

(2015) 10 SHI CK 0091
In the High Court Of Himachal Pradesh
Case No : CMPMO No. 365 of 2015

Aarti Rana

APPELLANT

Vs

Gaurav Rana and Others

RESPONDENT

Date of Decision : 12-10-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 151
Constitution of India, 1950 — Article 227
Divorce Act, 1869 — Section 3(5), 41, 42
Guardians and Wards Act, 1890 — Section 10, 12, 17, 17(1), 19
Hindu Minority and Guardianship Act, 1956 — Section 13, 2, 6

Citation : (2015) 10 SHI CK 0091

Hon'ble Judges : Rajiv Sharma, J.

Bench : Single Bench

Advocate : Anjali Soni Verma, Advocate, for the Appellant; Sanjeev Bhushan, Senior Advocate and Rajesh Kumar, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—This petition is instituted against the orders dated 18.8.2015 and 24.8.2015 rendered by the Civil Judge (Senior Division), Court No. 2, Shimla in case No. 6-2 of 2015.

2. "Key facts" necessary for the adjudication of this petition are that marriage between petitioner and respondent No. 1 Gaurav Rana was solemnized on 29.1.2007. Two children were born. Son, namely, Yuvraj is approximately 7 years of age and daughter is approximately 5 years of age. The relations between petitioner and respondent No. 1 are strained. Petitioner has taken away the children to her parents' house. Children were admitted in Adarsh Senior Secondary School on 14.8.2015. They are pursuing their studies at Pragpur. Respondents filed a petition under section 6 of the Hindu Minority and Guardianship Act, 1956 read with sections 25, 7, 8 and 10 of the Guardian and Wards Act, 1890 for the custody of minor children before the learned Civil Judge (Senior Division). Application under section 12 of the Guardian and Wards Act,

1890 was also filed. Civil Judge (Senior Division) allowed the application on 18.8.2015 and directed the petitioner to produce the minor son Yuvraj before the court between 10.00 A.M. to 4.00 P.M. on 22.8.2015.

3. Petitioner filed an application under section 151 of the Code of Civil Procedure for recalling/modification of order and also application for extension of time to produce the child before the trial court. She also filed an application under sections 9(1) and 3 of the Guardian and Wards Act, 1890 for returning the petition to be presented before the appropriate court. Petitioner was permitted to file the reply and show cause notice was issued to the petitioner why contempt proceedings for deliberate disobedience of order dated 18.8.2015 be not initiated against her. Hence, the present petition.

4. Ms. Anjali Soni Verma has vehemently argued that orders dated 18.8.2015 and 24.8.2015 are not in accordance with law. She has also argued that while deciding the custody of child, paramount consideration is the welfare of the child.

5. Mr. Sanjeev Bhushan, learned Senior Advocate has supported the orders dated 18.8.2015 and 24.8.2015.

6. I have heard the learned counsel for the parties and have gone through the record carefully.

7. The marriage between petitioner and respondent No. 1 was solemnized on 29.1.2007. Son Yuvraj is 7 years old. He needs constant care and protection by the mother. It has come on record that respondent No. 1 is in habit of consuming liquor and taking drugs. He used to go for treatment in habitation centre Panthaghati. Congenial atmosphere is of utmost importance while up-bringing the children. Learned Civil Judge (Senior Division) while ordering the custody of the child to the respondents has opined that Yuvraj was studying in reputed St. Edwards' School, Shimla and annual examinations are to be held in the month of December. He has also opined that respondent No. 1 is a businessman having sufficient means to take care of his son Yuvraj. It is reiterated that it is not affluence of the party which is to be taken into consideration, but the existence of congenial atmosphere is also required to be taken into consideration while deciding the custody of the children. In view of this, the court below has erred in law by directing the production of child in the court on 22.8.2015 and rejecting the application for modification of the order and issuing show cause notice to the petitioner for violation of order dated 18.8.2015. There is no inherent contradiction in the reliefs sought for by the petitioner while moving applications for extension of time as well as for compliance of the order.

