

Raj Kumar Gupta Vs. Barbara Gupta

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Court : Kolkata

Decided On : Jul-21-1988

Reported in : AIR1989Cal165,93CWN256

Judge : A.M. Bhattacharjee and ;Ajit Kumar Nayak, JJ.

Acts : [Hindu Minority and Guardianship Act, 1956](#) - Sections 3(1), 3(3) and 6; ;Hindu Law; ;Caste Disabilities Removal Act, 1850; ;[Constitution of India](#) - Article 15; ;Gardians and Wards Act, 1890 - Sections 4(2), 19 and 25; ;Indian Penal Code (IPC) - Sections 497 and 498; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 96

Appeal No. : A.F.O.O. No. 118 of 1988

Appellant : Raj Kumar Gupta

Respondent : Barbara Gupta

Advocate for Def. : Balai Chandra Roy, ;Pradip Ghosh, ;Asok Banerjee and ;S.S. Bose, Advs.

Advocate for Pet/Ap. : Arun Prakash Chatterjee and ;B.M. Mitra, Advs.

Judgement :

A.M. Bhattacharjee, J.

1. A husband filed an application under Section 25, Guardians and Wards Act, 1890, against his wife for an order for the return of their minor daughter, then aged about 2 1/2 years, to his custody on the allegation that the child 'was taken away from his lawful custody' by the wife and the application having been dismissed, the husband has preferred this appeal.

2. However anachronistic it may appear to be, even to-day in India, proclaimed to be 'Secular' in its National Charter and mandated thereby almost four decades ago to secure to all its citizens a Uniform Civil Code, 'religion' is still being allowed to have a dominant and decisive role even in secular matters relating to law and its administration and the rights and status of a person in matters relating to marriage, succession, guardianship and the like still depend on the religion he would belong to. The husband here is a Hindu, the wife a Christian and they were married under the Special Marriage Act, 1954. What religious community the child would then belong to? The question appears to have been authoritatively settled by both our pre-independence and post-independence apex Courts, the Judicial Committee of the Privy Council and the Supreme Court of India. In *Helen Skinner v. Sophia Evelina Orde*, (1871) 14 Moo Ind App 309 at p. 323, decided in 1871, it was ruled that 'from the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social status'. A five-Judge Bench of the Supreme Court in *Commr. of Wealth Tax v. R. Sridharan*, : [1976]104ITR436(SC) , decided in 1976, has virtually reproduced the above quoted words almost verbatim, but has referred to Mayne's Hindu Law (11th Edition, page 290) as authority for this view. But in Mayne's Hindu Law, the above observation in *Helen Skinner* (supra) was quoted with quotation marks, citing *Helen Skinner* (supra) as the authority therefor and, therefore, if we may say with respect, the real authority for this view is not the Mayne's Treatise, but *Helen Skinner* (supra). Reference, if need be, may also be made to an old Division Bench decision of the Madras High Court in *Queen-Empress v. Veeradu*, (1894) ILR 18 Mad 230 at p 232 where also it was held that 'children are in law presumed to follow their father's religion'.

3. We would also come to the same conclusion on a consideration of the relevant provisions in Section 3, [Hindu Minority and Guardianship Act, 1956](#), which again

are in pari materia with the corresponding provisions in Section 2, Hindu Marriage Act, 1955, and the Hindu Succession Act and the Hindu Adoption and Maintenance Act of 1956. Under Section 3(3), Hindu Minority and Guardianship Act, the expression 'Hindu' in the Act shall include all persons to whom the Act would apply under Section 3(1) and under Section 3(1)(c), the Act would apply 'to anyperson domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by Hindu law if this Act had not been passed'. Now the child being a minor must have its further's Indian domicile. It is nobody's case that the child is a Muslim, Parsi or Jew by religion. Neither the father nor even the Christian mother claims the child to be a Christian by religion. And the Privy Council decision in Helen Skinner (supra) and the Supreme Court decision in R. Sridharan (supra) are clear authorities that under the Hindu Law as it stood before this Act, the child would have, under ordinary circumstances, belonged to its father's Hindu religion and would have been governed by Hindu Law. The child, therefore, is a Hindu within the meaning of the Hindu Minority and Guardianship Act in view of its Section 3(1) and (3), notwithstanding its Christian mother.

