

Mohan Kumar Rayana Vs. Komal Mohan Rayana

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Court : Mumbai

Decided On : Jan-16-2009

Reported in : 2009(3)BomCR308; 2009(111)BomLR979; 2009(2)MhLj868

Judge : B.H. Marlapalle and ;D.B. Bhosale, JJ.

Acts : [Hindu Minority and Guardianship Act, 1956](#) - Sections 6, 13, 17(3) and 25; [Guardians and Wards Act, 1890](#) - Sections 7, 19 and 25; Family Courts Act; Indian Divorce Act; Maharashtra Family Courts Rules, 1987; Code of Civil Procedure (CPC) - Order 39, Rule 11

Appeal No. : Family Court Appeal Nos. 29 and 61 of 2007

Appellant : Mohan Kumar Rayana;komal Mohan Rayana

Respondent : Komal Mohan Rayana;mohan Kumar Rayana

Advocate for Def. : J.P. Cama. Sr. Counsel, ;Kevic Setalvad, ;Kave Tamboli, ;S. Srivastava and ;Umang Jagu, Advs., i/b., D.H. Law Associates in FCA No. 61/2007, ;Anand Grover, Counsel and ;Firdaus Mossa, Adv., i/b., Prak

Advocate for Pet/Ap. : J.P. Cama. Sr. Counsel, ;Kevic Setalvad, ;Kave Tamboli, ;S. Srivastava and ;Umang Jagu, Advs., i/b., D.H. Law Associates in FCA No. 29/2007, ;Anand Grover, Counsel and ;Firdaus Mossa, Adv., i/b., Prak

Judgement :

D.B. Bhosale, J.

1. These Appeals are directed against a common judgment and order dated 2nd February, 2007, rendered by the Family Court disposing of two petitions being Petition No. D-65/2005 and D-66/2005 filed by the respondent-wife and the appellant-husband respectively seeking custody of their daughter Anisha. By the impugned judgment the Family Court has directed the appellant to handover custody of Anisha to the respondent immediately on completion of her final terms of the academic session 2006-07 and to provide her all facilities to enjoy extra curricular activities and studies so also to meet all the expenses including food and clothings. The appellant is given access to Anisha every alternate weekends and share 50% of her school vacations, as per mutual agreement with the respondent. The parties were also given directions to consult each other on the questions of Anisha's further academic education.

Family Court Appeal No. 29 of 2007 has been filed by the husband (hereinafter referred as 'the appellant') being aggrieved by the change of custody of Anisha from the appellant to the respondent-wife, who has also filed Family Court Appeal No. 61 of 2007. The appeal filed by the respondent-wife challenges the order of access on every alternate weekends and to share 50% of the school vacations with the appellant. For the sake of convenience, the wife is being referred to as 'the respondent'.

2. It appears that this litigation had reached the Supreme Court against several orders passed by this Court at different stages of the proceedings. We do not wish to make reference to all those orders which were impugned before the Supreme Court as they may not be relevant for deciding the instant appeals on merits. However, it would not be out of place to make reference to the order of the Supreme Court dated 1.11.2007 disposing of Civil Appeal Nos. 5088-5097 of 2007 arising out of S.L.P. (C) Nos. 15167-15176 of 2007. All these appeals were filed by the appellant challenging the orders dated 12.7.2007, 19.7.2007, 27.7.2007 and 6.8.2007 passed by this Court. The Supreme Court disposed of those appeals with the following directions:

(i) Since the welfare of a minor child is involved, the High Court is requested to try and dispose of the pending appeals as expeditiously as possible, but preferably within three months from the date of communication of this order;

(ii) The appellant/father of the minor, will be entitled to have access to Anisha on weekends on Saturdays and Sundays and will be entitled, if the child is willing, to keep her with him on Saturday night. For the said purpose, the appellant shall receive the child from the respondent at 10.00 a.m. on Saturday from her residence at Bandra or from a mutually agreed upon venue and shall return the child to the respondent on Sunday by 2.00 p.m. In the event Anisha is unwilling to stay with the appellant overnight, the appellant will then make her over to the respondent on Saturday itself by 9.00 p.m.; in that case, the appellant will be entitled to take Anisha out on Sunday also between 9.00 a.m. to 5.00 p.m.;

(iii) Both the appellant as well as the respondent must co-operate with each other in making the aforesaid arrangements work. The respondent shall not prevent the appellant from having access to Anisha in the manner indicate above. Likewise, once Anisha is handed over to the appellant he too must honour the aforesaid arrangements and not keep Anisha with him beyond the time stipulated. In the event of either of the parties violating the aforesaid arrangement, the other party would be at liberty to pray for appropriate orders before the Bombay High Court in the pending appeals;

(iv) The aforesaid arrangement is being made so that the appellant can have access to his minor daughter and also to ensure that the child's education does not suffer in any way during the week.

It is against this backdrop the instant appeals are placed before us for final disposal.

3. We do not propose to narrate the facts in detail at this stage since we may have to make reference to the facts in the course of this judgment. The basic facts to the extent as may be necessary to be mentioned at this stage are as follows: The appellant-father and the respondent-mother tied nuptial knot at Hyderabad on 11th August, 2000 according to Hindu rites and after their marriage they moved to their

matrimonial home at Chembur, Mumbai. The daughter - Anisha was born to them on 2nd March, 2002. Initially, there were no disputes as such between the parties but after Anisha's birth, according to the respondent, atmosphere in the matrimonial home began to change and it was due to the behaviour of the appellant towards her on account of addiction to alcohol in the company of his friends. In June 2004, Anisha was admitted to a play school at Chembur, Mumbai. At one stage, in view of marital discord, according to the appellant, the mother allegedly abandoned the matrimonial home. That happened in July 2004. As per the appellant, the respondent abandoned the matrimonial home and Anisha and sought shelter with her parents in Bandra, whereas according to the respondent, she left the matrimonial home in July 2004 with her daughter and she continued to send Anisha to Kinder campus school at Chembur, the area where the father was residing, and permitted him on occasions to keep back Anisha at his residence. According to the respondent in October 2005, taking advantage of such a situation, the appellant kept Anisha back with him and did not return her to the respondent. That compelled the respondent to meet Anisha in the school campus, but since that arrangement did not work in the last week of November 2005, she approached the Chembur police station and with their help got back the custody of Anisha. It is alleged that on 30th November, 2005 the appellant, with the help of some of his associates, forcibly removed Anisha from the respondent's custody and made completely inaccessible to the respondent. It is in such compelling circumstances the respondent - mother moved the Family Court seeking custody of the minor daughter under Section 6 of the [Hindu Minority and Guardianship Act, 1956](#) (for short 'the Act of 1956') read with Section 7 and 25 of the [Guardians and Wards Act, 1890](#) (for short 'the Act of 1890'). The appellant - father also filed the custody petition and both the petitions were heard and decided by the Family Court vide judgment and order dated 2.2.2007.

4. The Family Court, after adverting to the material on record and asserting the wish of Anisha, after interviewing her, and considering the reports of the Counsellors appointed under the Family Courts Act and the Rules, in concluding paragraphs of the impugned judgment dated 2.2.2007, made the following observations:

On the strength of these observations I have to find out with the evidence on record as to which of the parent is having the best support system. I have already conducted that the petitioner is not interested or keen to follow her acting, modeling career and is interested in centering her life around her only child. She wanted to be a home-maker and therefore, virtually said good-bye to the glamorous world way back in the year 1995-96, i.e. almost than 12 years and admittedly having sound rapport with the daughter. The grievance of the respondent against her parents have been in the found to be devoted of any mere and therefore discarded at the there should itself. She is an educated lady comes from an affluent family with good sound background and capable of providing healthy sound environment to the child 'Anisha'. On the other hand, the respondent though claimed to be paying attention to the needs of his daughter and though has been in a position to provide best of amenities and comforts to his child and in fact the child has been under his care but the court has to deal with this aspect, keeping in mind the growing age of the child who is a girl, her growing needs, the protection the guidance, advise which she would be in a better position to give than the father. Pertinent to note that there is unimpeachable evidence on record indicating that respondent is a business tycoon, having his business units stretched out in as may as 65 countries in the world and is required to go abroad in connection with his work at least 9/10 times in a year, as reflected from perusal of his passport Exh.131. Besides as per his own admission, he is a social drinker and does take drinks at home at weekends and owns a mini-bar in his flat. He has further admitted that his friends also join him in drinks which includes his friend Mr Kotiyankar and Mr Pradip Patil. The only other female member in his house is his old, aged 65years mother who admittedly is a cardio patient as revealed from medical papers Exh.109 and needs medical supervision constantly as revealed from the evidence of Dr Hebbar vide Exh.143. The Counsellors report clearly indicates that the governess is for day time only and evidence indicates that she attends the respondent's mother also. Further there is a male attendant Mr Manish against whom lot of reservations has been made by the petitioner which at this stage need not be dealt with as not unnecessary for deciding the issue in question. Further evidence has come on record the respondent's mother time and again visits her only daughter in States. Comparing these two support system, mutually

one find that petitioner has better support system for the child than the respondent.