8. Their Lordships of the Hon'ble Supreme Court in Rosy Jacob Vs. Jacob A. Chakramakkal, have held that whether under one Act or the other the primary consideration governing the custody of the children is the welfare of the children and not the right of their parents. Their Lordships have held as under:

"[13] Now it is clear from the language of S. 25 that it is attracted only if a ward

leaves or is removed from the custody of a guardian of hi, person and the Court is empowered to make an order for the return of the ward to his guardian if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian. The Court is entrusted with 8 judicial discretion to order return of the ward to the custody of his guardian, if it forms an opinion that such return is for the ward's welfare. The use of the words "ward" and "guardian" leaves little doubt that it is the guardian who, having the care of the person of his ward, has been deprived of the same and is in the capacity of guardian entitled to the custody of such ward, that can seek the assistance of the Court for the return of his ward to his custody. The guardian contemplated by this section includes every kind of guardian known to law. It is not disputed that, as already noticed, the Court dealing with the proceedings for judicial separation, under the Indian Divorce Act, (4 of 1869) had made certain orders with respect to the custody, maintenance and education of the three children of the parties. Section 41 of the Divorce Act empowers the Court to make interim orders with respect to the minor children and also to make proper provision to that effect in the decree: S. 42 empowers the Court to make similar orders upon application (by petition) even after the decree. This section expressly embodies the legislative recognition of the fundamental rule that the Court as representing the State is vested with the power as also the duty and responsibility of making suitable orders for the custody, maintenance and education of the minor children to suit the changed conditions and circumstances. It is, however, noteworthy that under Indian Divorce Act the sons of Indian fathers cease to be minors on attaining the age of 16 years and their daughters cease to be minors on attaining the age of 13 years: S. 3(5) . The Court under the Divorce Act would thus be incompetent now to make any order under Ss. 41 and 42 with respect to the elder son and the daughter in the present case. According to the respondent-husband under these circumstances he cannot approach the Court under the Divorce Act for relief with respect to the custody of these children and now that these children have ceased to be minors under that Act, the orders made by that Court have also lost their vitality. On this reasoning the husband claimed the right to invoke S. 25 of the Guardians and Wards Act: in case this section is not applicable, then the husband contended, that his application (O. P. 270 of 1970) should be treated to be an application under S. 19 of the Guardians and Wards Act or under any other competent section of that Act so that he could get the custody of his children, denied to him by the wife. The label on the application, he argued, should be treated as a matter of mere form and, therefore, immaterial. The appellant's counsel on the other hand contended that the proper procedure for the husband to adopt was to apply under S. 7 of the Guardians and Wards Act. Such an application, if made, would have been tried in accordance with the provisions of that Act. The counsel added that Sections 7 and 17 of that Act also postulate welfare of the minor in the circumstances of the case, as the basic and primary consideration for the Court to keep in view when appointing or declaring a guardian. The welfare of the minors in the present case, according to the wife, would be best served if they remain in her custody.

[16] The respondent's contention that the court under the Divorce Act had granted custody, of the two younger children to the wife on the ground of their being of tender age, no longer holds good and that, therefore, their custody must be handed over to him appears to us to be misconceived. The age of the daughter at present is such that she must need the constant company of a grown-up female in the house genuinely interested in her welfare. Her mother is in the circumstances the best company for her. The daughter would need her mother's advice and guidance on several matters of importance. It has not been suggested at the bar that any grown-up woman closely related to Maya alias Mary would be available in the husband's house for such motherly advice and guidance. But this apart, even from the point of view of her education, in our opinion, her custody with the wife would be far more beneficial than her custody with the husband. The youngest son would also, in our opinion, be much better looked after by his mother than by his father who will have to work hard to make a mark in his profession. He has quite clearly neglected his profession and we have no doubt that if he devotes himself wholeheartedly to it he is sure to find his place fairly high up in the legal profession.