4. The same conclusion would also be arrived at on a consideration of the Explanation (ii) to Section 3(1) whereunder 'any child, legitimate or illegitimate, one of whose parents is a Hindu.....and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belong' is a Hindu. The child here has a Hindu father, and it is not the case of either the appellant-father or the respondent-mother that she was not brought up as one belonging to the Hindu community, group or family. The fact that the child bears a Hindu surname, Gupta, and also a Hindu name 'Sweta' are also factors we have taken note of in this connection. In fact neither Mr. Chatterjee, the learned Counsel for the appellant-husband nor Mr. Roy, the learned Counsel for the wife-respondent, has disputed that the child is a Hindu and both of them have proceeded on the basis that the child is a Hindu in fact as well as in law.

5. Once we hold, as we do, that the child is a Hindu, then the question relating to its guardianship and custody and wardship would be governed by the Hindu

Minority and Guardianship Act of 1956 super-added to the provisions of the Guardians and Wards Act of 1890, as provided in Section 2 of the former Act. The relevant portion of Section 6, Hindu Minority and Guardianship Act, may be reproduced hereunder : --

' 6. The natural guardians of the Hindu minor, in respect of the minor's person as well as the minor's property. are --

(a) In case of a boy or 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;'

6. This part of the Section does not expressly provide that the father or the mother must also be a Hindu in order to be entitled to be such natural guardians. As already noted, the Explanation (ii) to Section 3 of the Act, extracted hereinbefore, clearly contemplates cases of 'any child, one of whose parents is a Hindu' and expressly provides in Section 3 that 'this Act applies' to such a child. If, thus being fully alive to such cases where a father or a mother may not be Hindu, the Act in declaring the natural guardianship of a minor child of such parents in Section 6(a) uses the expression 'father' or 'mother' only without any qualification as to his or her religion, then should it not be held that even a non-Hindu father or a non-Hindu mother, as the case may be, may become the natural guardian of a Hindu minor? To illustrate, if the father is a Christian and the mother is a Hindu, but the child is brought up as a member of the mother's Hindu community, the child would be a Hindu within the meaning of Explanation (ii) to Section 3(1) to whom the Act would apply and would thus be a Hindu minor within the meaning of Section 6(a) of the Act, whereunder the father is to be the natural guardian. Since the expression 'father' in Section 6(a) is unqualified, can it not be urged that the father, though a Christian, would be a natural guardian Similarly, in a case, as here, where the father is a Hindu and the mother is a Christian, but the child is brought up as a member of the father's Hindu community, the child would be a Hindu under Section 3(1) -- Explanation (ii) and a Hindu minor within the meaning of Section 6(a), whereunder a mother is ordinarily entitled to the custody of the child who has not completed 5 years of age. Since the expression mother is un-qualified, can it

not be urged that the mother, even though a non-Hindu, would ordinarily be entitled to the custody of the Hindu minor till the completion of its fifth year. As we read the provisions of Section 3(1) and its Explanation (ii) and Section 6(a), Hindu Minority and Guardianship Act, we are inclined to think that it could be urged with reasonable plausibility that the father, in order to be entitled to the natural guardianship, or the mother, in order to be entitled to the custody, need not necessarily be a Hindu by religion in case of a minor whose one of the parents only is a Hindu and the minor is also brought up as a Hindu. Reference in this connection may also be made to the other Hindu Law of 1955-1956 Acts and it may be noted that a non-Hindu can very well inherit the properties of a Hindu under the Hindu Succession Act of 1956 and a non-Hindu mother can very well become the adoptive mother of a Hindu son adopted by her Hindu husband.

7. But the Proviso to Section 6 appears to strike a somewhat different note, which reads as under : --

'Provided that no person shall be entitled to act as a natural guardian of a minor under the provisions of this Section -- (a) if he has ceased to be a Hindu'.