5. It appears that Anisha was interviewed by the learned Judge of the Family Court on 2-3 occasions. During one of the interviews Anisha told the learned Judge that she goes to her mother's place on week-ends and she enjoys the access period and always awaits for week-ends. It is pertinent to note that when she was interviewed by the learned Judge she was brought from her father's custody directly to the court for the purpose of interview and she was called in the court-hall directly so as to avoid meeting the mother to eliminate any possibility of being influenced by her. Anisha was interviewed in the court- hall and also in the chamber where the parents were called and were made aware about the child's wishes and were advised by the court to find a sensible, logical, rational way of sorting out their differences. Thus, weighing of the pros and cons of the controversy and after weighing and balancing all the mitigating circumstances, the Family Court held that the custody of the child should go to the respondent-mother and considering Anisha's love and affection for both the parents provided access to the appellant-father.

6. We have heard learned Counsel for the parties at great length and with their assistance we have gone through the entire evidence on record. In the course of the arguments, the learned Counsel for the parties raised several questions for our considerations. Amongst several other questions, Mr Cama, learned senior counsel for the appellant, also raised the following questions: (i) whether the respondent-wife abandoned the matrimonial home at Chembur and started staying at her parents home at Bandra, leaving the child with the appellant/husband during the period from July, 2004 to November, 2005?; (ii) whether during this entire period the child was happy at home with the father and was doing well at school?; (iii) Whether the respondent-wife participated in 'Celebrity Speak' - chat show on the internet and whether in response to the many questions put to her by her fans, she stated that she was working in certain films and she would like to continue working in South Indian and Hindi films? (iv) whether she represented to be single and suppressed the existence of her child and her marriage?; (v) whether, in an interview given by the respondent-wife, as a film actress in the Bombay Times section of Times of India, in response to specific questions as to what brought her

back to Mumbai from South, she stated that she came back for her mother and father and she remained silent about the existence of her child?; (vi) whether a complaint in Chembur Police Station seeking their help to release her daughter from the appellant amounts to admission that the child was in exclusive custody of the appellant-husband?; and (vii) whether the police complaint filed by the respondent wife with the Bandra police station amounts to admission that for eight months prior to filing of the complaint the child was residing with the appellant-husband?

7. At the outset, let us make it clear that we will deal with all these questions in the course of this judgment, though most of the questions are not relevant for deciding the main question as to who, between the appellant - husband and the respondent - wife, is entitled to have custody of the child in the facts and circumstances of the case and paramount consideration of the welfare of the daughter.

8. Similar are the questions as to whom the burden of proof and onus in law would lie in such case?; whether it is discharged by the spouse seeking custody?; whether there existed any change in the circumstances warranting change of custody from the appellant-husband to the respondent-wife within 4.1/2 months from the date of the order granting interim custody?; whether there was direction of this Court of psychiatric evaluation of both the parents and a child?; whether the findings recorded by the Family Court while granting interim custody are conclusive in nature and whether the Family Court was right in reversing its finding within 4,1/2 months from the date of granting interim custody? These questions, in our view, need not be gone into and addressed in this judgment. The Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. The litigation where the question of a custody is involved and where the parties are at loggerheads, in our opinion, such litigation cannot be dealt with like any other petition/suit or appeal in civil or commercial litigation. The courts are not expected to examine legality of the impugned order or go into a question as to whether the trial court has committed any error of law. Such litigation needs to be dealt with keeping the welfare and well-being of the child in view.

9. Counsel appearing for the parties placed reliance upon several judgments of the Supreme Court and High Courts in support of their contentions. Before we proceed further and advert to the rival contentions of the parties, it would be advantageous to make reference to the judgments in order to appreciate the submissions of the learned Counsel for the parties. The first judgment that was cited before us was in (Srimati) Kamini Mayi Debi v. Bhusan Chandra Ghose AIR 1926 Cal 1193. The provisions of Section 19 of Guardians and Wards Act were under consideration before the Court. It was observed that What is meant by Section 19 is that where the father of the minor is living and is not incompetent to be the guardian of the person of the minor, no other person shall be appointed as guardian of the person of such minor.

10. In Fakhruddin Khan alias Harbans Rai v. Mt. Biro AIR 1926 Lahore 393, the very same provision was under consideration. The court observed that without a finding that the father is unfit, the law (Section 19 of the Guardians and Wards Act) forbids the appointment or declaration of any other person than the father to be guardian. In Kamalamma v. Laxminarayana Rao AIR 1971 Mys 211, while dealing with the provisions of Hindu Minority and Guardianship Act and also the Guardian and Wards Act, it was observed that the father in the case of a Hindu minor boy is the natural guardian of the person during his minority and it is permissible for the court to remove him from that position and to appoint either the mother and if the mother is also unfit somebody else as the guardian of the person of the minor boy only if in the opinion of the court the father is unfit to be the guardian of the person of the minor. It is further observed that nodoubt, the only person who can compete with the father as natural guardian on almost equal place is the mother though even she is only second to him.

10.1. In Samuel Stephen Richard v. Stellka Richard , the High Court in deciding the question of custody held that 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.

10.2. In Rozi Jacob v. Jacob A. Chakramakkal : [1973]3SCR918 , the Supreme Court, after dealing with the provisions of Section 25 of the Guardians and Wards

Act, in paragraph 14, observed thus:

But whether the respondent's prayer for custody of the minor children be considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan J., with which observation we entirely agree : 'the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents.' It was not disputed that under the Indian Divorce Act this is the controlling consideration. The Court's power under Section 25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom - if ever - identical. The contention that if the husband is not unfit to be the guardian of his minor children, then the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading. It does not take full notice of the real core of the statutory purpose. In our opinion, the dominant consideration in making orders under S. 25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of their children, the approach has to be somewhat different from that adopted by the Letters Patent Bench of the High Court in this case. There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody to the father cannot promote their welfare equally or better than the custody of the

mother, then he cannot claim indefeasible right to their custody under S. 25 merely because there is no defect in his personal character and he has attachment for his children - which every normal parent has. These are the only two aspects pressed before us, apart from the stress laid by the husband on the allegations of immorality against the wife which, in our firm opinion, he was not at all justified in contending. Such allegations, in view of earlier decisions, had to be completely ignored in considering the question of custody of the children in the present case. The father's fitness from the point of view just mentioned cannot override considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute generally to be better fitted to look after the children - being normally the earning member and head of the family - but the Court has in each case to see primarily to the welfare of the children in determining the question of their custody, in the background of all the relevant facts having a bearing on their health, maintenance and education. The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they get their due share of affection and care from both the parents in their normal parental home. Where, however, family dissolution due to some unavoidable circumstances becomes necessary the Court has to come, to a judicial decision on the question of the welfare of the children on a full consideration of all the relevant circumstances. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them. 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 give 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.

10.3. In *Smt Mohini v. Virender Kumar* : AIR 1977 SC1359 , the Supreme Court, while dealing with the provisions of Section 13 of the Hindu Minority and Guardianship Act, 1956, observed that welfare of the minor to be paramount consideration while deciding the question of custody. In this case mother was ultimately declared entitled to guardianship and custody of 11 years old child and the father was given access to the child.