[18] We accordingly allow the appeal with respect to the custody of the two younger children and setting aside the judgment of the Letters Patent Bench in this respect, restore that of the learned single Judge who, in our view, had correctly exercised his discretion under Section 25 of the Guardians and Wards Act. The directions given by him with respect to access of the parties to their children are also restored."

9. Learned Single Judge of Madras High Court in D. Rajaiah Vs. Dhanapal and Another, have held that under the Hindu Minority and Guardianship Act, 1956 the welfare of the minor children is paramount consideration and the same cannot be measured in terms of money. Learned Single Judge has held as under:

"[3] Before, I approach the question on facts, I would like to delineate and keep in mind the provisions of law, which should form guidelines in matters like this. The two minor children being Hindu Girls, with regard to natural guardianship as such the provisions of Hindu Minority and Guardianship Act, 1956 (No. 32 of 1956), hereinafter if occasion comes, referred to as Act 32 of 1956, shall first speak. Section 6 of Act 32 of 1956 says that in the case of an unmarried Hindu minor girl, the father and after him, the mother shall be the natural guardian. The mother had gone out of the picture by her demise. The father as such does not suffer any disqualification set forth in the proviso to S. 6 of Act 32 of 1956. Section 13 of Act 32 of 1956 reads as follows:

13(1) "In the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the

minor."

Section 2 of Act 32 of 1956 says that the provisions of the Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890 (8 of 1890), hereinafter referred to as Act 8 of 1890. Section 17 of Act 8 of 1890, reads as follows:

"17. Matters to be considered by the Court in appointing guardian.

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Omitted by Act III of 1951.

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

The rule of Hindu law is that no one other than the father and failing him the mother has an absolute right to have the guardianship, over and custody of an unmarried Hindu minor girl. The Hindu Law recognises primarily the father as the legal guardian and custodian of his unmarried minor daughter when he is alive. Failing the father only the mother comes into the picture and she could assume such guardianship and custody only in such a contingency. But an unmarried Hindu minor girl if she has not completed the age of 5 years shall ordinarily be in the custody of the mother. As stated above, the mother is not in the picture at all. Furthermore, the minors have passed the age of 5. The first minor has completed the age of 12 and is running the 13th year and the second minor has completed the age of 11 and is running the 12th year. Section 6 of Act 32 of 1956 does not make any substantial alteration in the law on the subject and gives legislative sanction to the principle well established already. As such, the father could legitimately claim the right to have the guardianship over and custody of his unmarried minor girls. In this context, S. 19 of Act 8 of 1890 can also be adverted to, when it countenances, that if the father of the minor is alive, no other guardian can be appointed, unless, in the opinion of the Court, the father is not fit for appointment, The father as natural guardian is primarily entitled to the custody of his minor children unless there are overwhelming circumstances to the contrary. It is true that there is an appreciable difference between custody and guardianship, for guardianship is a more comprehensive

and a more valuable right than mere custody. The sole consideration both in the case of guardianship and custody of the minor should be the welfare of the minor. The Court is bound to take into consideration all the facts and circumstances of the case, bearing in mind that the pivotal factor is the benefit and well being of the minor. That the dominant factor for consideration of the Court is the welfare of the child, has found statutory footing both in S. 17(1) of Act 8 of 1890 and S. 13 of Act 32 of 1956, Both the provisions emphasize that the powers of the Court are to be exercised for the welfare of the minor, which should be the paramount consideration. The" rule of Hindu law recognising the father to be the guardian and custodian of his unmarried minor daughters, the maternal grandfather cannot straightway insist that he should be declared or appointed as the guardian and custodian of such minors. The father being primarily entitled to the guardianship over and custody of his unmarried minor daughters, it is for the maternal grandfather, who wants to maintain a contrary position, to demonstrate that there are peculiar and strong circumstances which warrant deprivation of such a parental right of, the father. The father can be deprived of such rights only if the facts and circumstances of the case warrant it. Keeping in mind the above salient principles of law, this Court has to examine the facts of the case to find out as to whether" strong and convincing circumstances have been made out against the father to take away from him the guardianship and the custody annexed to it of his unmarried minor daughters or to deny him the custody of his unmarried minor daughters, maintaining guardianship with him. I am visualising the latter contingency because in the course of arguments advanced on behalf of the maternal grandfather, it was stated that though the guardianship of the father need not be disturbance yet the custody of the two minor children should be permitted to be with the maternal grandfather.