8. Now, the body of a Section has got to be read, wherever possible, harmoniously with the Proviso appended thereto, one throwing light on the other, unless such reading, in a given case, is logically impossible, as it is also a well-accepted canon of interpretation that a Proviso cannot cut down the generality of the ambit of the body of the Section, if adumbrated with irresistible clarity. If under the mandate of the Proviso, a parent becomes disentitled to act as a natural guardian on his or her ceasing to be Hindu, it may not be possible to urge that a parent is nevertheless entitled to become a natural guardian under the body of Section 6, even though he or she was or is never a Hindu. A person can cease to be a Hindu only when he or she was a Hindu and a combined reading of Section 6 and the proviso may, therefore, be construed to give rise to the inference that one is not entitled to become a natural guardian of a Hindu minor under this Act unless he or she is a Hindu. A learned author has, however, observed that 'ceasing to be a Hindu' may be a disqualification, which is different from 'being a non-Hindu' and so where a parent has been a non-Hindu from the very beginning, Clause (a) of the proviso to

Section 6 cannot be invoked. (See, Dr. Tahir Mahmood's 'Studies in Hindu Law', 2nd Edition, page 196).

9. Be that as it may, the Proviso, in our view, is unfortunate and clearly a retrograde step and is in clear conflict with the Caste Disabilities Removal Act of 1850, otherwise known as the Freedom of Religion Act, enacted about a century and four decades ago. That Act, which is still a law in force, clearly provides that --

'So much of any law or usage now in force within India as inflicts on any person forfeiture of rights or property, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in any Court'

10. Under that law, therefore, conversion to another religion cannot by itself deprive a Hindu parent of the right of guardianship or custody of his or her minor child. No citation should be necessary in view of the express provisions of the Act, quoted hereinabove, whereby, as held by Sir Ameer AH in the decision of the Privy Council in *Khunni Lal v. Gobind Krishna Narain* (1911) ILR 33 All 356 at p. 366, 'Legislature virtually set aside the provisions of Hindu Law which penalizes renunciation of religion or exclusion from Caste'. But if need be, reference may be made to the decisions of the Allahabad High Court in *Kanahi Ram v. Biddya Ram* (1904) ILR 1 All 549 at p. 560 and in *Kaulesra v. Jorai Kasundhan*, (1906) ILR 28 All 233 at p. 235, of the Sind Judicial Commissioner's Court in *Mahammad Yakub v. Mst. Radhibai*, AIR 1918 Sindh 32 at p. 34 and of the Lahore High Court in *Hari Chand v. Ghulam Rasul*, AIR 1932 Lahore 385 at p. 386, which are clear authorities for the view that the right to guardianship is also a 'right' within the meaning of the Caste Disabilities Removal Act of 1850 and no person can be deprived of such right on account of renunciation of religion or conversion to another religion.

11. We are afraid that the provisions of this proviso depriving a Hindu parent of his or her right to guardianship might well be violative of the right to equality and ultra vires Article 15 of the Constitution countermanding any discrimination on the ground of religion. It is now well settled that even if a classification is otherwise permissible under Article 14 as being based on a reasonable differentia having a

rational basis with the object of the law, it shall still be struck down under Article 15, which supplements Article 14, if such classification is solely based on one or more of the forbidden grounds listed in Article 15, including religion. The proviso providing that a Hindu parent 'ceasing to be Hindu' shall not 'be entitled to act as the natural guardian' of his or her minor child, in effect, classifies Hindu parents into two classes, namely, (i) Hindu parents continuing to be Hindu and (2) Hindu parents ceasing to be Hindu, and disentitles the latter from the guardianship of their children and thus discriminate against them. Even assuming the classification to be otherwise reasonable, it cannot probably to be disputed that the classification is based solely on the continuation and cessation of religion to attract the interdiction of Article 15. However otherwise reasonable or even laudable the object of the classification may be, it is, as pointed out by the Supreme Court in the eleven-Judge Bench in the Bank Nationalisation case (R. C. Cooper v. Union of India, : [1970]3SCR530) and later further explained in Bennett Coleman v. Union of India, : [1973]2SCR757 , not the object or the purpose or the form that determines the question of impairment of the fundamental rights, but the direct operation or effect of the law on those rights.