10.4. In *Smt Surinder Kaur Sandhu v. Harbax Singh Sandhu* : [1984]3SCR422 , while dealing with Section 6 of the Hindu Minority and Guardianship Act, the Supreme Court observed that it constitutes the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.

10.5. In *Smt Radha alias Parimala v. N. Rangappa* AIR 2004 Kar 299, it was observed that Under normal circumstances, the natural guardian is entitled to have the custody of the minor child. However, the controlling consideration governing the custody of the minor children is the welfare of the children and not the right of the parties. The father's right to the custody of the minor children is neither an absolute nor an indefeasible one. The welfare of the child should be the paramount consideration. The mother can also be given the custody of the minors, if their welfare or interest should require it, even if the father is otherwise fit to act as guardian. It is further observed that the Court before appointing a guardian of a minor or entrusting the custody of a minor to a parent or others it will take into account the totality of the circumstances of the case and assess the situation with regard to the guardianship and custody of the minor keeping in mind the welfare of the minor as the first and foremost consideration.

10.6. In *Kumar V. Jahagirdar v. Chethana Ramatheertha* : AIR 2004 SC1525 , while dealing with the issue of child custody, the Supreme Court observed that mother cannot always claim superior custody rights - Yet remarriage by mother is no disqualification for custody. Female child on the advent of puberty primarily requires mother's care and attention. Absence of female company in the house of the father is relevant factor and apprehension of second husband creating ill will

against the natural father found misplaced. In that case, custody was given to the mother and father was given only visitation right though the mother was remarried.

10.7. In *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka* : [1983]1SCR49 , the Supreme Court has reiterated the principle that the question of custody of the child must necessarily be considered from only the view point of the welfare of the child. In that case, the Supreme Court observed that the father was obsessed with the idea of having exclusive control of the children, he has been trying to poison the minds of the children against the mother with the only object of completely alienating them from their mother, and in his spiteful obsession, the father fails to appreciate the very great harm done to the children. The judgment of this Court was ultimately set aside by the Supreme Court allowing the custody of the child to the father. It is further observed that where the child is not in a position to express any intelligent preference between his/her parents, mature thinking is necessary to decide as to what will enure to his/her benefit and welfare.

10.8. In *R.V. Srinath Prasad v. Nandamuri Jayakrishna* : AIR 2001 SC1056 , it was observed 'that custody of minor children is a sensitive issue. It is also a matter involving sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between the attachment and sentiments of the parties towards the minor children and the welfare of the minors which is of paramount importance.'

10.9. In *Rajesh K. Gupta v. Ram Gopal Agarwala* : 2005 CriLJ2581 , in paragraph 7 held thus:

7. It is well settled that in an application seeking a writ of habeas corpus for custody of minor child, the principal consideration for the court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. It is equally well settled that in case of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties (see *Dr (Mrs) Veena Kappor v. Shri Varinder Kumar Kapoor* : AIR 1982 SC792 and *Syed Saleemuddin v. Dr Rukhsana and*

Ors. : AIR 2001 SC2172). It is therefore, to be examined what is in the best interest of the child Rose Mala and whether her welfare would be better looked after if she is given in the custody of the appellant, who is her father.

10.10. In *Sumedha Nagpal v. State of Delhi* (2000) 9 SCC 745, the Supreme Court while deciding the question of custody observed that what we have to bear in mind is the welfare of the minor child and not decide such a question merely based upon the rights of the parties under the law. It is further observed that 'the trauma that the child is likely to experience in the event of change of such custody, pending proceedings before a court of competent jurisdiction, will have to be borne in mind. We are conscious of the emphasis laid by the learned Counsel for the petitioner that the lap of a mother is the natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same.' The Supreme Court proceeded to further observe that no decision by any court can restore the broken home or give a child the care and protection of both dutiful parents. No court welcomes such problems or feels at ease in deciding them. But a decision there must be, and it cannot be one repugnant to normal concepts of family and marriage. The basic unit of society is the family and that marriage creates the most important relation in life, which influences morality and civilization of people, than any other institution. During infancy and impressionable age, the care and warmth of both the parents are required for the welfare of the child.

10.11. In *Jai Prakash Khadria v. Shyam Sunder Agarwalla* : AIR 2000 SC2172 , after referring to *Rozi Jacobs* case, has observed that orders relating to custody of children are by their very nature not final but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interest of the child. In *Lekha v. P. Anil Kumar* , the Supreme Court has observed that while dealing with the issue of custody the court should 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 over all development.

10.12. In *Nil Ratan Kundu v. Abhijit Kundu* (Civil Appeal No. 4960 of 2008, decided on 8th August 2008), the Supreme Court after considering English law, American law and Indian law so also the various other judgments of the Supreme Court, in paragraph 56 thereof held thus:

56. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parents patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations.

10.13 Recently, the Supreme court in *Gaurav Nagpal v. Sumedha Nagpal JT 2008* (12) SC 115, had an occasion to deal with a situation where the father had flouted orders of the court and managed custody to the point that contempt proceedings were initiated against him. The Supreme Court held that he cannot be beneficiary of his own wrong and thus confirmed the order passed by the High Court granting custody to the mother after seven years. In this case also, the Supreme Court, after considering several judgments of the Supreme Court and also the American law, observed that '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'. The Supreme Court further observed that 'Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him.' While interpreting the word 'welfare', the Supreme Court observed that it 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 Courts as well as its physical well being.

11. The legal position that emerges from the aforementioned judgments of the Supreme Court and High Courts is as follows:

(i) The father in the case of a Hindu minor boy is the natural guardian of the person during his minority and it is permissible for the court to remove him from that position and to appoint either the mother and if the mother is also unfit somebody else as the guardian of the person of the minor boy if in the opinion of the court the father is unfit to be the guardian of the person of the minor. The controlling consideration governing the custody of the minor is the welfare and well-being of the child concerned and not the right of their parents.

(ii) The discretion vested in the Court is, as is the case with all judicial discretions, to be exercised judiciously in the background of all relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents.

(iii) The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then he cannot claim indefeasible right to their custody merely because there is no defect in his personal character and he has attachment for his children - which every normal parent has. In short, the father's fitness cannot override considerations of the welfare of the minor children.

(iv) Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also equally be affectionate towards her children and otherwise equally free from blemish.

(v) Section 6 of the Hindu Minority and Guardianship Act constitutes the father as the natural guardian of a minor. But that provision cannot supersede paramount consideration as to what is conducive to the welfare of the minor.

(vi) The father's right to custody of the minor children is neither an absolute nor an indefeasible one. The welfare of the child should be the paramount consideration. The mother can also be given custody of the minors, if their welfare or interest should require it, even if the father is otherwise fit to act as guardian.

(vii) Female child on the advent of puberty primarily requires mother's care and attention. Absence of female company in the house of the father is relevant factor.

(viii) Where the child is not in a position to express any intelligent preference between his/her parents, mature thinking is necessary to decide as to what will enure to his/her benefit welfare.

(ix) In case of dispute between the mother and the father regarding custody of their child, the paramount consideration is welfare of the child and not the legal rights of either of the parties. The Court, therefore, should examine what is in the best interest of the child, whether her welfare would be better looked after if she is given in the custody of either the father or the mother. Such cases cannot be decided solely by interpreting legal provisions.

(x) A court while dealing with the custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child.

(xi) In selecting a guardian, the court is expected to give due weight to the child's ordinary comfort, contentment, health, education, intellectual development and

favourable surroundings. But over and above, physical comforts, moral and ethical value cannot be ignored. They are equally important, essential and indispensable considerations.

12. Before we proceed further, we would like to mention few admitted facts. The appellant and the respondent got married in Hyderabad on 11.8.2000. A child Anisha was born on 2.3.2002. All the three and the mother of the appellant-husband resided together at Chembur, Mumbai till July, 2004. In July, 2004 the respondent-wife left the matrimonial home and started residing with her parents at Bandra. On 24.11.2005 at about 3 pm the respondent-wife, with the assistance of about five police personnel from the Chembur police station, took away Anisha from the custody of the appellant's mother. On 30.11.2005 the appellant brought back his daughter Anisha. The appellant-husband and the respondent-wife both filed custody petitions in December, 2005. On 20.12.2005, the Family Court passed an order granting week-end access/visitation rights to the respondent-wife. Vide order dated 15.9.2006 the Family Court granted interim custody of the child to the appellant pending hearing and final disposal of the custody petitions. During pendency of both the petitions, the Family Court appointed counsellors and they interviewed the parents and the child on 2-3 occasions during the period from January, 2006 to January, 2007. Admittedly, the child is in the custody of the respondent-wife since last more than 1.1/2 years and before that the appellant father was having exclusive custody of the child since November 2005 till the impugned order dated 2.2.2007. We, therefore, propose to examine the question as to between the appellant and the respondent, who is better placed/fitted to look after Anisha and have her custody.