[7] Learned counsel for the maternal grandfather would urge that the fact that the two minor children have remained in the maternal grandparents house from May, 1982 should not be lost sight of and if at this juncture they are to be snatched away from that atmosphere, which would be against their will, it will bring about a trauma in their mind and will not behave well for the interests of the minors. It is true that the paramount consideration that should weigh with the Court is the welfare of the minor children. From the bare fact, for two years and more in the past the two minor children happened to be in the custody of the maternal grandparents, it is not possible to say that such a custody should be continued in preference to the legitimate claims of the father, on the ground of paramount interests of the two minor children. The financial affluence of the maternal grandparents should not be the sole criterion. It is not claimed that the father is a man of no means and he could not maintain and bring up his two minor children comfortably and according to his status. On the other hand, as adverted to earlier, the evidence of the maternal grandfather examined as P.W.1 points out a different position; and makes out that the father will cater to all the comforts of his minor children and bring them up as good as the maternal grandparents. The coming over of the mother of the two minors for treatment at

Madurai, her demise at Madurai and the children coming along with her earlier to that and staying with the maternal grandparents could only be treated as temporary phases, and they cannot govern as paramount factors with regard to the welfare of the minors. After all, they are the children of the father and when the Court has found that the father has not suffered any disqualification from being a guardian and custodian of his two minor children and nothing has been brought to the notice of the Court that it will not be desirable to leave the guardianship and custody of the two inaner children with the father, the situation that the maternal grandparents would look after the children in a more better and affluent circumstances is not a relevant factor that should weigh with the Court to deny the legitimate parental right of the father to the guardianship and custody over his two minor children. A proposition that wherever affluence and luxury are prevailing that should be the proper atmosphere for minor children to be brought up, denying the legitimate rights of the parents and lawful guardians, would be a dangerous one. Primarily, the children should be in the custody of their parents, who are their lawful guardians. They cannot expect a status and upbringing de hors the status of the parents while they are being brought up by them. No one else could be allowed to snatch away the children from the parental household on the ground that they could afford luxury and affluence to the children. The welfare of the minor children is not to be measured only in terms of money and physical comforts. The word "welfare" must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well-being. The two minor children are girls. Shortly they will come up age and they will have to be married. In our Indian society and in particular Hindu society any body seeking matrimonial alliance will certain give due importance to the girls living with the parent and a situation, where a girl is living away from her parent will be looked at askance, and may draw assertive remarks too."

10. Learned Single Judge of Delhi High Court in Narinder Kaur Vs. Parshotam Singh, has held that merely mother is not having any income of her own is no ground to deprive her of the custody of the minor child. Learned Single Judge has further held that court has power to modify order if circumstances so demand during pendency of proceedings. Learned Single Judge has held as under:

