations between Bhairavi and appellant were cordial. Bhairavi had narrated to her the rude behaviour of the appellant. She had to exert herself. Bhairavi's mother used to take care of child in absence of Bhairavi. The witness reiterates the version of the respondent. In the cross-examination, she stated that she had never been to London. She does not have personal knowledge about matrimonial affairs between the appellant and his wife at London. She did not have personal knowledge about the medical problem of appellant's wife and child Darsh at the time of delivery. Child Darsh was approximately 2 to 3 months old, when she saw him for the first time. She was present with mother of the appellant, when Bhairavi was taken to Dr.Shashtri at Mumbai. There was no talk between her and the Doctor. She does not remember what doctor had disclosed to the mother of appellant about medical condition of Bhairavi. She came to know about Bhairavi's medical problem from her mother-in-law. Bhairavi did not state anything to her. Respondent was not present when they visited Dr.Shashtri's Clinic. The Doctor had prescribed medicine to Bhairavi. She did not enquire from Bhairavi for what problem the medicine is prescribed. She had

never admitted Bhairavi to any hospital in India. She had signed hospital admission form of Nashik on 26.08.2018. She had not admitted Bhairavi at that time and was forced by Bhairav's mother-in-law to sign the hospital form. She does not remember the name of hospital or doctor who treated Bhairavi. She did not lodge any complaint about forcibly obtaining her signature.

13. Third witness examined at the instance of the respondent before the Trial Court was Ms. Asha Matani. In examination-in-chief she stated that she is the sister in law of the respondent and paternal aunt of Bhairavi. She stays near the house of respondent. Earlier, she used to stay in joint family and hence Bhairavi is close to her. Bhairavi told her that she wished to stay jointly with appellant and wanted to spend most of her time with him, but he was inclined to stay separate. Appellant's mother was taking decisions without consulting anybody and suggested shock treatment to Bhairavi. She was not allowed to speak with the doctor who were treating Bhairavi. She had witnessed emotional bonding and comfort of Darsh with respondent. Respondent is looking after Darsh. After Bhairavi left for Nottingham, respondent took care of minor son Darsh. In the cross-examination, she deposed that she is residing in joint family with her brother at Andheri. Respondent and she are residing in separate buildings. She never visited U.K. She has

no personal knowledge about the things happened between Bhairavi and appellant. She does not know as to how many days Bhairavi was hospitalised. She does not know from which ailment Bhairavi suffered in U.K and what kind of treatment was provided to her. Bhairavi had gone to Nashik alongwith child Darsh. Bhairavi visited India three to four times. While recording evidence, the Court noted the demeanour of this witness and observed that she is not giving proper answer and all the while, changing the answers. She is speaking unnecessarily and giving unnecessary answers which are not relevant to the questions at all and despite giving specific understanding, she is not following directions. The witness stated that Bhairavi had been to Dr.Shastri's hospital in 2013. Appellant had visited India two to three times. During visit of appellant he used to stay with Bhairavi and Darsh at Nashik. Bhairavi was called by hospital where she was working.

14. The appellant had examined himself by tendering affidavit-in-lieu of evidence. He stated that he had acquired Bachelors degree in Medicine and completed masters in Obstetrics and Gynaecology. He is currently working as consultant in Gynaecology Oncology at Royal Darby Hospital affiliated to the NHS group of Hospital in Nottingham, U.K. He hails from educated family. His mother is Gynaecologist and father, brother and her wife are

dentists by profession. His family runs a hospital at Nashik since 1987. After marriage, he resided with Bhairavi in Nashik for few months and then moved to U.K in June, 2002. Bhairavi joined him in U.K. in December 2002 and resided with him in Nottingham. Bhairavi moved to hospital at Nottingham. Both resided together. Bhairavi started training as Registrar in NHS group of Hospitals at Nottingham in July, 2006. Both of them bought a house in joint name. She gave birth to Darsh on 20th November, 2007 in Queens Hospital at Nottingham. She was on maternity leave for one year. Appellant also took leave of two weeks to be with Bhairavi and minor child. Respondent had visited Nottingham at the time of pregnancy and delivery and stayed with them. Appellant's mother visited Nottingham in January, 2008 and stayed with them for 42 days. In February, 2008 Bhairavi came to India with child Darsh and with appellant's mother to visit family members and stayed at Mumbai and Nashik for 3 months. Bhairavi returned to Nottingham. Bhairavi complained that she is unable to manage the work. The appellant appointed nannies. A cleaner was appointed to clean the house. Child Darsh was kept at day care center. In November, 2008 the appellant received a call from hospital that Bhairavi was screaming and was hallucinating. She was taken for medical examination and it was found that she was suffering from post