13. It is against the backdrop of these facts and circumstances, Mr Cama, learned senior counsel for the appellant-husband, vehemently submitted that during the period from July, 2004 to November, 2005 the respondent-wife abandoned not only the matrimonial home but even the child-Anisha. He submitted that she abandoned the child-Anisha in order to pursue her film career and hence is not entitled to have her custody. The respondent-wife was TV/Film star, especially in South Indian Films right from her childhood. The respondent-wife has not disputed that she was TV/Film star. She had shifted her base to South India in the year

1988-89. She thereafter attained celebrity status and had successful career as an actress.

14. Mr Cama, submitted that when the respondent-wife left the matrimonial home in July,2004, she left it with her all belongings including jewellery and valuables with clear intention not to return. As against this, according to the respondent-wife, she was forced to leave the matrimonial home due to alleged illtreatment meted out to her by the appellant-husband, his mother and their servant Manish. She claims that she left the matrimonial home with her daughter-Anisha. However, there is no specific case pleaded or stated in the evidence that she left the matrimonial home with daughter-Anisha.

15. Mr. Cama, on the basis of the pleadings and some admissions elicited in the cross-examination of the respondent-wife, submitted that after July,2004 the respondent worked in a TV serial 'Vah Rahanewali Mahilo Ki'. In February, 2005, she participated on 'Celebrity Speak' which is an internet chat show. In that show, to one of the questions put to her by her fan, she did not admit her marriage nor did she talk about the child. Similarly in her interview given in the Bombay Times, section of the Times of India, in response to one of the questions, she stated that she came back to Mumbai for her mother and father and she remained silent about the existence of her child. Thereafter, according to Mr Cama, in November, 2005, the respondent-wife lodged a police complaint with the Chembur police station in which she made several adverse allegations against the appellant-husband. In the complaint she stated that she required the police to release her daughter from the appellant-husband's house. This complaint, according to Mr Cama, shows that the child was in the appellant's custody. He further submitted that on 24.11.2005 the respondent-wife lodged another police complaint with Bandra Police Station where she admitted that for the last eight months the child was residing with the appellant-husband. Thus, Mr Cama submitted, it becomes clear that the child was residing with the appellant-husband atleast since March,2005, that is eight months prior to November,2005. He then submitted that the admissions given in the cross-examination by the respondent-wife, wherein she has stated that the arrangement of keeping Anisha partly with her and partly with the appellant went smoothly for 5/6 months from July, 2004 and thereafter

she was prohibited from meeting Anisha, would clearly show that atleast from January 2005 to November, 2005 Anisha was not with the respondent-wife nor did she meet her during this period.

16. On the other hand, Mr Grover, learned Counsel for the respondent-wife, submitted that during the period from July,2004 onwards the child-Anisha used to stay with both - the appellant-husband and the respondent-wife. He contended that the respondent-wife used to drop Anisha to her school in the morning and from there would go to the appellant's home for a nap and the servant Manish would bring her back to the home of the respondent at Bandra in the evening. In support of his contention he took us through the evidence of Amol Dhamdhare, Shridhar Khochare and Dr. Vivek Hembar, apart from the evidence of the respondent-wife.

17. We perused the evidence of all the witnesses including the evidence of the appellant-husband to examine the contention of the appellant-husband that during July,2004 to November,2005 the respondent-wife abandoned the matrimonial home and the child.It is true that after the respondent-wife left the matrimonial home she did act in the TV serial and also participated in the chat show and gave interview to the Bombay Times. From perusal of the transcript of the chat show and the interview given to the Bombay Times, it appears to us that she tried to suppress from her fans that she was married and she had a child. But, in our view, merely because she did not disclose about her marriage and the child to her fans, would not help the appellant-husband to contend that she abandoned the matrimonial home and the child. In the glamorous film industry it is often seen that film personalities do not make their private life public and try to hide their matrimonial status from people at large.

18. From the evidence, it will have to be seen that after she left the matrimonial home in July,2004, whether she was in contact with her child-Anisha, as claimed by her. Though, across the bar, it was contended that she left the matrimonial home with her child in July,2004, we do not find any material on record either in the form of an oral evidence or in the form of documents that she left the home with her child. As a matter of fact, in her cross-examination she has stated that

between July,2004 and November,2005 she was constantly in touch with the child and the child used to stay with her on and off during that period. In the written statement she has stated that she used to visit the play group to see Anisha from time to time only few days prior to Diwali in 2005. She has further stated that she was physically driven out of the matrimonial home and used to meet the child at school thereafter from time to time. In the cross-examination, to one of the questions she responded, stating, that sometimes Anisha used to sleep at her place and sometimes at the place of the appellant-husband. All these admissions clearly go to show that when she left the matrimonial home in July,2004 she left it alone with her belongings. Whether this amounts to abandoning the child is the question which we will have to address.

19. A heavy reliance was placed upon the admissions given by the respondent-wife in the cross-examination that she does not recall when the child was with her between March, 2005 and November 2005. Though she has denied that Anisha was never with her for eight months prior to 24.11.2005, insofar as the period prior to March, 2005 is concerned, she has specifically stated that she was in constant touch with Anisha and that Anisha used to stay with her on and off during that period. In support of her case, she examined Amol Dhamdhare, a qualified chemical engineer and the President of the Indian Education Society and a neighbour of the respondent's parents in Bandra. He has deposed that the respondent and her daughter came to stay at her parents house in Bandra in September, 2004. In the cross-examination he has deposed that he came to know that Anisha was being taken by the respondent from Bandra to Chembur in 2004. Further, he has stated that he saw the mother with her daughter-Anisha in September, 2004. Similarly Shridhar Khochare, the Secretary of the Society where the parents of the respondent reside, has deposed that he had seen the respondent and Anisha, about two years before, that is in December, 2004, when both of them came to stay with the respondent's parents. In the cross-examination he has stated that he had seen the respondent with Anisha since 1.1/2 to two years before, that is, in 2004-2005. Similar is the evidence of Dr. Vivek Hebar who, in his cross-examination, has stated that whenever he had occasion to visit the school he had occasion to come across the respondent-wife there. The respondent-wife has also placed several photographs on record which also show

that the mother was in constant touch with the minor after she left the matrimonial home in July,2004. In view of this evidence, it cannot be stated that the respondent-wife was not in touch with Anisha and had no occasion to meet her or she did not reside with her at Bandra on and off. Atleast till March, 2005 Anisha on several occasions met and resided with the respondent.

20. After March, 2005 till November, 2005, according to the appellant-husband, the respondent-wife did not meet Anisha at all. This contention of the appellant-husband is based upon the complaint made by the respondent-wife to the police (Exhibit-77), wherein it was stated that she did not meet her child for eight months. It is true that there is no material on record to show that during March,2005 to November,2005 the respondent-wife used to meet Anisha either in the school or at any other place. But this, by itself, in our view, would not amount to abandoning the child, particularly in view of the respondent's case that she was not allowed to meet Anisha during this period. That apart, the respondent in her cross-examination has stated that she never made any such statement as is seen in the complaint (Exh.77) and she has further stated that she cannot assign any reason as to why the police recorded that she had not seen Anisha for eight months prior to November, 2005.