"[5] The father also made allegation against the mother that she was of unsound mind. These allegations were also made before Mrs. Kanwal Inder, the then Guardian Judge. She observed in her order that the mother had been appearing before her and making submissions and that there was nothing in her conduct from which it could be inferred that the mother was suffering from any mental disorder disentitling her to the custody of her own child. During the pendency of this appeal on an application (CM 4365/86) Leila Seth, J. in her order dated 26.5.87 also observed that the mother had been attending the proceedings in Court and appeared to be well behaved. Before me also the mother had been appearing on various dates and she appeared to be quite normal. Merely that

mother is not having any income of her own is no ground to deprive her of the custody of the minor child. No amount of wealth is substitute for the love, affection and care which a mother can bestow on her infant child. Further merely because the parents of the mother are not affluent people is again no ground to deprive the mother of the custody of the child. If the mother is not having an independent income for her maintenance and that of the child father can certainly be asked to give that maintenance but he cannot use this as a handle to deprive the mother of the custody of the child. I cannot believe the father when he says that the mother did not breast feed the child. It just appears to be his imagination.

[7] It was contended by Ms. Santosh Kaira learned counsel for the appellant that the learned Guardian Judge had no jurisdiction to review his order and also that even assuming if he had such jurisdiction the case did not fall with any of the clauses under Rule I of Order 47 of the Code of Civil Procedure. She said that her application for grant of interim custody of the child was under Section 151 of the Code. Section 12 of the Act provides that a court may make such order for the temporary custody and protection of a minor as it thinks proper. It is immaterial if the application is labelled under Section 151 of the Code. If the court has power under Section 12 of the Act for grant of temporary custody during the pendency of the proceedings it will have jurisdiction as well to modify that order if the circumstances so demand during the pendency of the proceedings. The Court must be deemed to possess such powers by necessary intendment and it cannot, therefore, be said that the order for interim custody of the child cannot be modified or varied though perhaps the review may not be the proper word but effect remains the same. Then Mr. Mitra learned counsel for the father said that if that be so no appeal could be filed against an order made under Section 12 of the Act. In this connection he referred to Section 47 of the Act. An order under Section 12 is not one of the orders against which an appeal would lie. This submission appears to be correct but then it is a fit case to exercise jurisdiction under Article 227 of the Constitution of India which I do."

11. Leaned Single Judge of Calcutta High Court in Sajjan Sharma Vs. Dindayal Sharma, has held that paramount welfare of child is the only criterion which should be considered while deciding application, irrespective of the applicant and his relation with the child. Learned Single Judge has further held that environment and surroundings conducive for child to grow and become a good human being should be guiding factor for deciding application under section of the Guardians and Wards Act, 1890.

12. Their Lordships of the Hon"ble Supreme Court in Gaurav Nagpal Vs. Sumedha Nagpal, have held that paramount consideration of the court in determining the question as to who should be given custody of a minor child, is the welfare of the child and not the rights of the parents. Their Lordships have further held that there should be proper balance between rights of the respective parents and the welfare of the child. Their Lordships have held as under:

"29. In Halsbury's Laws of England, Fourth Edition, Vol. page 217 it has been stated;

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

(emphasis supplied)

It has also been stated that if the minor is of any age to exercise a choice, the Court will take his wishes into consideration. (para 534; page 229).

[30] Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is "welfare of the child".

[43] The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force.

[46] In Rosy Jacob Vs. Jacob A. Chakramakkal, , this Court held that object and purpose of 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

[47] Again, in Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka, , this Court reiterated that the only consideration of the Court in deciding the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the Court. Mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.

[50] When the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others."

13. Their Lordships of the Hon"ble Supreme Court in Athar Hussain Vs. Syed Siraj Ahmed and Others, have held that in matters of custody the welfare of the children is the sole and single yardstick by which the court shall assess the comparative merit of the parties contesting for the custody. Their Lordships have further held that while deciding the question of interim custody, the court must be guided by the welfare of the children since section 12 of the Guardians and Wards Act, 1890 empowers the court to make any order as it deems proper. Their Lordships have held as under:

"30. Reasons are as follows: Section 12 of the Act empowers courts to "make such order for the temporary custody and protection of the person or property of the minor as it thinks proper." In matters of custody, as well settled by judicial precedents, welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the Court to make any order as it deems proper.