12. But even though we do not, as we need not, decide the question as to the vires of the proviso and allow it to have its operation, we can only allow it to operate strictly according to its express terms. As we have already indicated, but for the proviso, there is nothing in Section 6(a) of the Hindu Minority and Guardianship Act to disentitle a non-Hindu parent from the natural guardianship, particularly in view of Section 3(1) and Explanation (ii) which clearly contemplates a case of a Hindu minor having one non-Hindu parent. Conceding that as a result of the Proviso, a non-Hindu parent cannot become a natural guardian, the said proviso has got nothing to do with the right of custody of the mother, as distinguished from her right to guardianship. Since according to our reading of the provisions of Section 6(a) read with Explanation (ii) to Section 3(1), a non-Hindu mother may be entitled to the custody of the minor child who has not completed 5 years of age, as distinguished from guardianship of that child, and since the proviso refers to the right of guardianship only and not to the right of custody, a non-Hindu mother of a Hindu minor is not to be deprived of her such right to custody under Section 6(a), because of her not being a Hindu or ceasing to be a

Hindu. The child in this case was admittedly born on 17th April, 1983 and, therefore, in January, 1986 when the child is alleged to have been taken away by the wife-respondent and the present application under Section 2S was filed, she was less than 3 years old and, therefore, under Section 6(a), Hindu Minority and Guardianship Act, the custody of the child was and was to be in the ordinary course with the respondent-mother. Section 6(a) declares that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother and nothing has been brought on record to show, nor it has been alleged by the husband-appellant, that there was something extraordinary in this case as a result whereof the custody of the child, which was to be ordinarily with the wife-respondent, was not with her on the date when the child is alleged to have been taken away by her and the present application was filed.

13. Section 25(1), Guardians and Wards Act, 1890, reads as under : --

'If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of the guardian may make an order for his return...'

14. If the child in the case at hand was in fact and was to be deemed in law to be in the custody of the wife-respondent, then it is difficult to understand as to how she, herself having the custody, can be said to have removed the child from the custody. It is true that Section 25 speaks of removal of the ward from the custody of the guardian of his person and under Section 6(a), Hindu Minority and Guardianship Act, the appellant-father is a lawful guardian of the ward. But since under Section 6(a), the custody was lawfully with the mother, and not with the father, there cannot be a case of removal of the ward from the custody of the father, when the mother, who is the lawful custodian, takes the child with her even away from the matrimonial home. We are accordingly of the view that on the date when the instant application, giving rise to this appeal was filed, the child having been lawfully in the custody of the mother, there could not be any removal by her of such a child within the meaning of Section 25, Guardians and Wards Act, and the application was to be rejected on that ground alone.

15. But we do not propose to dismiss the appeal on this ground, as by the time the appeal was being heard by us, the child has already completed 5 years of age and it is now well established that a Court, including a Court of appeal, can and, wherever possible should take into account the events and developments which have taken place after the institution of the lis when the relief otherwise awardable at the date of the commencement of the lis would become inappropriate in view of the changed circumstances and mould the relief in accordance therewith, whenever it is necessary to do so to shorten the litigation or to do complete justice between the parties and if any citation is needed for such a well-settled proposition, reference may be made to the decision of the Supreme Court in *Shikharchand v. Digambar Jain*, : [1974]3SCR101 , approving the leading decision of this Court by Sir Ashutosh in *Rai Charan v. Biswanath*, AIR 1915 Cal 103. Such a course should all the more be adopted in proceedings relating to marriage, divorce, guardianship and the like, where multiplicity and protraction of proceedings must always be avoided not only in the interest of the parties to the proceeding but also the society in general so vitally concerned in the institution of marriage and the children of such marriage who would constitute the future generation. We would accordingly proceed to dispose of the case at hand on the basis that the child has already completed 5 years of age and, therefore, the mother has no longer any preferential right to its custody under the Act, even if the Hindu Minority and Guardianship Act applies to the case. There can be no doubt that detention of a minor by one who has no right of custody against the wish of one who has such right amounts to 'removal of the child' from the custody of the latter. Let us, therefore, have a fresh look at the provisions of Section 25, Guardians and Wards Act, without the provisions of the Hindu Minority and Guardianship Act superimposed therein.