21. That takes us to consider the counsellors' reports heavily relied upon by the counsel appearing for both sides. There are six reports of the counsellors on record. The first report is of Mrs S.P.Chavan dated 29.1.2007. The next two reports are of Mrs A.R. Tulalwar dated 13.1.2006 and 25.4.2006. Then there are reports of Dr. Anjali Chhabaria dated 16.1.2006 and 2.3.2006 and a report of Dr. Gopa Khan dated 18.1.2007. Out of these reports, the reports of Mrs S.P.Chavan and Mrs A.R. Tulalwar were submitted by them in pursuance of the orders passed by the Family Court. Insofar as the remaining reports are concerned, they are of the doctors who were engaged by the appellant-husband and examined by him as his witnesses.

22. Before we go to the reports of the counsellors appointed by the Family Court we would like to refer to the reports of Dr. Abjali Chhabaria dated 7.1.2006 and 12.1.2006. From perusal of these reports and the evidence of Dr. Chhabaria, it is

clear that the appellant-husband had approached her in January, 2006. In his first meeting with her, he had informed Dr. Chhabaria, that Anisha was residing with him and that her custody matter is pending in the Family Court. He also informed her that as per the order of the Family Court he was required to give access to the child's mother. He then informed her, whenever he tried to comply with the order he noticed that the child was resenting going to the respondent's residence and that she was reacting in an extremely aggressive manner - howling, screaming and crying and refusing to go to her mother's residence at Bandra. He also informed Dr. Chhabaria that he was unable to comply with the court's order on one occasion since Anisha was screaming, shouting and crying and she refused even to sit in the car as she feared that her father was asking her to go to her mother's residence. It is against this backdrop, it appears that Dr. Chhabaria met Anisha on 7.1.2006 and 12.1.2006 along with the appellant. When Dr. Chhabaria met Anisha, she did not like to talk about her mother. On further questioning, according to Dr. Chhabaria, Anisha told her that her mother was mad and she beats her ('Mummy Pagal Hai, Achhi Nahi Hai', 'Mummy Muzhe marti hain'). We have perused the report of Dr. Chhabaria and her evidence. In our opinion, when the appellant met Dr. Chhabaria alone, he ought not to have told her about the alleged behaviour of Anisha whenever he attempted to comply with the order of access. We do not find the briefing made by the appellant to Dr. Chhabaria true and correct in the light of the reports of the counsellors appointed by the Family Court. The appellant ought not to have prejudiced Dr. Chhabaria before taking Anisha to her.

23. One of the reports of Ms Tulalwar is of 13.1.2006, i.e. immediately the next day on which Dr. Chhabaria met Anisha. We perused the report of Mrs A.R. Tulalwar dated 13.1.2006. The reports of Dr. Chhabaria are dated 7.1.2006 and 12.1.2006. Mrs Tulalwar interviewed the child -Anisha on 13.1.2006. It is very interesting to note that in the report dated 12.1.2006 of Dr. Chhabaria, she has mentioned that Anisha did not talk about her mother and on further questioning she uttered 'Mummy Pagal Hain, Achhinahi hain and Mummy Muzhe Marti hain' and that she was unwilling to meet her mother. Whereas on 13.1.2006 Mrs A.R. Tulalwar interviewed the child in pursuance of the order passed by the Family Court. She has mentioned that the child was happy to see her mother and she was talking and playing with her mother freely and happily in the cabin. She has further

mentioned that the child shared normal relationship with the mother and considering her age she needs mother's company to strengthen the bonds between them. Then she opined that the child is familiar with the mother and the access can be worked out even outside the court. What is pertinent to note is this that when the meeting was arranged in the presence of Mrs A.R. Tulalwar, Anisha was in the custody of the appellant-husband and she was meeting her after long time. It is clear from the observations made by Mrs Tulalwar in her report that when the child was interviewed by Dr. Chhabaria, either the child was tutored or the report is made to favour the appellant-husband. In any case the report of Dr. Chhabaria does not inspire confidence and cannot be relied upon for forming an opinion one way or other. Dr. Chhabaria never met the respondent or her parents before submitting her report. She did not conduct home or school visits. In the circumstances, the report of Dr. Chhabaria is of no avail to the appellant-husband.

24. The next report is of Mrs Tulalwar dated 25.4.2006. She was directed to ascertain the wishes of the child in respect of access as per the order of the Family Court. She had meeting with the child-Anisha alone on 24.4.2006 in her cabin in the morning. She has stated that Anisha appeared happy and talkative as earlier. For that interview she had come from her mother's house. The mother was given overnight access on Saturdays and Sundays. Anisha stated that she played with her maternal cousin sister Anaya and Aliya, her aunt's daughters. She has further mentioned in the report that Anisha was, side by side, drawing pictures while being interviewed and was telling stories created by herself to the counsellor. The counsellor found in all her stories the main character was her mother who protects Anisha from Dinosaur and from King of Jungle. The counsellor recorded her observations stating that 'the child shares very good relationship with her mother. She is willing to spend time with her mother. In fact, this is her need at this age'.

25. Then there is a report dated 29.1.2007 of Mrs S.P. Chavan. She was appointed by the Family Court vide order dated 11.1.2007, to conduct the detailed investigation about the family background, status and standard of living of both parents. She seems to have interviewed the appellant-husband, the respondent-wife, the child and she also conducted home and school visits. It appears that Mrs

Chavan visited the residence of the respondent-wife on Saturday-Sunday when Anisha was with her. Anisha showed her toys and her room and also her dance performance to Mrs Chavan. Anisha expressed her preference to stay at the respondent-wife's place and did not wish to go back to the appellant's place as she had to attend the school daily. She also expressed that she would like to learn dance from her mother. She also showed her attachment with the grand-parents. Similarly Mrs Chavan also visited the appellant's residence. She found it situated in good locality having all the amenities including swimming pool and club. The appellant and his mother stay in the said flat. He has one servant and one Governess-cum-nurse to take care of his mother and Anisha. Anisha calls her as teacher. The Governess showed Anisha's progress card and informed that Anisha was good in her studies. She was also informed that Anisha sleeps with her grandmother or father or servant. The Governess also informed that she left Anisha at the respondent's place for access on week-ends. Thereafter the child was interviewed by Mrs Chavan. It would be advantageous to reproduce a part of the report which speaks about the child interview as follows.

Child is four years old. She is very social, confident and cheerful. She is talkative child, had fracture of her right hand and so it was in plaster. But still she was very active and in playful mood. She expressed that she does not like to take medicines. She told that she goes to her mother's place on week-ends. She mentions that she likes both the parents. She enjoys access period and she always awaits for week-ends. She wishes to learn dance from her mother. She expressed that she feels more free at the mother's residence (respondent-wife). She enjoys more at the petitioner's place. Child mentions that she has friends and likes to play all the time.

Mrs Chavan also interviewed the appellant-husband and the respondent-wife and then she also visited the school. The respondent-wife in her interview told Mrs Chavan that she was willing to give regular access to the appellant-husband if custody of Anisha was given to her. Similarly, the appellant-husband told the counsellor that Anisha was looked after by him properly and he had no objection for continuing week-end access and even the vacation access. During school visit the counsellor found that the child was well looked after by the father and the child

had never shown in the school that her mother was not staying with her. According to the teacher, ever since the child had started meeting her mother on week-ends, she was lacking in discipline to some extent. In the concluding part of the report, Mrs Chavan has made the following observations:

Child is very social talkative. She mixes with anyone very freely within a short time. It was not difficult to build a rapport with the child. She is cheerful and always keeps herself involved in play or study. She is active and attentive. She is adjusted at her present residence, though she is more free and open with the petitioner. She appears to be liking both the parents and attached to both. It appears that she is attached to her grand parents more with her maternal one. She was moving more freely and happily at petitioner's place. It appears that mother may be a better parent for a girl child who is of tender age. Anisha appears to have great understanding capacity and positive feelings towards both the parents. As far as house structure is concerned, Respondent residence is more luxurious with all modern amenities. Respondent is taking care of the child but for majority of time the child is at the hands of the teacher or servants. Whereas when she is at the petitioner's residence. She clings to her mother all the time. The atmosphere at the petitioner's residence is more informal and free. Both the residence are situated in good locality and has school nearby. Material and/or financial condition appears to be better of the respondent's residence. Father's house has economically better marital facilities. Mother appears to be emotionally rich and more capable to look after the child with love and affection. Hence emotional needs of the child appears to be satisfied in a better way by the petitioner.