[36] Keeping in mind the paramount consideration of welfare of the children, we are not inclined to disturb their custody which currently rests with their maternal relatives as the scope of this order is limited to determining with which of the contesting parties the minors should stay till the disposal of the application for guardianship.

[37] The appellant placed reliance on the case of R.V. Srinath Prasad Vs. Nandamuri Jayakrishna and Others, . This Court had observed in this decision that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children. In that decision, while granting interim custody to the father as against the maternal grandparents, this Court held:

"The Division Bench appears to have lost sight of the factual position that the time of death of their mother the children were left in custody of their paternal grand parents with whom their father is staying and the attempt of the respondent No. 1 was to alter that position before the application filed by them is considered by the Family Court. For this purpose it was very relevant to consider whether leaving the minor children in custody of their father till the Family Court decides the matter would be so detrimental to the interest of the minors that their custody should be changed forthwith. The observations that the father is facing a criminal case, that he mostly resides in USA and that it is alleged that he is having an affair with another lady are, in our view, not sufficient to come to the conclusion that custody of the minors should be changed immediately."

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

[38] Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in the case of Mausami Moitra Ganguli Vs. Jayant Ganguli, . This Court held:

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

[39] After taking note of the marked reluctance on part of the boy to live with his mother, the Court further observed:

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

14. Their Lordships of the Hon"ble Supreme Court in Mohan Kumar Rayana Vs. Komal Mohan Rayana, have held that welfare of the minor is paramount consideration. Their Lordships have further held that though petitioner father was fond of the child and concerned about her welfare and future, but in view of his business commitments not right or even practicable to disturb status quo regarding the child's custody.

15. In the instant case children are with the mother and it would not be proper to disturb the company and surroundings of the children.

16. Their Lordships of the Hon"ble Supreme Court in Ruchi Majoo Vs. Sanjeev Majoo, have laid down the tests for determining jurisdiction under section 9 of the Guardians and Wards Act, 1890 as under:

"[24] It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the "ordinary residence" of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy."

17. Their Lordships of the Hon"ble Supreme Court in Gaytri Bajaj Vs. Jiten Bhalla, have held that the interest and welfare of the minor should be treated as being of paramount consideration. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. Their Lordships have held as under:

"[14] It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the "ordinary residence" of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy."

18. Their Lordships of the Hon^{ble} Supreme Court in *Gaytri Bajaj Vs. Jiten Bhalla*, have held as under:

"[6] In the aforesaid facts and circumstances, we feel that if the children are forcibly taken away from the father and handed over to the mother, undoubtedly, it will affect their mental condition and it will not be desirable in the interest of their betterment and studies. In such a situation, the better course would be that the mother should first be allowed to make initial contact with the children, build up relationship with them and gradually restore her position as their mother.

[8] In the relevant facts and circumstances of the case, we are convinced that the interest and welfare of the children will be best served if they continue to be in the custody of the father. In our opinion, at present, it is not desirable to disturb the custody with the father. However, we feel that ends of justice would be met by providing visitation rights to the mother. In fact, during the hearing on 12.12.2011, Ms. Indu Malhotra, learned senior counsel for the petitioner-wife represented that if such visitation rights, namely, visiting her children once in a fortnight is ordered that would satisfy the petitioner-wife. Learned senior counsel also represented that if the said method materializes, the petitioner-wife is willing to withdraw all civil and criminal cases filed against the respondent-husband which are pending in various courts."

19. In the present case since serious allegations have been made by the petitioner against respondent N.1 of his being drug addict, the Court is of the considered view that the custody of the child should be with the mother.

20. Accordingly, in view of the analysis and discussion made hereinabove, the petition is allowed. Orders dated 18.8.2015 and 24.8.2015 are set aside. Learned Civil Judge (Senior Division) is directed to conclude the proceedings within six months from today. The parties through their counsel are directed to appear before the trial court on 26.10.2015. Pending application(s), if any, also stands disposed of. No costs.