

(2024) 04 CHH CK 0007
In the Chhattisgarh High Court
Case No : First Appeal (MAT) No. 26 Of 2021

K. Kiran Kumar

APPELLANT

Vs

Swaroop

RESPONDENT

Date of Decision : 02-04-2024

Acts Referred:

Family Courts Act, 1984 — Section 19(1)
Guardians and Wards Act, 1890 — Section 4, 5, 7, 8, 9, 10, 16, 17, 19, 25, 47
Code Of Criminal Procedure, 1973 — Section 97
Hindu Minority and Guardianship Act, 1956 — Section 4, 6
Hindu Marriage Act, 1955 — Section 13, 26/li>

Citation : (2024) 04 CHH CK 0007

Hon'ble Judges : Goutam Bhaduri, J;Radhakishan Agrawal, J

Bench : Division Bench

Advocate : Dr. N.K. Shukla, Saurabh Dangi, Palak Dwivedi, Sajal Kumar, Malay Shrivastava

Judgement

1. This appeal is by the husband under Section 19 (1) of the Family Courts Act, 1984 (for brevity 'the Act of 1984') read with Section 47 of the Guardians and Wards Act, 1890 (for brevity 'the Act of 1890') against the judgment dated 06.03.2021 passed by the First Additional Principal Judge, Family Court, Durg, C.G. in Misc. Civil Suit No.24/2020, whereby the application filed by husband under Section 25 of the Act of 1890 has been dismissed.

2. (i) Brief facts of the case are that on 24.05.2014, marriage of the appellant-husband was solemnized with the respondent-wife according to Hindu Rites and Rituals at Vijaynagram, Andhra Pradesh and out of their wedlock, Ku. Dakshata was born on 21.03.2015. It is alleged by the appellant that the respondent did not take care of her child and was always careless towards the child since birth. Upon consultation with psychiatrist, the appellant came to know that respondent is suffering from schizophrenia disease and thereafter she was taken to Citizen Hospital, Hyderabad where Dr. Anita Arya conducted her treatment for a long time. The respondent and her parents had left the child with the appellant for her

proper care. Thus, the daughter has been living under the protection of the appellant since the age of one year. When the appellant filed a divorce petition against the respondent before the Family Court, Durg in which proceedings respondent appeared and prayed for time to file written statement. Meanwhile, the respondent filed an application under Section 97 Cr.P.C. before SDM, Durg and got a warrant issued against the appellant seeking presence of her daughter.

(ii) It is alleged that the respondent subjected the appellant to mental harassment by way of abusing and threatening him and also used to create nuisance and used to quarrel with him over petty matters and always wanted to take her daughter back from his custody for which she used to issue threats in that regard and being fed up with the persistent ill-treatment, he filed a complaint before the concerned police station. In such a situation, the future of the minor daughter is not safe and secure in the hands of respondent as under her guardianship there is likely to have an adverse effect on both physical and mental development of the child whereas the appellant is fully competent to look after his daughter by bringing her up and educating her as he is working as Accountant. Therefore, being a natural guardian, custody of child be given to him.

3. Wife filed her written statement denying the plaint averments. She stated that after marriage, the appellant started mental harassment with her with respect to demand of dowry. It is pleaded by the respondent that at present, she is working in the office of ESIC and thus she is fully competent to take care of her child, rather appellant is very careless as also even not bothered to meet his daughter. She has further stated that the appellant is not capable to properly maintain and educate her daughter. Apart from that, it is stated by her that if the custody of her daughter is given to appellant, there would be negative impact on her. She has also stated that she is mentally & physically fit and thus capable to take care of her daughter as also to provide proper education and therefore, custody of minor child sought for by the husband may not be granted.

4. Learned Family Court after evaluating evidence adduced by both the parties, dismissed the application filed by the husband under Section 25 of the Act of 1890 while giving the custody of minor child to the respondent-mother taking into consideration the paramount welfare of the minor child.

5. Learned counsel for the appellant/husband submits that the Family Court ought to have considered the paramount interest of the minor child Ku. Dakshata. The Family Court has failed to appreciate that husband is a natural guardian and is entitled to get the custody of minor child. According to the husband, he is in a better position to provide proper education for bright future of daughter. It is contended that Family Court has failed to appreciate that wife has attitude of violent nature and is also suffering from schizophrenia and thus, impugned judgment passed by Family Court cannot be sustained in law and deserves to be set aside.