16. Under the general law as indicated in the Guardians and Wards Act, if the father is living, then in view of Section 19(b) thereof, no one else can be declared or appointed to be the guardian of the person of the minor, unless the Court is of opinion that the father is 'unfit' to be a guardian. Since nothing has been brought on record to show that the father-appellant is so 'unfit', we would proceed on the basis that no one but the father-appellant is the guardian of the minor within the meaning of Section 4(2), Guardians and Wards Act, which has defined 'guardian'

to mean 'a person having the care of the person of the minor'. Guardians and Wards Act, unlike Hindu Minority and Guardianship Act, nowhere provides that the custody of a child of any age shall ordinarily be with the mother. We, therefore, proceed on the basis that the father-appellant is the guardian of the child, and is entitled to its custody and, therefore, taking away of the child by the mother-respondent was 'removal of the child' from the custody of the guardian within the meaning of Section 25. But a reading of the provisions of Section 25 would at once make it clear that a father as the guardian and having the custody of the child, who has been removed from such custody, is not entitled to an order of its return as a matter of course only on proof of such guardianship, custody and removal therefrom, The Section clearly invests the Court with the discretion to order or not to order return and 'may' order such return, if, and only if, 'it is of opinion that it will be for the welfare of the ward to return to the custody, of his guardian'. We have not the slightest doubt that where, as here, a child of tender years was all along with the mother in the matrimonial home of its parents, and thereafter also, when the mother has left the matrimonial home with that child without the consent of the father, and has thus removed the child from the custody of its guardian within the meaning of Section 25, Guardians and Wards Act, the father cannot still claim return of the child to him under Section 25 as of right and as a matter of course, merely on the strength of his guardianship-cum-custody, unless the Court is also satisfied that such return would be conducive to the welfare of the minor. In the case at hand, therefore, we would be justified in ordering the return of the child to the father, only if we are satisfied that such return would be for the welfare of the child, notwithstanding the right of the father-appellant to the guardianship and custody of the child and the child's removal therefrom by the mother-respondent.

17. It must, as it cannot but be accepted as settled law in this jurisdiction that under whichever enactment this jurisdiction is invoked, be it the matrimonial enactments governing the various communities or the Hindu Minority and Guardianship Act or the Guardians and Wards Act, all questions relating to the custody of a minor must and cannot but be decided solely and only from the point of view of the welfare of the minor and the decision of the Supreme Court in *Thrity Hoshie Dolikuka v. Hoshiqm Sharakasha Dolikuka*, : [1983]1SCR49 may be referred to as a rather recent re-enunciation of that well-established principle. In

Halsbury's Laws of England (3rd Edition, Vol.21, Para 428, pages 193-194), which has been quoted with approval by the Supreme Court in the aforesaid decision, it has been stated that in any proceedings before any Court, concerning the custody or up bringing of an infant, the Court must regard the welfare of the infant as the first and paramount consideration, and must not take into consideration, whether from any other point of view, any right at common law possessed by the father or the mother in respect of such custody. We must make it clear that in the earlier portion of our judgment, we have taken into consideration, the legal right of the mother to the custody of a minor under Section 6(a) of the Hindu Minority and Guardianship Act, only to decide the question as to whether a mother who has in fact and in law such a custody can at all be regarded to have removed the minor from any lawful custody to attract the statutory provisions of Section 25 Guardians and Wards Act, which can be invoked only when there is such removal. We must not be taken to have said that since a mother has the lawful custody of her minor child aged not more than 5 years, such custody cannot in any event be changed and be given to the father, even if the welfare of the minor irresistibly requires such a changed And now that we have noticed that the minor having already completed 5 years of age during the hearing of this appeal, the ordinary right of the mother to such custody has ceased, we have decided to proceed on the basis of the merits of the case and to determine whether we can be satisfied that an order of return of the minor to the father's custody wilt be for the welfare of the minor, even assuming for the purpose that there was a removal of the minor by the mother from the custody of the father.