natal depression. She was hospitalised. Respondent had visited Nottingham in January, 2009 and stayed till July, 2009. Bhairavi was under medication by psychiatrist. Respondent was requested to visit Nottingham. She came to Nottingham in August, 2009 and stayed till January, 2010. Bhairavi worked part time. She went off medication. It was mutually decided that the appellant would join the super speciality course at Manchester in 2011. It is situated at 90 miles away from house in Nottingham. The course was of two years. Bhairavi supported and encouraged him. While he was at Manchester, Bhairavi was assisted by full time nanny. Appellant used to visit at weekends. In 2011, Bhairavi started showing signs of relapse. She was put on medication. In November, 2011 Bhairavi visited India to spend time with family. She arrived in India with Darsh in January, 2012. Darsh was admitted in school. Appellant had visited Nashik and spent time with Bhairavi and Darsh. In May, 2012 Bhairavi showed erratic behaviour. A flat was purchased at Dahisar through joint account of appellant and Bhairavi. Appellant never gave medication on his own to Bhairavi. Appellant visited Bhairavi and child in Nashik on 28th March, 2012 to 21st April, 2012. He again came to India on 16th February, 2013 to May 2013. Bhairavi was in India for temporary period. Bhairavi was hospitalised at Nashik under supervision of psychiatric Dr.Bhirud in August, 2013.

The appellant rushed to Nashik on 13th August, 2013 and stayed until 8th September, 2013. Bhairavi was required to undergo medical assessment. She visited Nottingham in January, 2015 for psychiatric assessment at Queens Medical Hospital. Bhairavi tried to assault the appellant with kitchen knife and in the scuffle, he had bruises on stomach. Bhairavi threw boiling water on appellant, which resulted in burns injuries. Appellant was admitted in hospital. Bhairavi was arrested and remanded to custody. She has been kept under detention under the provisions of Mental Health Act. Her condition is improving. When the appellant came to India, Darsh was taken for checkup in U.K. in November, 2014. Doctor have recommended revision surgery for his condition. Appellant was required to approach the Court for taking him to U.K. In view of order of the Supreme Court, Darsh was taken to U.K., and again brought to India after undergoing surgery. Respondent filed a petition for custody.

In the cross-examination, the appellant stated that his mother is staying at Nashik and during his visit to India, he used to stay at Nashik. He is working as a Consultant Gynaecological cancer surgeon. He performs 3 to 4 surgeries in week and one surgery takes about 3 to 4 hours. In January, 2011 to 2013 he was staying at Manchester during weekdays and stayed at Nottingham during weekends. After coming to Nashik, Bhairavi was helping his mother

at Nashik. Darsh was admitted in school at Nashik. He visited Nashik 3 to 4 times. He admitted that shock treatment was given for 5 days to Bhairavi. In October, 2013 Bhairavi and Darsh shifted to Mumbai. Darsh's academic progress is good and he is satisfied about his development. Bhairavi was under treatment under Doctor Hazel Johnson. In 2012, super sub-speciality training in Gynecology Oncology course were also started at Nottingham. When he joined the course at Manchester, his parents were not at Nottingham. During the period of June, 2011 he personally felt that he should drop his course and join his family at Nottingham. He did not feel that his son is not secure at Nottingham during the said period. He was not in personal touch with the Dr. Hazel Johnson. Bhairavi told him that she would take care of herself and child, and not to contact Dr. Hazel. During his stay at Manchester, Bhairavi told him that she was feeling lonely and she wants to go to India. She also said that her first preference will be her in-laws family, not her family. She wanted to work with his mother. After returning to India, Bhairavi had undergone IUI treatment for second pregnancy. He had accompanied her to hospital. He was shown underlined portion marked B of paragraph 32 of his examination-in-chief. He stated that it was false. The supervisor has not made any statement to Bhairavi in his presence as stated in paragraph 32 of his affidavit. The

underlined portion marked C in para 32 of his affidavit is false.

15. Appellant also examined Dr. Mahesh Bhirud as his witness. In the examination-in-chief he stated that he completed Bachelor of Medicine from Government Medical College, Yavatmal and Masters in Medicine with specialization in Psychiatrist Medicine. He is practicing as psychiatrist and is having a clinic. He was also attached to Ramalayan Hospital, Nashik. He received call on 26th August, 2013 that the family member of the appellant was extremely hysterical, aggressive and uncontrollable and needed immediate medical help. Bhairavi was brought to hospital by her uncle and aunt. He examined Bhairavi, noted past medical history and found her symptoms similar to psychotic disorder which was explained to her relatives. Further examination diagnosed her illness as schizo-affective disorder. He started treatment. In such situation for patients of this type of disorder a treatment of Electro Convulsive Treatment (ECT) is mandatory. ECT treatment was first time administered on 27th August, 2013 with consent of patient relatives in writing. Her condition was reviewed after first ECT by him. It showed improvement. She was prescribed medication, subsequent ECT was given on four occasions. Bhairavi was under his observation and treatment. He met appellant on 30.08.2013. Bhairavi showed improvement and was discharged from hospital on 2nd September,