6. Per contra, learned counsel for the respondent/wife submits that being father

of the child, the appellant/husband is obliged to give more care and attention for the progress of child but she is not being given due care attention by the father. It is submitted that the father is very careless towards the daughter. He further submits that in fact, the appellant has no competence to provide better education for the daughter. It is contended that now the daughter is 9 years of age, therefore, at this stage keeping in view the comfort and convenience of the daughter, the assistance of mother is necessary as she is mentally and physically fit. The judgment of Family Court is just and proper, which does not call for any interference.

7. We have heard learned counsel for both the parties and perused the record of the Family Court as well as the documents attached with the appeal.

8. The statute which deals with the situation is the Guardian and Wards Act, 1890 and Section 4 of the Act of 1890 defines minor as a person who has not attained the age of majority. Guardian means a person having the care of the person of minor or of his property, or of both his person and property. Ward is defined as a minor for whose person or property or both, there is a guardian.

9. Chapter II (Sections 5 to 19) relates to appointment an declaration of guardians. Section 7 deals with the power of the Court to make order as to guardianship' and reads as under:

"7. Power of the Court to make order as to guardianship.-(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made--

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

10. Section 8 of the Act of 1890 entails the persons entitled to apply for an order as to guardianship. Section 9 empowers the Court having jurisdiction to entertain an application for guardianship. Sections 10 to 16 deal with procedure and powers of the Court. Section 17 is another material provision which is reproduced :

"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.

[***]

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

(emphasis supplied)

11. The Hindu Minority and Guardianship Act, 1956 (for brevity 'Act of 1956') is another equally important statute relating to minority and guardianship among Hindus. Section 4 defines "minor" as a person who has not completed the age of eighteen years. "Guardian" means a person having the care of the person of a minor or of his property or of both his persons and property, and inter alia includes a natural guardian. Section 2 of the Act declares that the provisions of the Act shall be in addition to, and not in derogation of the Act of 1890.

12. Section 6 of the Act of 1956 prescribes the procedure to appoint a natural guardian. It reads thus :

"6. Natural guardians of a Hindu Minor.-The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an 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;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl:- the mother, and after her, the father.

(c) in the case of a married girl:- the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.--In this section, the expressions "father" and "mother" do not

include a step-father and a step-mother.”

13. Section 8 enumerates powers of a natural guardian. Section 13 is an extremely important provision and deals with welfare of a minor. The same may be quoted in extenso :

“13. Welfare of minor to be paramount consideration .-(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.”

(emphasis supplied)

14. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

15. 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.

16. The Supreme Court in *Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others* (2019) 7 SCC 42 at paras 26 and 27 has observed that the welfare of the minor child is the paramount consideration. At para 27, referring to the law laid down in *Nil Ratan Kundu and Another v. Abhijit Kundu* (2008) 9 SCC 413, which further finds a reference in *Goverdhan Lal and Others v. Gajendra Kumar* AIR 2002 Raj 148, the Court held that while dealing with the child custody cases, the paramount consideration should be the welfare of child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. Paras 26 and 27 of *Tejaswini Gaud's* case (*supra*) are relevant and quoted below :

“26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.”

27. After referring to number of judgment and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment,

health, education, intellectual development and favourable surroundings, in Nil Ratan Kundu (2008) 9 SCC 413, it was held as under (SCC pp.427-28, paras 49-52)

"49. In Goverdhan Lal v. Gajendra Kumar, AIR 2002 Raj 148, the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominate consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live."

17. Therefore, it is the ultimate welfare of the child which would be dominant matter for consideration of Court when the Court is confronted with the conflicting demands made by parents, both demands are to be justified and cannot be decided on the legalistic basis and 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. It further held that the word 'welfare' used in Section 13 of the Act of 1956 has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Therefore, the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parents patriae jurisdiction arising in such cases.

18. Therefore, in the instant case, the averment of the husband that he being the father and natural guardian can be given a preference and welfare of minor would be the paramount consideration.