18. The fact that the child was with the mother since its birth in 1983 is not disputed though until the mother left the matrimonial home in 1986, the child was also with the father. It is also not disputed that since 1986, the child is with the mother alone. In the law relating to guardianship and custody, the welfare of the minor is paramountly the decisive consideration and would outweigh the mere legal right of the parents to the minor's guardianship and custody as would be evident from the various provisions of the Guardians and Wards Act and also the Hindu Minority and Guardianship Act, particularly Section 7 of the former and Section 13 of the latter. Therefore, Section 6(a), Hindu Minority and Guardianship Act in providing that 'that the custody of a minor who has not completed the age of

five years shall ordinarily be with the mother' must be taken to have enacted a legislative presumption that ordinarily in case of a minor of such tender age, the custody of the mother is conducive to the welfare of a minor. This is what has been held by a Division Bench of this Court in *Gopa Guha v. Rathin Guha*, (1987) 1 Cal HN 64 at p. 70 and we would like to think that the presumption does not automatically stand dislodged immediately on the minor completing the age of 5 years. The statutory presumption, though expressly enacted in Section 6(a), Hindu Minority and Guardianship Act, must be taken to be of universal application, for a Hindu mother is not necessarily more motherly because of her being a Hindu, nor a non-Hindu mother would be less motherly in her care and affection for the child because of her professing some other faith and the presumption must ordinarily be allowed to operate whatever religion the mother may belong to. We are inclined to think that if a mother has in fact the custody of the minor of tender years, even if she may not have the legal right to such custody, the same should not be changed or altered except for compelling reasons and we are glad to find that our view finds support from the observations of Lord Mac Dermot in the House of Lords in *J. v. C.*, (1969) 1 All ER 788 at p. 824, to which our attention has been drawn by Mr. Roy, the learned counsel for the wife-respondent, where the learned Law Lord has observed that 'even though some of the authorities convey the expression that the upset caused to a child by change of custody is transient and a matter of small importance', 'a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by such a change'. We should, therefore, order a change of the existing custody only if we are satisfied that the welfare of the minor, which is the paramount consideration in all such matters, warrants such a course.

19. Mr. Chatterjee has very strongly urged that once it is shown that the father is the legal guardian and custodian and the ward was removed from his custody, then an order under Section 25 for return of the ward to such custody should be made as a matter of course, unless the person opposing such order for return can affirmatively satisfy the Court that such return would not be for the welfare of the minor. As we have already indicated, legal right to custody is not, by itself, the decisive factor in matters relating to retention or restoration of custody and as we have further indicated, custody of child of tender years with the mother is ordinarily

to be presumed to be conducive to the welfare of the child and, therefore, such custody should not ordinarily be altered or disturbed by the Court unless the Court is of opinion, on the materials on record, that there is something extraordinary to outweigh that ordinary presumption and to warrant alteration of such custody and its commitment to the father.

20. It has not been urged on behalf of the father-appellant that the child has not been properly looked after and brought up and the mother has failed to provide the child with anything that may be reasonably necessary for its proper up-bringing. We have ourselves seen the child in the Court as well as in our Chamber in the presence of the parents and their lawyers and we found the child to be well-nourished, sprightly, lively, vivacious and gay and we have been told by the learned lawyers that the child was hopping, playing and even dancing in the Court room during the recess period. The child in answer to our queries has no doubt said that she would like to stay with the mother only. But we would be taking no notice thereof as we do not think that the child has attained that maturity to form any intelligent preference.