2013. In cross-examination, he stated that Dr. Pranav Ashar instructed him to appear as witness in this case. He was knowing him. He is real brother of appellant. Affidavit was prepared by his advocate. He treats patients having psychological disorder. After meeting Bhairavi on first time, he observed that she is suffering from schizophrenia. It is not true that Bhairavi was not in need of ECT and only on the instructions of Dr. Niranjana ECT was done. It is not true that he started ECT without following medical guidelines. It is not true that ECT is not given as a first line treatment to the patient suffering from schizophrenia.

16. The Family Court while allowing the petition of the respondent has observed as follows:-

The evidence of PW-2 and PW-3 examined by the respondent indicate that the respondent was looking after minor child Darsh since the time of birth and she has been taking care of child. The child is extremely attached to the respondent. The cross examination of both the witnesses has not been shaken in any manner. The appellant in his cross examination has admitted that he has never objected his wife Bhairavi and child Darsh to reside at the house of respondent at Andheri and he noticed that his child Darsh was attached to the respondent and his academic progress was good and he was satisfied with child's overall development. He also admitted

that during his stay at Manchester his wife Bhairavi had informed him that she is feeling lonely and therefore she wants to go to India. The appellant shifted to Manchester for pursuing advance studies. During the said period his wife Bhairavi's mental health was not good and she was suffering from depression and was on medication. The child was 4 years old. In such situation, it was not expected from the appellant to give preference to his higher studies since his presence was very much essential to look after his wife Bhairavi and child. He gave more priorities to his career rather than family. He was relying on help of maid, nannies and cook for looking after the child and wife. Due to conduct of appellant a question arises about his concern in respect of child's welfare. the respondent's case is that after January 2015, the appellant's parents started threatening her about taking away the child from her custody. In other words, from November 2013 to January 2015, the appellant was not concerned with child's welfare. On the contrary, he had consented for child's school admission at Mumbai and jointly purchased the flat at Dahisar alongwith Bharavi. Such act and conduct makes respondent's contention that Bhairavi and the appellant had decided to shift to India is more probable and reliable. Absence of Bhairavi at Mumbai cannot be ground for the appellant to show his concern for the child. After about 5 years it cannot lie in appellant's mouth that the

education and life at UK is better than India. There was lack of care and concern from the appellant's side to show his desire for having child's custody during the aforesaid period, since the age of 5 the child is with the respondent. From November 2013 till the incident of detaining Bhairavi in prison and thereafter at Arnald lodge, the appellant had not claim child's custody from the petitioner. During the said period, he used to visit Mumbai and never objected his wife and child to reside with the respondent. Thus the question arises as to why all of sudden after Bhairavi's detention in prison or Arnold lodge, he started showing his concern for child's custody. The respondent is financially sound and able to look after the child. The financial status cannot be sole criteria for deciding the welfare. Due to nature of work, the appellant may not be in a position to spare time for the child. Nobody else is residing at Nottingham. The mother of appellant is not in position to dedicate her full time at Nottingham. The parents of the appellant did not step into the witness box to support his contention that they are ready to shift in Nottingham for looking after the child. Child cannot be left at the mercy of Nannies and family members are expected to be there with child of small age. Respondent is retired person and fully dedicated to child. She is supported by another daughter who is available by all means. Child is getting company of school and neighbourhood

friends. Merely, because appellant is doctor and having more medical knowledge, the child is not required to be shifted permanently from respondent to appellant. The child's medical requirement can be looked into in the same way it was earlier done by the parties. In case, the child is able to express the desire about residing with either of the party, then the child's wish and desire has been taken into consideration. The Marriage Counsellor's report shows that the child was confused as he was expressing his wish that he is fine wherever he is and is comfortable with both the families. The Court also referred to the fact that the child was interviewed by the learned Judge, and child has initially stated that he wants to continue with the school and friends, since he is attached to them. He also stated that he is ok to reside in U.K. The child was not clear with any decision and there was a confusion which was natural. Thus it is not case that the child is strongly expressing and wishes and desires to stay with the appellant and not willing to stay with the grand mother. The claim of the appellant is merely based on natural guardian and legal right to have custody of the child being father. However, such right cannot supersede the welfare of the child which is paramount consideration. Learned Family Court Judge, vide Judgment and Order dated 19th April, 2018 allowed the petition and the respondent (petitioner therein) was permitted to retain the