19. As per statement of appellant-husband (PW-1) K. Kiran Kumar, after birth of minor child, the respondent did not take care of her and used to be careless towards her child since birth. The behaviour of the respondent-wife is irritable and introverted nature. He has further stated that from the childhood the respondent has been advised to take medicines on account of Childhood trauma suffered by respondent. In addition to that she is suffering from schizophrenia disease and the treatment was given at Citizen Hospital where psychiatrist namely Dr. B. Trivedi of Bhilai has examined her. It has been further stated that during course of her treatment, his in-laws told him to take care of the minor child and since then he has been taking care of his minor daughter from the age of one year. He has stated that while the minor child was staying with him, the respondent started harassing him and used to threaten him on one pretext or other. Being fed up with the persistent ill-treatment meted out by the respondent-wife, he filed a complaint before the concerned police station, Mohan Nagar, but the police has refused to register his complaint on the ground that it is the matter of husband and wife and thereafter he filed a written complaint before the

Police Superintendent, Durg. Then, one fine morning, the respondent-wife forcibly entered his house and started residing there. On account of schizophrenia disease, her behaviour some times become violent and aggressive. In such a situation, the future of the minor daughter is not safe and secure in the hands of respondent as under her guardianship there is likely to have an adverse impact on both physical and mental development of the child. He has further stated that a civil suit was filed by him on 25.01.2020 in which he has filed an application for interim custody of the child wherein "till the filing of civil suit, the custody of child with him" were not mentioned, and further stated that the minor child stayed with him till 07.08.2020.

20. PW-2 Dr. B. Trivedi has stated that he has been working as psychiatrist in CIIMHANS Hospital, Devada for the last ten years. The appellant took the respondent to him where he has been told that respondent is not able to do daily routine work and her behaviour is self-harming and aggressive which she has been suffering for the last two years, then he has conducted mental status examination and during such examination, he found her to be irritable, introverted and apathetic in nature and advised her to get some medical tests. In his statement, he has been asked a question about what is meant by Evolving border line treitz and emotionally unstable personality disorder whereupon he has stated that self-image of patient remains disturbed and has a mentality of momentary passion, anger and self-harm.

21. Reiterating the pleadings in her statement, it has been specifically stated by DW-1 Swaroopa that she is mentally and physically fit for which she has filed an application (I.A. No. 07/2024) on 14.02.2024 for taking documents on record, which is considered and allowed. This apart, her financial sound is good, therefore, is fully competent to look after the child and further stated that if the custody of the child remains with the father, then it would be irreparable loss towards the future of minor child as he is very careless, therefore, at this stage keeping in view the comfort and convenience of the daughter, the assistance of mother is necessary. Similar is the statement of DW-2 P. Murli Krishna, brother of DW-1.

22. When we examine the statements of above witnesses, it is clear that marriage between the appellant and respondent was solemnized on 24.05.2014 and out of their wedlock, they were blessed with a one female child namely Ku. Dakshata. After her birth, some disputes and differences arose with respect to proper care of the minor child and that both leveled allegations against each other. For obtaining custody of child, appellant filed Misc. Civil Suit on 25.01.2020 which was dismissed by the Family Court, Durg while giving custody of the minor child to the mother. Meanwhile, since the relation between husband and wife entered into rough weather and blame game started, therefore, by mutual consent, the marriage between them was dissolved as is evident from judgment dated 25.11.2023 passed by the 3rd Additional Principal Judge, Family Court, Durg vide Annexure-C filed on behalf of respondent.

23. On 05.02.2024, when the case came up for hearing before this Court, it was decided by the Court to make interaction with the child in the chamber to know her wish as to with whom she wants to live. After interacting with the child, her statement was recorded and from perusal of her statement, it appears that the child was very clear and categorically expressed her desire to stay with her father for the reason that when she was staying with his father, she got plenty of love and affection from her father as well as from her grand-parents.

24. In the matter of Gaytri Bajaj vs Jiten Bhalla (2012) 12 SCC 471, it has been observed by the Supreme Court that the interest and welfare of the minor should be treated as being of paramount importance and held at 14 as under:-

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

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

"50. [T]hat 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 Mousmi Moitra Ganguli case, the Court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well-being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction arising in such cases."

26. Reiterating the well settled legal position that while deciding the dispute pertaining to custody of minor, Courts should keep in mind the paramount interest of the minor, the Supreme Court, in yet another decision rendered in *Purvi Mukesh Gada v. Mukesh Popatlal Gada* and another (2017) 8 SCC 819, has held that it was incumbent upon the High Court to find out the welfare of the children before passing the order regarding custody because the welfare of the child is the Supreme consideration in such matters.