21. It has, however, been urged that the mother is a diabetic and smokes cigarette and drinks wine too. Diabetis is an ailment to which any one may be subject and unless it is suggested, and it has not been suggested, that the same has incapacitated her in any way from discharging her parental duties and obligations, it would be absolutely irrelevant for our present purpose. Smoking again may be, as we very often find these days, a fashion for many ladies and at any rate, no one can seriously suggest that a father or a mother, if otherwise found to be fit to have the custody of the child, is to be denied such custody only on the ground that he or she smokes tobacco. And looking to our modern society with its craze for pseudo-sophistication, it would be impossible to regard drinking, by itself, to be such as to disqualify a person from guardianship or custody of a child. The prolific growth of Bars under State patronage by way of granting licences therefor in and around our city and other places has really eroded Article 47 of our Constitution almost out of existence, whereunder it was provided that 'the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks'. Even assuming the mother to be a drunkard, it is not alleged

that she is such a drunkard to have become unfit to properly look after the custody and up-bringing of the child.

22. It has no doubt been urged that the mother was having some adulterous relation with another person and it appears that the father instituted a prosecution against that person under Sections 497 and 498, Penal Code. But certified copies of that proceedings (being Case No. C/165 of 1986 in the Court of the 14th Metropolitan Magistrate, Calcutta) have been produced before us to show that the father did not care to proceed with the case and was absent in court on several dates and the accused has been ultimately discharged under Section 245, Criminal P.C., whereunder such discharge can be made only when the Court considers the charge against the accused to be groundless. It has also been urged that when the father went to the flat where he thought that the mother was residing with the child, he found the same to be dark and some armed guards to be posted there. We have completely failed to understand that even assuming that the mother was residing at the flat with the child, how the fact that on one evening there was no light in the flat and that guards were posted there can, by themselves, go to show that the custody of the child with the mother would be injurious, and the return of the child to the father would be conducive to the welfare of the child.

23. As held by the learned trial Judge, materials on record clearly demonstrate that the relation between the father and the mother has become bitter to the extreme. There are allegations of physical violence against each other and diaries have been lodged with the police by both the parties, one accusing the other. There almost appears to be a deadlock in their wedlock and the marriage appears to have suffered a serious breakdown, at least for the time being and admittedly they are living separately. We have also taken note of the fact that, as found by the trial court and as has also been admitted by the learned Counsel, Mr. Mitra, appearing for the father, that the father stays alone with no female relation, and in fact no other relation, with him and it is also admitted that he has his business to look after. Reliance has been placed both by Mr. Roy and also Mr. Chatterjee on the decision of the Supreme Court in *Rosy Jacob v. Jacob*, : [1973]3SCR918 , but as pointed in *Rosy Jacob* itself (supra at 2099), all that was and can be laid down is

the broad proposition that Section 25, Guardians and Wards Act, vests the Court with discretion, the controlling consideration for the exercise thereof being the welfare of the minor; but otherwise 'each case has to be decided on its own facts and other cases can hardly serve as binding precedents, facts of two cases in this respect being seldom -- if ever -- similar'. We have, however, taken note of the observation in Rosy Jacob (supra, at 2100), to the effect that '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'.

24. On a consideration of these facts and circumstances, we find no justification to interfere with the impugned order of the trial Judge, which, in our view, has been passed on proper appreciation of the facts of the case and in judicious exercise of his discretion and the order is accordingly upheld. All the other directions given by the trial Judge about the right of the appellant-father to visit the child and about the respondent-mother to furnish to the trial court her address where she would be staying with the child and about the parties applying to the court giving their suggestions as to the day of the week, time and place where the appellant-father can meet the child in the presence of the mother-respondent or any other person on her behalf, are also accordingly maintained, with this modification that the date 3-11-87 fixed therefor by the trial Judge for making such application is extended to one month from this date and the trial Judge shall thereafter pass necessary orders as expeditiously as possible. Security arrangements provided for the respondent and her child under orders of this Court are to continue as before until such further orders, as aforesaid, are passed by the trial court and thereafter, further security arrangements, if any, shall be made as may be directed by the trial Judge. The records of the case, if any, along with a copy of our judgment, to go down at once to the trial court by a special messenger. No costs for this appeal.

Ajit Kumar Nayak, J.

25. I agree.