custody of child Darsh with her. Learned Judge in the impugned Judgment observed that the petition is for custody of child and the enquiry of the Court should only be restricted to the welfare of the child which is paramount consideration. Learned Judge observed that the Court has to give weightage of child's interest and welfare which is paramount consideration. Personal rights and laws of the parties cannot supersede the welfare of the child. The appellant's contention that he being natural guardian father of the child has absolute right to custody of the child is devoid of substance. With regard to the maintainability of the petition, the Court observed that there was no serious objection raised regarding maintainability of the petition. Respondent is the grandmother and had filed the petition for custody of the child. Whether it is essential for respondent to seek declaration of guardianship. It was contended by the respondent that the subject of guardianship and custody are entirely different. It was contended that since the parents of child are alive, the respondent cannot seek guardianship and therefore she is simply seeking retaining the custody of child with her. The Court further observed that, the child is with the respondent since January, 2013 and since January, 2015 she is looking after the child. It is in the interest of the child to stay with the respondent. There is nothing on record to show that she is unfit or child's welfare is at stake as her hands. She is

acting like a de-facto guardian of the child by dedicating her time for welfare of child. Seeking declaration regarding guardianship is nothing but formal act and when the respondent was and already acting as de-facto guardian and not claiming guardianship for any other purpose. There is no need for her to seek guardianship of the child.

17. Upon perusal of evidence of witnesses examined by either side, we do not find that the appellant has no affection towards his wife Bhairavi or child Darsh. The respondent in her evidence stated that the relations between the appellant and Bhairavi was cordial. Both are medical professionals. After marriage, both stayed in U.K. Both had obtained British Citizenship. They purchased house at Nottingham. There was no complaint by respondent against appellant or his family members at any point of time. Bhairavi had suffered post natal depression. When she came to India, appellant repeatedly visited India to meet Bhairavi and Darsh. When Bhairavi was admitted to Hospital at Nashik for the psychiatric treatment, appellant came to India and visited Nashik. Although two witnesses who were related to respondent claimed to be close to Bhairavi, they did not know several facts about her. They had no personal knowledge as to what was happening at U.K. The allegations about unwarranted ECT shock treatment at the instance of mother of

appellant, is not supported by evidence. Dr. Bhirud has explained the need for such treatment. His cross-examination, does not elicit anything contrary to his opinion. Allowing Darsh to be with Bhairavi in India does not mean, appellant has no affection towards him. Bhairavi went to U.K. for medical assessment and remained there. Child Darsh continued to be in India. Subsequently, respondent refused to give custody of child Darsh to appellant. The evidence would show that the appellant was concerned about child Darsh and wife Bhairavi. He had spent time with them and had facilitated his wife Bhairavi to recover at the earliest. The record would indicate that Bhairavi and child Darsh came together to India and Darsh stayed with Bhairavi. The question of objecting stay of Darsh with Bhairavi does not arise. Bhairavi came to India on medical leave and the appellant met them atleast 4 times in India. The appellant came to India during the time that Bhairavi and child Darsh were residing at Nashik and Mumbai. They went for holidays together. Child Darsh and Bhairavi travelled to Nottingham in October 2014 and resided with appellant. The appellant visited India to meet Darsh several times in a year and also took child Darsh with him to U.K. for operation during the pendency of the proceeding after obtaining permission from Court and child Darsh resided with appellant for almost nine months. On all the occasions permission was granted to

the appellant by Court and he made all efforts to come to Mumbai to be with minor child Darsh. It cannot be said that the appellant is unfit to be guardian and to have custody of his child. Darsh was with Bhairavi till January, 2015, after which she left for U.K. Respondent refused to let the child go with the appellant when he came to Mumbai in March, 2015. The record also indicates that the appellant was required to take permission of the Court from time to time for access of child Darsh.

18. Child Darsh was born in UK on 20th November, 2007. Since birth child Darsh is having one kidney and is born with a congenital condition of undescended testes. Child Darsh was required to be operated repeatedly after his birth and carry out corrective surgeries. The first operation was performed in UK when child Darsh was about two years of age. The second surgery was performed in Mumbai when the child was aged about four years. The third surgery was performed in Nottingham, UK. Appellant's wife, Bhairavi is a qualified Gynecologist and was working in United Kingdom. She was attached to Queens Medical Centre in Nottingham from 2006 to 2011. After marriage the appellant and Bhairavi went to UK and were residing there. The relations between the appellant and Bhairavi were cordial. After birth of minor child Darsh, Bhairavi came to India alongwith him. Certain ceremonies were performed by