27. In the present case, no doubt both the spouses are capable to look after the child, but as per the evidence available on record, it appears that the respondent-wife has aggressive nature. Although she has filed Medical Board Certificate issued by the District Hospital, Durg, but a perusal of the same shows that the same was filed in the Office for the joining as Staff Nurse and there is no reliable document on record to show that her mental and physical status so as to enable her to look after the child. However, looking to the welfare of the child being supreme consideration, this Court interacted with the child to know her wish, thereupon she has expressed her wish to stay with father. Therefore, considering the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values and considering the overall facts, we are of the opinion that looking to the paramount interest of the child, it would be proper and appropriate if the father (appellant) holds the custody of the child and we order accordingly. In view thereof, the finding arrived at by the learned Family Court with respect to custody of child to be with mother is set aside.

28. Now coming back to the visiting rights of mother, the visitation rights, was considered by the Supreme court in the case of *Yashita Sahu Vs. State of Rajasthan* and Ors. (2020) 3 SCC 67 reported in wherein while adjudicating likewise issue, it was observed that it is always the child who is the victim in the custody battle. It further held in the fight of egos and increasing acrimonious battles and litigation between two spouses, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to get the custody of the child. The court observed that the child of tender years requires the love, affection, company, protection of both the parents. It further held that it is natural requirement of the child which is his/ her basic human right just because the parents are at war with each other, it does not mean the child should deny the care, affection, love or protection of any one of the two spouse. It further held that a child is not an inanimate object which

can be tossed from one parent to the other and after every separation, every reunion may have a traumatic and psychosomatic impact on the child.

29. The Supreme Court in the case *supra* further held even after the custody is given to one parent, the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Evaluating the evidence in this case, it do not show any extreme circumstances whereby one parent for all practical purposes can be denied to meet the child. The evidence which is on record would show that both the wife and husband though are living separately and the custody of the child is with wife no allegations have been made against each other by husband and wife, therefore the reasons for both the husband and wife residing separately is not clear or has surfaced. The Supreme Court in the case *supra* further observed that the concept of "visitation rights" is not fully developed in India. Most of the courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. The Supreme Court held that the child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

30. In addition to "visitation rights", the court observed that the "contact rights" is also important for the development of the child especially in cases where both the parents live in different places, the concept of contact rights in the modern age would be contacted by telephone, e-mail or in fact we feel the best system of contact, if available between the parties should be video calling. It observed that with the increasing availability of Internet, and the courts dealing with the issue of custody of child must ensure the parent who has denied the custody of the child should be able to talk to his / her child as often as possible. It held that the communication will help in maintaining and improving the bond between the child and the parent who is denied the custody. If that bond is maintained, the child will have no difficulty in moving from one home to another during vacations or holidays. The purpose was held that the court cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each.

31. In *Ritika Sharan v Sujoy Ghosh* 2020 SCC OnLine SC 878, the Supreme Court has held that a balance has to be drawn so as to ensure that in a situation where the parents are in a conflict, the child has a sense of security. The interests of the child are best served by ensuring that both the parents have a presence in his/her upbringing.

Goutam Bhaduri, J

32. I had the advantage of going through the draft judgment of my esteemed brother Justice Radhakishan Agrawal. Though, broadly I subscribe to the views

expressed by His Lordship on various principles and facets as expressed in the judgment, but looking to the great importance of issues involved, I have penned my reasons for my views expressed.

33. The Supreme Court in the matter of *Smriti Madan Kansagra v Perry Kansagra* (2021) 12 SCC 289 repeatedly held that best interest of the child is required to be considered. The Court observed that to decide the issue of the best interest of the child, the Court would take into consideration various factors, such as the age of the child; nationality of the child; whether the child is of an intelligible age and capable of making an intelligent preference; the environment and living conditions available for the holistic growth and development of the child; financial resources would be a deciding factor. The Supreme Court held thus at paras 15.5 and 15.6 :

15.5. To decide the issue of the best interest of the child, the Court would take into consideration various factors, such as the age of the child; nationality of the child; whether the child is of an intelligible age and capable of making an intelligent preference; the environment and living conditions available for the holistic growth and development of the child; financial resources of either of the parents which would also be a relevant criterion, although not the sole determinative factor; and future prospects of the child.