26. The next report is of Dr. Gopa Khan. In our view, his report is innocuous and does not help either of the parties. He had done counselling to both-the appellant and the respondent- between 2000 and 2002. He never met Anisha. Similarly, even the report of Dr. Nadkarni is also of no avail to the parties since he has not expressed any opinion about Anisha or her parents. He speaks about the mother of the respondent-wife. She was under his treatment for psychotic depression. This report also, in our view, would not help either of the parties.

27. There is no dispute that since March 2005 till the child was interviewed either by Mrs Tulalwar on two different occasions or by Mrs Chavan all throughout the custody of the child was with the appellant-husband and the respondent-wife had only week-ends access. The report dated 13.1.2006 of Mrs Tulalwar would show that though the respondent was meeting Anisha after long time, the rapport between the two was found to be affectionate and loving. These reports, in our opinion, do not support the case of the appellant-husband that the respondent-wife had abandoned the child in July 2004 and till November, 2005 she even did not bother to meet Anisha, since she was more concerned with her film career.

28. That takes us to consider the report of Dr. Haridas. Pursuant to the impugned order dated 2.2.2007, the custody of Anisha was directed to be handed over to the respondent-wife. This Court and the Supreme Court, by various orders, granted interim access to the child in favour of the appellant-husband. However, the order of access did not work for some or other reason. This Court, at the stage of considering the issue of interim access, vide order dated 25.7.2007, appointed, Dr Haridas, the Head of the Department of Psychiatry of the J.J. Hospital for the purpose of counselling the parties and the child and was directed to submit a report of psychiatric evaluation of the couple and the child. In pursuance of the said order, the parties were subjected to all standard psychological tests by Dr. Mistry, Clinical Psychologist, Dr. Bodke, Sr.Resident in Psychiatry and Dr. Haridas himself, who was appointed by the order of this Court. They administered different tests on the appellant, the respondent and Anisha and recorded their clinical impressions about all the three. The clinical impressions recorded by the team of doctors at J.J.Hospital regarding all the three, read thus: Clinical impression: (Anisha Rayana)

On the date of evaluation, the case history, test findings and clinical observation suggests that baby Anisha Rayana has above average potential to perform the task. She is emotionally disturbed where she has anger spells, irritability, insecurity along with sad and tensed mood. She has feeling of neglect from surrounding. She is avoiding or running away from the situation. She is not revealing herself truly outside environment. She wants both the parents and wants to feel secure. Baby Anisha is crying for help as she is helpless and has desire to

grow. She has positive outlet for future. (She has hope that something good will happen with her). But she feels that somebody is trying to take her away from the parents. She wants love and affection.

Clinical impression : (Komal Rayana)

She is introvert, tense, anxious and sensitive to the attitude of others. She is overly impressed in fantasy and imagination and day dreaming. She is dependant, indecisive and emotionally unstable. She is not showing any feature of psychosis but has traits of histrionic personality disorder like; attention seeking behaviour, displays rapidly shifting and shallow expression of emotion, constantly using physical appearance to draw attention is suggestible (easily influenced by others). And has a style or speech that is excessively impressionistic and lacking in detail.

Clinical impression : (Mohan Rayana)

On the date of evaluation, the case history, test findings and clinical observation suggests that he is introvert. But at the same time he is inviting people for open communication, he is tensed and worried due to current situation. He has mild mood disturbance due to current situation. He is sincere, relaxed, calm and free from stress. He has good planning, decision making and adjustment ability. He has potential to take responsibility. He is emotionally stable and balanced personality. He is not showing any psychopathology and any traits of homosexuality.

29. The psychiatric evaluation by the team of Doctors headed by Dr. R.M. Haridas was done in September, 2007. Since more than a year had passed, this Court once again directed to conduct the similar tests by the very same team of doctors and accordingly Psychiatric Evaluation Report has been submitted by Dr. Haridas. They have stated that upon full review they did not find any evidence to revise the report dated 30.9.2007 in any way and their recommendations made in the earlier report are as valid now as then. In short, the recent evaluation shows the similar profile on psychological tests done in 2007.

30. Nodoubt, the report of the team of Doctors headed by Dr. Haridas is not in favour the respondent-wife. The report records that the respondent-wife is a highly dependent, inadequate and immature personality and depends on her mother for the most trivial decision. It further records that she lies readily, is manipulative and emotionally unstable. She is incapable of sustaining meaningful relationships. She obviously tutored the child prior to interview. Insofar as the child is concerned, apart from the other observations as reflected in the clinical observations, it is also recorded that she wants to be with both parents and feels that somebody is trying to take her away from her parents.

31. It is true that the report of Dr. Haridas makes some observations against the respondent-wife. We, however, have two sides of the coin before us. The first is the reports of the counsellors appointed by the Family Court and the other is the report of Dr. Haridas. The counsellors and the doctors who conducted the tests have no interest whatsoever in either of the parties. They have performed their duties in pursuance of the orders passed by the Family Court and this Court. If the report of Dr. Haridas is weighed against the reports of the counsellors who interviewed the parties and Anisha and also conducted school and home visits, in our opinion, the reports of the counsellors carry more weightage than the report of Dr Haridas. Moreover, the report of Dr. Haridas does not show that the respondent-mother is either mentally or physically abnormal and unfit to have a custody of Anisha.

32. Counsel for the respondent-wife raised few questions, insofar as the report of Dr. Haridas is concerned, such as, whether the mandate of the orders of this Court in respect of counselling was carried out?; whether the orders passed by this Court dated 19.7.2007 and 25.7.2007 mandate only counselling to be administered to the appellant, the respondent and Anisha?; whether the orders mandate psychiatric evaluation?; whether Dr. Haridas alone was directed to carry out the mandate?; whether the report of Dr. Haridas could be looked into since he was not subjected to cross-examination? etc. In our opinion, we need not address these questions for a simple reason that the parties willingly underwent counselling/psychiatric test conducted by the team of Doctors of JJ Hospital. Not only that when this Court further directed the very same team of the doctors to

conduct similar test/evaluation in view of the passage of time, the parties have willingly faced the evaluation.

Dr. Haridas has, inter alia, stated that 'the mother wants extravagant alimony' and 'there needs to be a clean break between them (parties), namely, a divorce' and that the mother 'obviously tutored the child', and that 'she' is unfit to take care of the child properly'. Undoubtedly, Dr. Haridas was not expected to enter into these controversies while carrying out the mandate of the orders passed by this Court. That apart, the report of Dr. Haridas does not show that the respondent-wife is an abnormal and, therefore, incapable to look after the well-being of Anisha.

The report of Dr. Haridas, therefore, will have to be weighed and considered against the reports/experience of the counsellors who interviewed all the three and conducted home and school visits. The experience/observations of the counsellors, in our opinion, are more practical as against the observations made by the team of doctors headed by Dr. Haridas. If the observations of the doctors are examined in the light of the reports of the counsellors, it cannot be stated that the mother is not capable of taking care of Anisha. As a matter of fact, we find that both the parents are concerned about the welfare and well-being of Anisha and they have love and affection for their daughter, who is a brilliant student.

33. The Maharashtra Family Courts Rules, 1987 provide for an appointment of counsellors, their qualifications, their functions, conducting of interviews, home visits, to assist the parties to arrive at settlement, to supervise custody of children, reconciliation etc. Under these Rules, the Family Court had appointed Ms Chavan, Ms Tulalwar and Ms Italia as counsellors. They not only interviewed the child but also seeing/observing the child in school and at home, submitted the aforementioned reports. As against this, the appellant-father has brought on record the reports of Ms Gopa Khan and Dr. Anjali Chhabaria who were privately employed by him. As observed earlier, their reports do not inspire confidence. They did not follow the procedure nor did they interview all the three-parents and Anisha. In our opinion, the reports of Ms Gopa Khan and Ms Chhabaria are of no avail in reaching any conclusion as to who is better fitted to have custody of Anisha in the present case.