the family at Nashik. The mother of the appellant is a Doctor. She is conducting Nursing Home at Nashik. On completion of Maternity leave, Bhairavi returned to United Kingdom. The evidence of the appellant discloses that Bhairavi was diagnosed with post natal depression by the Doctors of the hospital where she was working. She was hospitalised and was kept under treatment. After she recovered from her illness, she resumed part time employment. Darsh attended pre-school in Nottingham. While Bhairavi was under employment, she had relapse of her post natal depression alongwith schizophrenia disorder and was under treatment and supervision of Dr. Hazel Johnson. Bhairavi proceeded on sick leave and decided to come to India. Bhairavi came to India with Darsh. Initially, she was residing at Nashik with parents of appellant. Darsh was admitted to school at Nashik. The evidence also discloses that Bhairavi has relapse of illness and was treated at hospital at Nashik. Thereafter, Bhairavi came to Mumbai. According to appellant, he had organised funds from their joint account to purchase flat at Dahisar. Bhairavi resided at Dahisar flat with Darsh from November, 2013 to March, 2014 and Darsh attended a school at Dahisar. Subsequently, she decided to stay with respondent with Darsh at Mumbai. Bhairavi and Darsh visited UK and spent time with the appellant. In 2015, Bhairavi visited UK for her mental health assessment. Darsh was left

with the respondent. Bhairavi stayed with the appellant at Nottingham. On account of incident on dated 06.02.2015, Bhairavi was taken in Police custody and thereafter moved to Secure Mental Institution. According to the appellant, the Crown Court of Justice Nottingham, UK on concluding the hearing, passed the order of detention under the Mental Health Act, UK on 23.09.2015 without limit of time and since then, Bhairavi is at Mental Institution under treatment. The evidence of appellant also discloses that he came to India on 18.03.2015, after he was discharged from hospital to take his minor son Darsh with him to United Kingdom. The respondent refused to hand over Darsh to him. The respondent filed petition on 23.03.2015. The petition was pending before the Family Court and the decision in the petition was delivered on 19.04.2018. Custody continued to be with respondent.

19. The record discloses that the respondent had visited UK in June, 2007 to be with her daughter during pre-delivery period. After the birth of Darsh, she visited UK again. She returned to India in December, 2007. She again visited UK on 02.08.2009 and she stayed there for a period of about 6 months. She returned to India in January, 2010. The mother of appellant visited UK in December, 2008 to look after Darsh and she returned in February, 2009. She again visited UK on 07.05.2008 and returned to India on 19.05.2008.

She re-visited UK in May, 2011 and returned in June, 2011. The record also discloses that Bhairavi visited India in February, 2008 and stayed for a period of about 3 months. She again visited India in January, 2012 and stayed for a period of about 20 months. The appellant visited India to meet Darsh on 20.03.2012 and returned to UK on 21.04.2012. He visited India on 04.08.2012 and returned on 18.08.2012. From 16.02.2013 to 26.05.2013, 31.08.2013 to 08.09.2013, 26.10.2013 to 16.11.2013, the appellant was in India and stayed with Bhairavi and Darsh. The record also reveals that Darsh and Bhairavi had visited Nottingham from 25.10.2012 to 13.11.2012, 17.05.2012 to 24.06.2012 and October, 2014 for a period of 15 days.

20. Learned Counsel for the appellant tendered documents and pointed that during the pendency of petition before the Family Court, the appellant had preferred applications to avail access of minor child Darsh. Consent Terms were filed in the Family Court on 20.04.2015 on access. Access was given on 21.04.2015, 23.04.2015, 25.04.2015, 26.04.2015 and 29.04.2015 as per time stipulated therein. The passport of appellant was deposited in the Family Court till 29.04.2015. He again preferred an application and access was allowed from 03.05.2015 to 08.05.2015. The appellant again preferred an application and allowed to take minor child Darsh to

Nashik after depositing the passport before the Family Court. Access of Darsh was given on 04.01.2016 and Darsh was with him from 04.01.2016 to 07.01.2016. Access was again allowed by the Court to the appellant from 21.03.2016 to 28.03.2016. The appellant had preferred an application before the Family Court for allowing Darsh to be taken to UK for treatment. The said application was rejected by Family Court. The appellant had moved this Court by filing Writ Petition which was allowed, granting interim custody for surgery of Darsh from 30.07.2016 to 30.11.2016 in U.K. The said order was challenged by the respondent before the Supreme Court. As per order dated 17.08.2016, interim custody of Darsh was handed over on medical ground to the appellant. Darsh travelled to UK with appellant from 02.10.2016 to July, 2017 for surgery in Nottingham, UK. Darsh was brought back to India and handed over to respondent in accordance with the order of the Court. The passport of child Darsh was also handed over to respondent. Access of child Darsh was also granted to appellant from 16.10.2017 to 26.10.2017, 26.12.2017 to 30.12.2018, 23.03.2018 to 31.03.2018 and 23.05.2018 to 01.06.2018.