15.6. This Court in *Nil Ratan Kundu v. Abhijit Kundu* [*Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413] set out the principles governing the custody of minor children in para 52 as follows : (SCC p. 428)

“Principles governing custody of minor children

52. 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 the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human 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 *parens 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. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.”

34. Similarly, the Supreme Court in the matter of *Mausami Moitra Ganguli v Jayant Ganguli* (2008) 7 SCC 673, held that while determining the question as to

which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute and each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents. The Court observed that the children are not mere chattels; nor are they mere play things for their parents. The Supreme Court held thus at paras 19 to 22 :

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

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

21. In *Rosy Jacob v. Jacob A. Chakramakkal* [(1973) 1 SCC 840] a three-Judge Bench of this Court in a rather curt language had observed that : (SCC p. 855, para 15)

"15. ... The children are not mere chattels : nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them."

22. In *Halsbury's Laws of England* (4th Edn., Vol. 13), the law pertaining to the custody and maintenance of children has been succinctly stated in the following

terms:

"809. Principles as to custody and upbringing of minors.—Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

35. With such background and on the basis of principles laid down by the Supreme Court, the conversation was made with the child. The entire conversation, which took place in the chamber is relevant and the same is quoted below :

36. Perusal of the entire conversation would show that though the child is in the custody of mother, she has made allegation that her mother is a careless person and she used to beat her. She is being taken by her mother to the hospital wherein she is scared after seeing the dead bodies. She further stated that she is being tutored the abusive words. According to the child, her mother also used to beat her Nani. Her Mama used to beat her mother, though he is younger to her. The girl further showed her injuries as also the marks of old injuries. Whereas with respect to father, the girl stated that she was kept very well and her grandparents (dada dadi) also used to take care of her and used to love her. She also stated that whatever she has stated herein should not be disclosed to her mother otherwise she would be beaten and she do not want to stay with her mother and want to stay with her father. The said statement was made by the girl despite the fact that she was in the company of the mother when the appeal was heard.

37. The Supreme Court in the matter of Nil Ratan Kundu (supra) held that if the minor child is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor. In the instant case the custody of child on monetary well off is not a big issue, as both the parents are working. On the other hand, the interaction made with the child by the Judges paints the picture otherwise. When the preference is evaluated it do not stand up to the objective scrutiny to hold a sway in favour of the mother. The affirmative actions have been stated by the child against the mother which naturally, in our opinion, would affect the mind of the child.

38. The statement potentially demonstrates that eventually the child has to bear the burnt and continuation of custody of the child with the mother henceforth would not be proper. In the alternative it will deprive the daughter of her mental

development in the environment so placed, therefore, we order that the custody of the child be handed over to the appellant-father.

39. Since the child has expressed her fear that in case her mind is disclosed to the mother she would be beaten, her fear might looms large in her mind. Thus, we deem it proper to send a copy of this judgment to the concerned Secretary, DLSA, forthwith, who will ensure the safety of child for her proper protection.

40. Therefore, following the principles laid down in the case of Yashita Sahu v State of Rajasthan and Ors. (2020) 3 SCC 67 and in the case of Ritika Sharan v Sujoy Ghosh 2020 SCC OnLine SC 878, we hereby order to facilitate the grant of visitation and contact right to mother. The following arrangement shall be drawn by both the appellant and the respondent as father and mother:-

The respondent-mother would be able to engage with the child on a suitable video conferencing platform for one hour every Saturday and Sunday and 5-10 minutes on other days.

Both the respondent-mother and the appellant-father in order to facilitate the video conferencing in between shall procure smart phones which would facilitate the inter se video calling.

Every month preferably on 2nd Saturday and 2nd Sunday and on a festival day, the father shall allow the child to visit her mother.

41. In the result, the appeal is allowed. There shall be no order as to cost(s).

42. A decree be drawn up accordingly.

43. Now coming back to the social media publications. After the case was reserved for judgment, an application was filed by the respondent for appropriate action for tampering the live streaming Court proceedings of the Court. Certain copies of social media messages were also annexed with application. Some of the derogatory comments are as under :

I can hear cries in his voice... that lady deserves special place in hell.

Absolutely ridiculous decision. If the mother's income is fair, she cannot ask for alimony.

Be immensely careful of the woman you choose to marry & plan a family with. I would not wish this day even on my worst enemy.