34. Section 6 of the Hindu Minority and Guardianship Act, 1956 speaks about the natural guardian of a Hindu minor. Under this provision, the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of minor's property, excluding his/her undivided interest in the Joint Family Property, is : in the case of a boy or a unmarried girl - the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Explanation appended to Section 6 explains the expressions 'father' and 'mother' which do not include a step-father and a step-mother. In the present case we are not concerned with clauses (b) to (d) of Section 6. The Supreme Court, while dealing with the very same provision in *Anjali Anil Rangari v. Anil Kripa* : (1997)10SCC342 , held that the mother is also a natural guardian under Section 6 of the Hindu Minority and Guardianship Act. In *Jacob v. Jacob* (supra), the Supreme Court has observed that the fitness of the father to be entrusted with the custody of his minor children needs to be determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote the welfare of the child better than the custody of the mother, then he cannot claim indefeasible right to their custody under Section 25 of the Guardians and Wards Act 1890 merely because there is no defect in his personal character and has attachment for his children. In short, the father's right to the custody of the minor is neither an absolute nor an indefeasible one. While deciding the question of custody, the welfare of the child should be paramount consideration. The Court while deciding the issue of custody of a minor, should take into account the totality of the circumstances, keeping in view the welfare of the minor as the first and foremost consideration. This Court in *Shantabai Sonu Barathe v. Gautam Vishnu Shellar* (1994) 2 Mh.L.J.1879, after considering the provisions of Sections 6, 17(3) and 25 of the Hindu Minority and Guardianship Act, 1956 observed that the court was not justified in allowing the application on the basis of legal rights of the father.

35. In the present case, the child Anisha was born on 2.3.2002 and is now over six years old. In view thereof, it was vehemently submitted that the natural guardian of the child is the appellant-husband and he is entitled for her custody. In support, counsel for the appellant-husband placed reliance upon the judgment in

Kamalamma V Laxminarayana Rao AIR 1971 Mys 211. In this case, it was observed that the father is the natural guardian and someone else may be appointed as the guardian only if the Court comes to the conclusion that the father is unfit to be the guardian of the person of the minor whose father is alive and is not unfit to be the guardian of the person of the minor. The law is, however, settled by the Supreme Court in the judgments referred to in the earlier part of this judgment. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. Though Section 6 of the Hindu Minority and Guardianship Act, constitutes the father as the natural guardian of a minor, but that provision cannot supersede paramount consideration as to what is conducive of the welfare of the minor.

36. Counsel for the appellant, after taking us through the evidence on record, submitted that the respondent-wife is not at all fit to have custody of Anisha. He submitted that the respondent abandoned the matrimonial home and the child to make career in the film industry. As pointed out earlier, in support, our attention was invited to her interview published in the Bombay Times, her role in one of the TV serials and her participation in chat show. Reliance was also placed upon the reports of Dr. Haridas, Dr. Chhabriya and Ms Gopa Khan to contend that she is unfit to have custody of the child. On the other hand, counsel for the respondent-wife submitted that the appellant, being business tycoon who is required to travel abroad about 9-10 times a year and also within India for attending conferences and who often attends drink parties and also arranges such parties at his home and since there is no female member in the family to take care of the female child, is unfit to have custody of the child.

37. The arguments advanced by both the learned Counsel for the parties on the point of fitness have not impressed us. The material on record shows that when the child was in the custody of the appellant father she was well looked after by him, she was happy and was doing extremely well in the school. Even from the reports of the counsellors it is clear that Anisha was comfortable and happy while in the custody of the appellant-husband and she did not make any grievance whatsoever against her father. Similarly, it is clear from the evidence and the

reports of the counsellors on record that Anisha was happy and comfortable in the company of her mother. She expressed her desire not only before the counsellors but even before the Court that she feels comfortable and happy in the company of her mother. It has also come on record that though the respondent-mother was keen in making career in the film industry she decided to give up that career and so stated before the Court. She also stated that now she would like to look after and take care of Anisha and her career. She also stated that she came into film industry accidentally and she would like to continue to be a house-wife. Though she made an attempt to enter the film industry, once again after July 2004, after she left the matrimonial home, it appears that after her marriage in 2000 till July 2004 she had given up her career. She has stated that after the birth of Anisha, her marital life became miserable for various reasons, which forced her to leave matrimonial home in July 2004. The respondent-wife before the Family Court as also before us, while she was being interviewed in chamber, reiterated that she would not like to work either in the films/TV serials or anywhere else and she would like to be a full time mother and look after Anisha and focus on her career. The evidence on record, thus, show that both - the appellant-father and the respondent-mother - are fit to have custody of Anisha.

38. After having reached a conclusion that the appellant and the respondent both are fit to be appointed as guardian of Anisha, the question that will have to be considered is between the two who is better fitted. Fitness will have to be considered, determined and weighed predominantly in terms of the welfare of the child in the context of all the relevant circumstances. If the custody of the appellant-father cannot promote Anisha's welfare equally or better than the custody of the mother, then he cannot claim indefeasible right to her custody merely because he has attachment for her. In short, the fitness cannot override consideration of welfare of the minor child. As observed earlier, the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents.

39. Undoubtedly, in the present case we are more than satisfied that the appellant-father is concerned about the future of Anisha, he loves her tremendously and is capable of taking care of her future. But that by itself will not be sufficient to grant

custody of Anisha to the appellant. We will have to compare and consider who between the two, in the context of all the relevant circumstances, is fit to have custody of Anisha.

40. The appellant-husband is a business tycoon. He is a group adviser of the three companies, namely, Wanbery Company, Wanbery LIC and Cantebria Spain. He has stated in his cross-examination that all the three Managing Directors of these companies report to him. Out of these three companies, one is in Spain, the other at Netherland and third in India. He has further stated that he leads the entire workforce of these three companies and is responsible for its management. He is also associated with the company by name PPIL. He has admitted that he requires to visit various cities in India in connection with his business. He has then stated that his company organises conferences at regular intervals in different cities in India. He has further stated in the cross-examination that he requires to visit various countries in connection with his business once in two months and on an average his every trip lasts for 4/5 days. He has denied the suggestion that he requires to visit foreign countries in connection with his business once or twice every month. When he was confronted with his passport, he has stated that his company is covering 65 countries and off and on he is required to visit either of these countries. His office timings are from 10 am till 7.30 - 8 pm. He, however, denied the suggestion that he hardly gets time for his daughter Anisha. In the cross he has also admitted that he visits pubs, however, it is occasional. Even while talking about the family he has admitted that except his mother there is no other female member in the family. His married sister, who is settled in USA, occasionally visits India and stays with him. The mother of the appellant is about 68 years old and it appears that she speaks only Telgu and Hindi and she often goes to USA to meet her daughter or to Hyderabad to meet her relatives. In the house, the appellant has a servant and one governess-cum-nurse. The nurse takes care of the appellant's mother and of Anisha. His mother has some ailment for which full time governess-cum-nurse has been employed by the appellant.

41. On the other hand, the respondent-mother is a graduate in English literature and she is also into Fine Arts and Culture. She knows Marathi, English, Hindi and Telgu very well. She is also an accomplished classical dancer. She has

categorically stated before the court that she has given up her career as an Actress and she will be available 24 hours of the day to take care and for upbringing Anisha. Her other family members are also educated. Moreover, the counsellors reports show that Anisha is happy in the company of the respondent mother and her educational and social needs are being well taken care of by the mother. Looking to overall facts and circumstances of the case and the evidence on record, it is clear that Anisha is doing well with the mother and she is a happy child.

42. The controlling consideration governing custody of the child is her welfare and not the right of her parents. The contention that if the appellant-father is not unfit to be a guardian of Anisha, then, question of handing over her custody to the respondent mother does not arise, must be rejected outright in view of the settled position of law that the dominant consideration in making order of custody is the welfare of the minor child and not the right of the father. Nodoubt, the father has been presumed by the statute, generally, to be better fitted to look after children - being normally earning member and the head of the family - but the court has, in each case, to see predominantly to the welfare of children in determining the question of their custody in the background of all the relevant facts having bearing on their health, upbringing and education.

43. There is no reason to consider the respondent-wife ineligible to look after the minor. The respondent-mother after having obtained custody of Anisha, pursuant to the impugned order, has not neglected her or to look after her needs. We interviewed the child. Undoubtedly, we found the child tutored and had hostile attitude against the appellant-father. But the fact remains that she was happy in the respondent's company and has also been doing consistently well in the school.