21. Access of child was also granted to the appellant during the pendency of the appeal before this Court from 27.10.2018 to 08.11.2018, 25.12.2018 to 29.12.2018, 22.03.2019 to 28.03.2019

and 04.05.2019 to 28.05.2019. Under an Order dated 18.04.2019 in Civil Application No. 93/2019, which was passed by consent and without prejudice to the rights and contentions of the parties, the appellant was allowed temporary custody from 04.05.2019 to 28.05.2019. The appellant was by the said order permitted to take Darsh to U.K, interalia for the purpose of Medical examination of Darsh at Queens Medical Centre, Nottingham. One of the condition stipulated in the said order is that the appellant shall ensure that during his stay in U.K, Darsh visits and spends time with his mother at Nottingham twice a week subject to approval of Nottingham Health Care Hospital.

22. During the pendency of the petition before the Family Court, in accordance with the order of the Family Court Darsh was interviewed by Counsellor on 07.04.2018. The Counsellor's report dated 11.04.2018 mentions that child Darsh was interviewed on 07.04.2018 to ascertain his wishes for custody. It states Darsh is healthy. He was neatly dressed and is free and talkative. Darsh is 11/12 years old and is studying as Arya Vidya Mandir, situated at Juhu since 2014, he is staying with his maternal grandmother who is approximately 74 years old as told by the child and maternal aunt who is unmarried. Child could not tell her approximate age. Darsh was born in England. Both his parents work in England. However,

some years back, they came back to India and was staying at Nashik with his parents and paternal grand-parents. His family is of all doctors. His father is doctor, his maternal aunt also doctor. From Nashik they came to Mumbai and were staying at Andheri. His mother has some health ailment and admitted in hospital at England and his father now stays also at England and work as doctor there. During vacations, he goes to his paternal grand parents at Nashik and spends time there. The report also mentions that father was called to observe the relation between father and son. Child was freely talking to father and was comfortable in his company. Father reported that his wife has been admitted in hospital in England for quite some time and he wishes to take the child in England so that the child will be in the company of both father and mother. He wishes to go to England and at the same time, expressed his wish that he is fine wherever he is. At his age this confusion is natural. He has a good rapport with his father and his family. Child is comfortable with both families. Thus, the report of the Counsellor indicates that the child was comfortable with the father. The Family Court, however, in impugned order has observed that the child was confused. Undisputedly, the report does not mention that the child does not wish to be with his father. The facts disclosed by the appellant in his evidence and the Counsellor's report would indicate

that the appellant has rapport with Darsh. Thus, there is no reason to believe that the appellant has neglected the child or he has not bothered to look after him.

23. The evidence on record makes it clear that the appellant was is in touch with his son Darsh and Bhairavi. The child was born at U.K. The relationship between Bhairavi and appellant were cordial. Bhairavi started working at Nottingham. Child Darsh was born. She came to India. She stayed at the Nashik with the parents of the appellant. Certain ceremonies on account of birth of Darsh were performed. She returned to U.K. Thereafter, she suffered from post natal depression. She was undergoing treatment for the same. Merely on account of the fact that the appellant had joined the course for further studies and was required to stay 90 miles away, it cannot be said that he had given priorities to his study over his wife and the child. According to the appellant, he had decided to join the course with consent of his wife. It is also disclosed that on weekends he used to come at Nottingham and stay with the family. He had also made arrangements of maid servants and nannies. Full time maid from Gujrati family was employed to look after child Darsh. The Court however had drawn adverse inference on this count. We do not find that the appellant had neglected Bhairavi and Darsh at any point of time. It is also apparent that when Bhairavi came back to India

with Darsh she stayed at Nashik. Bhairavi then came to Mumbai with Darsh. She and Darsh stayed with respondent. Thus, child Darsh was in custody of Bhairavi as well as respondent and it is not that child Darsh was in exclusive custody of respondent all the time. It is only when Bhairavi went to U.K., the child was left behind in custody of respondent. Subsequently, Bhairavi had a relapse and she was required to be detained on account of the incident in February 2015. She is undergoing treatment. The appellant was in continuous touch with Darsh when he was in India. He visited India on several occasion and met him. Thus it cannot be said that the appellant was not concerned about child Darsh. The appellant has also disclosed that when Darsh was taken to U.K, he met his mother.

24. During the hearing of this proceeding we have interviewed child Darsh. We have also talked to the appellant and the respondent. We found that Darsh was confident. He was clear in his thought. Presently, he is aged about 13 years. He stated he loves his grandmother as well as his father. He also expressed that he is keen to join his father at U.K. He also stated that he has friends at the school he attended in U.K. We also note that both the appellant and the respondent have immense love and affection for Darsh.

25. The petitioner is the father of the child. There is nothing

to arrive at conclusion that he is unfit to look after the child. The child has medical issues and has undergone surgeries. The appellant being highly qualified doctor, would be in a better position to understand the health condition of child and take corrective measures in that regard. The father is the natural guardian. The Family Court has observed that merely because he is natural guardian custody cannot be given to him. While dealing with the issue of custody, the welfare of the child is to be considered. From the evidence it is also clear that the the respondent who is the maternal grand mother of the child has taken good care of the child. She has admitted child in a reputed school. The academic record of the child is also good. It is also true that the child has affection towards his grand mother. She has provided love and affection to the child. At the same time, it cannot be overlooked that the appellant is the father and loves Darsh and there is nothing to show that he would not look after the welfare of child Darsh. Darsh has never declined to be with his father. Darsh is a bright student. He is a British national. The father is definitely going to look after his further studies, career and well being. The Marriage Counsellor report cannot be said to be adverse against the father. The father has at all times shown affection towards the son. Thus, there is no reason to deny custody of Darsh to the appellant. We also feel that whenever

the respondent intends to visit Darsh in U.K., she should be permitted access of Darsh by the appellant. Moreover, if Darsh so desires, he should be permitted during his vacation in the U.K. school to stay with the respondent for a few days in Mumbai.

26. Both the sides have relied upon several judicial pronouncements in support of the submissions. In the case of ***M.P. Krishnamurthy V/s. Sri Arun (Supra)*** the Karnataka High Court has observed that the court which is considering of proceeding of declaring guardian of a minor, has to bear in mind the welfare of minor. The court has to take into consideration age, sex, and religion of minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes if any of parent and any existing or previous relations of the proposed guardian with the minor. The Court cannot appoint any guardian against the will of minor child. In the facts of that case it was observed that however affectionate the maternal grand parents may be, they may care to bring up the child, the same cannot be substitute for the father in bringing up the child. In that case, the mother of child had died during the road traffic accident and thereafter the child was residing with her maternal grand parents. The petition was filed by the father of the child, since the grand parents were refusing the custody of the child. In the case of ***Amol Pawar V/s. State of Maharashtra (Supra)***,

this Court has dealt with the issue of custody of child, was in custody of the maternal grand mother of the child. The Court observed that the petitioner being the father of the child, is the natural guardian. He was prosecuted for the offence under section 498A, 302 of IPC. However, he was acquitted of the said offence. It was observed that the father cannot be deprived from obtaining the custody of minor child. In the case of ***Gajendra Rathod V/s. State of Maharashtra (Supra)*** this Court was dealing with the petition relating to custody of child from the maternal grand father of the child. It was observed that the grand father of the child has interest with the weflare of grand child and developed affection towards the child. However, the father of the child deserves his son's love and affection. In the case of ***Shekhar Jagdishprasad Tiwari V/s. State of Maharashtra (Supra)*** this Court has dealt with the issue of the custody of the child. The facts of that case would indicate that the child has lost her mother. The child was in custody of maternal uncle of the child and his sisters. This Court observed that the father of the child was natural guardian under Section 6 of the Hindu Minority and Guardianship Act, 1956. Child is about 17 month of age and needs love, care and affection of the father. The father is highly educated man and gainfully employed in prestigious company and it cannot be said that the welfare of the child will be seriously compromised if the custody

is handed over to father. The child is not capable of forming and expressing her wish on account of tender age. Hence the father is entitled to get custody. The said order was challenged before the Apex Court vide Criminal Appeal No. 838 of 2019. The order of the high Court was confirmed by the apex Court vide Judgment dated 6th May, 2019. The Apex Court considered several decisions referred to by both the parties and it was observed that Section 6 of the Hindu Minority and Guardianship Act, 1956 enacts as to who can be said to be a natural guardian. As per Section 6 of the Act, natural guardian of the Hindu minor in respect of minor's person as well as in respect of minor's property is the father, in the case of boy or unmarried girl and after him the mother. Father continues to be a natural guardian unless he has ceased to be Hindu or renounced the world. Section 13 of the Act deals with the welfare of the minor. Section 13 stipulates that in the appointment or declaration of any person as a guardian of Hindu minor by a Court, the welfare of the minor should be paramount consideration. Section 13(2) stipulates that no person shall be entitled to the guardianship by virtue of the provisions of the Act if the Court is of the opinion that his or her guardianship will not be for the welfare of the minor. The welfare of the minor is paramount consideration. The Court is not bound by mere legal right of the appellant or guardian. The welfare of the child has to be

determined owing to the facts and circumstances and of each case and the Court cannot take a pedantic approach. Respondent in that case, had neither obtained the child nor deprived the child of the right to his love and affection. Merely, the appellant being the relatives took care of child, they cannot retain the custody of the child. In the case of ***Gouhar Begam V/s. Suggi Begam and Others (Supra)*** the custody of the child was given to the mother although the child was not in continuous custody of the mother. In the case of ***Shilpa Agrawal V/s. Viral Mittal and Anr.*** the Supreme Court had considered the issue of custody of child who was citizen of U.K. Appellant having permanent resident status of U.K. and child was brought into India by mother. The Court of U.K. had passed the order in the proceeding initiated by the father of the child. The Court had passed the order to retain the minor child to the jurisdiction of England and Wales. The Supreme Court held that comity of Courts as well as the interest of the minor child has to be taken into consideration. It is not necessary, to refer the other decisions relied upon by the learned counsel for the appellant as the principles enunciated in the other decisions is similar.