44. We have no doubt, in our mind, that the respondent-mother is obsessed with the idea of having exclusive control of Anisha and she has tried to poison her mind against the father with the only object of completely alienating her from the appellant-father. We will be dealing with this attitude of the respondent-wife in giving access to the father independently. But that, in our opinion, is not sufficient to make the respondent ineligible to act as a guardian of Anisha. At this stage, we

observe that looking to the age of Anisha and her hostile attitude against her father, as a result of tutoring, we are satisfied that she is not in a position to express any intelligent preference between her parents.

The interest of the minor in this case, in our view, will be best served if she remains with the respondent. It has come on record that she has given up her career as an actress and she devotes 24 hours of the day to the care and upbringing of Anisha. Merely because the respondent left the matrimonial home and acted in 4/5 episodes of the T.V.serial and gave interview to the newspaper expressing her willingness to make career in acting, we need not doubt her statement that she has given up an idea to make career in film industry. The record shows that the minor is attached to her maternal grand-parents. The counsellor reports also show that she was happy in her mother's house in the company of her grand parents and her mother. There is no allegation that the social and educational needs of the child are not taken care of by the respondent. All factors indicate that the child is doing well with the mother and she is a happy child except her attitude towards her father. The past behaviour of the respondent cannot be the reason to remove Anisha from her custody and hand her over to the appellant. In any case, at this stage, we would not like to hand over the custody of Anisha to the appellant-father and we are satisfied that in the interest and for the welfare of Anisha, her custody should continue with the respondent-mother. This is to strike a just and proper balance between the requirements of the welfare of Anisha and the rights of their respective parents over her. We are satisfied that if sufficient access is provided to the father that will meet the ends of justice.

45. The record before the court clearly demonstrate that after the custody of Anisha was given to the respondent-wife in pursuance to the impugned order and despite various orders passed by the Supreme Court and this Court from time to time, the appellant-husband could not enjoy an access to Anisha. The orders granting access to the appellant-husband for some or other reason have not worked at all. We have gone through the entire material before us in this regard and also interviewed the parties. We have no hesitation in holding that the respondent-wife is responsible for depriving the appellant-father from getting access to Anisha. It is clear not only from the record but from our own experience,

as observed earlier, the respondent mother is obsessed with the idea of having exclusive control of Anisha and she has been trying to poison her mind against the appellant father with the only object of completely alienating Anisha from her father. The respondent mother, as a matter of fact, fails to appreciate the very great harm she has been doing to Anisha by tutoring and poisoning her mind against the father. It appears that the respondent-wife has succeeded in her attempts in alienating Anisha who, as the record shows, was once deeply attached to her father and had great affection for him. Anisha has undoubtedly become hostile to the appellant father. Though at this stage we find it necessary, in the interest and for the welfare of Anisha, to continue her custody with her mother the Court would not hesitate to change custody, if the respondent-wife continues to behave in this manner.

46. We observe that if the respondent mother creates any hurdle in giving access to the father, perhaps that would amount to contempt of court and in which case the court will have to change the custody for flouting the orders of the court. The respondent-wife has no right whatsoever to deprive Anisha from her father's love and affection and the appellant father from her love and affection. The respondent-mother, we hope and trust, will resist herself from poisoning the mind of her daughter against her father and to alienate her from him. The respondent will appreciate that by poisoning the mind of Anisha against the father, the stress and strain Anisha must be undergoing in the process of losing her love for the father. She also does not understand how unfortunate it is, for any daughter to be deprived of the affection of her father and to lose her own love for the father.

47. We have no doubt, in our mind, that the hostility shown by Anisha towards her father, when we interviewed her on two occasions in the chamber, was the result of tutoring and poisoning her mind against the appellant father by the respondent-mother. If the love and affection of the mother towards Anisha is genuine and if the mother is honestly interested in the welfare and well being of Anisha, she should, on the contrary, persuade Anisha to go to her father during the access period. It is necessary in the interest of all the three and more particularly the child Anisha. We observe that having found both -the appellant and the respondent - are fit to take custody of Anisha, it is always open to the appellant-husband to seek permanent

custody if the respondent-wife flouts the order of access. If the order of access does not work in future the custody will have to be handed over to the father on being satisfied that the respondent-mother is responsible for poisoning the mind of Anisha against the appellant father.

48. We are aware that initially the access period may temporarily cause flutter and Anisha may not be able to immediately adjust herself at the home of the appellant-father, but it does not mean that mere willingness of Anisha would be decisive factor. Looking to her age and hostile attitude towards the appellant, her wish, insofar as access/visitation right is concerned, need not be given importance or any weightage. The Court is not supposed to act as executor of the wish expressed by the minor.

49. In these obtaining circumstances, we are satisfied that it would be in the utmost interest of Anisha for her upbringing, education and welfare that she remains in the custody of her mother and we are not inclined to interfere with the impugned order passed by the Family Court regarding Anisha's custody. At the same time, we also do not find any reason to cause interference in the impugned order so far it relates to access and spending of 50% of the school vacations with the appellant-father. In our opinion, it is the respondent-mother who has to take initiatives and all the necessary steps to comply with the order of access to Anisha and her spending 50% of the school vacations with her father. We are saying so because, as noticed earlier, the respondent-mother has not cooperated and on the other hand has tutored the daughter to such an extent that the orders passed by this Court from time to time as well as the order passed by the Apex Court on 1/11/2007 regarding access and vacations sharing have not been implemented. On the face of the behaviour of the wife and as noticed by us from time to time, we do not find any justification to proceed against the husband in respect of the show cause notice issued in the impugned order.

We are also informed, across the bar, that the appellant-husband has filed a separate petition for divorce and the same came to be dismissed in default. It was further stated that he has applied for restoration of the said petition.

50. In the premises, the appellant's prayer for custody of his daughter Anisha is hereby rejected. Anisha's custody shall continue to remain with her mother. The appellant shall be entitled to have access to Anisha on Saturdays and Sundays and will be entitled, if Anisha is willing, to keep her with him on Saturday night. For the said purpose the appellant shall receive Anisha from the house of the respondent (her parents house) at 10 a.m. on Saturday or from a mutual agreed upon venue and shall return Anisha to the respondent on Sunday by 5 p.m. In the event Anisha is unwilling to stay with her father overnight at his house, the appellant-father shall then make her over to the respondent-mother on Saturday itself by 9 p.m. and in such an eventuality the appellant shall be entitled to take Anisha out on Sunday between 9 a.m. to 5 p.m. for which he will receive Anisha from the respondent's house at Bandra (West). During the school vacations (Diwali, Christmas and Summer) Anisha will spend first half period with her father and the remaining half with her mother. This period of sharing would be altered by the appellant and respondent in consultation with and the convenience of each other and shall be decided at least two weeks before the vacation commences. For sharing the school vacations, the appellant-father will receive Anisha from the respondent's house at Bandra (West) and at the end of the sharing period, he will reach Anisha to the respondent's house.

Both the appellant as well as the respondent must cooperate with each other in implementing the order of access as well as sharing of school vacations. The respondent-mother shall not take any step or act in any manner so as to prevent the appellant from having access to Anisha in the manner indicated above. Likewise, once Anisha is handed over to appellant, he too must honour the aforesaid arrangements and not keep Anisha with him beyond the time stipulated above. Similarly, the respondent-mother shall take initiative and all necessary steps to ensure that Anisha spends 50% of the school vacations with her father. The continuance of Anisha in the existing school or the change over of school shall be decided by the appellant and respondent in consultation with each other.

None of the parents shall move Anisha out of the jurisdiction of the court without advance intimation to and permission from each other. The passport of Anisha, on its renewal, shall remain deposited with the Family Court.

In the event of either of the parties violating the aforesaid arrangements, the other party would be at liberty to pray for appropriate orders before the Family Court at Mumbai.

The show cause notice issued to the appellant-husband under Order 39 Rule 11 of C.P.C. for committing breach of the orders and directions of the Family Court, is hereby quashed and set aside.

51. Family Court Appeal No. 29 of 2007 is disposed in terms of the above directions and Family Court Appeal No. 61 of 2007 stands dismissed.

Parties to bear their own costs.

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