27. In the case of ***Shakuntala Sonawane V/s. Narendra Khaire (Supra)*** this Court allowed the maternal grandmother

guardianship of minor son. Even if natural guardian is alive and stakes his claim, Court can still proceed to appoint some other fit person as guardian in the interest and welfare of minor. It was observed that, there was nothing on record to indicate that the interest of minor was not properly looked after by the petitioner. The petition was for appointment of guardian of minor and his property without security and remuneration. The father of the child was prosecuted for the setting his wife on fire. The application for custody of the child preferred by the father before the Family Court. It was contended that the father was not fit person for being appointed as guardian since he is an accused in criminal case pending against him, though he is natural guardian. The Court observed that the grandmother had looked after of throughout. The mother of the child had expired. In the case of ***Anjali Kapoor V/s. Rajiv Bajjal*** the Apex Court observed that the right of natural guardian is not an absolute and paramount consideration for deciding custody is welfare of the child. The maternal grandmother was allowed to retain the custody of minor son, as the child remained in custody of grandmother for long time and he was growing up well in atmosphere which is conducive to its growth. In ***Nilratna Kundu and Another V/s. Abhijeet Kundu (Supra)*** it was held that in determining custody of child, it is not a negative test that the

party is not unfit or disqualified to have custody of his son/daughter is relevant but the positive test that such custody would be in the welfare of the minor, which is material in and it is on the basis that the Court should exercise the power to amend or refuse custody of minor in favour of father, mother or any other guardian. In ***Gaurav Nagpal V/s. Sumedha Nagpal (Supra)*** it was held that in determining the question has to who should be given custody of minor child, the paramount consideration is welfare of the child and not rights of parent under statute for the time being in force.

28. From the aforesaid decisions, it is clear that the welfare of the child is paramount consideration. In the present case, we do not find any reason to conclude that welfare of child Darsh does not lie in the hands of the appellant. Although, the respondent has taken good care of child Darsh, it cannot be said that the appellant has neglected child at any point of time. He has shown affection and love towards Darsh. Darsh is also attached to the father. It is true that Darsh is also having attachment to his grandmother and he has stayed with her. We notice that child Darsh is bright and capable of understanding things. He is confident. He has expressed love for his grandmother and his father. Child Darsh is growing. The appellant is father of child Darsh. He is doctor by profession. Child Darsh has one kidney and was operated for undescended testes thrice. He would

require monitoring of his health. The appellant would be in a better position to provide medical attention and facilities to child Darsh. Child Darsh has met his mother Bhairavi at U.K. Child Darsh would have an opportunity to study abroad. He had in the past joined Kimberly School at Nottingham, U.K. in Grade-4 when appellant took care of him. The evidence on record does not persuade us to believe that the appellant would not be a fit person to look after the welfare of the child. His mother Bhairavi is also in U.K in a institution where she is undergoing medical treatment. On Darsh's stay in U.K. in May 2019, under order dated 18th April, 2019 of this Court, he had met his mother Bhairavi several times. Taking into consideration all aspects, we do not find any reason to deny custody of child to the appellant. In our view, the overall health, development and better future of child Darsh would lie in the custody of his father who is the natural guardian. The interest and welfare of child Darsh would be best served in the custody of his father, the appellant. In the circumstances, we find that the findings of the Family Court, cannot be sustained. The Judgment and Order of the Family Court, is therefore required to be set aside.

29. Hence, we pass the following Order:

ORDER

1. Family Court Appeal No. 146 of 2018, is allowed;

2. Impugned Judgment and Order dated 19th April, 2018 passed by Family Court Bandra, Mumbai in Petition No. D-17 of 2015, is set aside;
3. The custody of the minor child Darsh be handed over to the appellant by respondent. Appellant is at liberty to take the child with him to United Kingdom;
4. Respondent shall hand over the custody of the child Darsh to appellant on or before 15th April, 2021 after completion of his present academic year. Darsh's passport shall also be handed over to the appellant;
5. In the event the respondent desires to meet child Darsh in U.K., the appellant shall cooperate in all respects. If Darsh so desires, he shall also be allowed to visit and stay with the respondent for a few days in Mumbai during his vacation in the U.K. school;
6. The appeal and all the connected application stand disposed of accordingly.

(PRAKASH D. NAIK, J.)

(A. A. SAYED, J.)