So basically one qualification to be a Judge is to be stupid and unrealistic ?

Don't be surprised if this man and his mother is sent to jail for mental cruelty towards this woman.

The judges are mostly men, why can't they see pain of other man instead of being biased towards one Gender, let's treat culprit be culprit and victims be

victim.

C ho kya judge

I'd request my honourable and respected Judiciary System to put that man and his mother behind the bars for the harassment and mental agony caused to the wife. I hope the wife will get justice from this super intelligent Judge.

Judge giving judgment after he got beaten by wife in morning.

Maybe after sleeping with victim's wife.

44. It appears that "Judge bashing" and using derogatory and contemptuous language against the Judges and Lawyers has become a favourite pastime of some people. These statements tend to scandalize and lower the authority of the Courts and cannot be permitted because, for functioning of democracy, an independent judiciary to dispense justice without fear and favour is paramount. While fair and temperate criticism of the Court even if strong, may not be actionable, but attributing improper motives or tending to bring Judges or Courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must be and will be taken.

45. The Supreme Court in the matter of R.C. Cooper v Union of India AIR 1970 SC 1318 observed that those who err in their criticism by indulging in vilification of the institution of Court, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril.

46. The Supreme Court in the matter of Advocate General, State of Bihar v Madhya Pradesh Khair Industries (1980) 3 SCC 311 held thus :

".....It may be necessary to punish as a contempt a cause of conduct which abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of justice. The public have an interest, an abiding and a real interest, and vital stake in the effective and orderly administration of justice, because unless justice is so administered, there is the peril of all rights and liberties perishing. The Court has the duty of protecting the interest of the public in the due administration of justice and, so, it is entrusted with the power to commit for contempt of Court not in order to protect the dignity of the Court against insult or injury as the expression "Contempt of Court" may seem to suggest but to protect and to vindicate the right of the public and the administration of justice shall not be prevented, prejudiced, obstructed or interfered with."

47. Lord Diplock, speaking for the Judicial Committee in Chokolingo v. Attorney General of Trinidad and Tobago (1981) 1 All ER 244, summarized the position thus:

"Scandalising the Court is a convenient way of describing a publication which,

although it does not relate to any specific case either part of pending or any specific Judge, is a scurrilous attack on the judiciary as a whole which is calculated to undermine the authority of the Courts and public confidence in the administration of justice. Thus, before coming to the conclusion as to whether or not the publication amounts to a contempt, what will have to be seen is, whether the criticism is fair, temperate and made in good faith or whether it is something directed to the personal character of a Judge or to the impartiality of a Judge or court. A finding, one way or the other, will determine whether or not the act complained of amounted to contempt."

48. Judiciary is the bed rock and handmaid of democracy. If people lose faith in justice parted by a Court of law, the entire democratic set up would crumble down. In this background, observations of Lord Denning M.R. in *Metropolitan Properties Ltd. v. Lennon* (1968) 3 All ER 304 are relevant: "Justice must be rooted in confidence, and confidence is destroyed when right minded people go away thinking - the Judge is biased."

49. In *Brahma Prakash Sharma and others v The State of Uttar Pradesh* AIR 1954 SC 10, the Supreme Court after referring to various decisions of the foreign countries as well as of the Privy Council stated thus:

"It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice, or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmative that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely or tends in any way to interfere with the proper administration of law."

50. The Supreme Court in the matter of *Swapnil Tripathi v Supreme Court of India* (through Secretary General) (2018) 10 SCC 639 has considered the aspects of live streaming of Court proceedings in other countries like Australia, Canada, China, England, European Court of Human Rights (ECHR), Germany, International Criminal Court (ICC), Ireland, Israel, New Zealand, Scotland, South Africa, United States of America and issued certain guidelines for live streaming and further it held thus at paras 8, 9 & 54 :

8. Indubitably, live streaming of court proceedings has the potential of throwing up an option to the public to witness live court proceedings which they otherwise could not have due to logistical issues and infrastructural restrictions of courts; and would also provide them with a more direct sense of what has transpired. Thus, technological solutions can be a tool to facilitate actualisation of the right of access to justice bestowed on all and the litigants in particular, to provide them virtual entry in the court precincts and more particularly in courtrooms. In the process, a large segment of persons, be it entrants in the legal profession,

journalists, civil society activists, academicians or students of law will be able to view live proceedings in propria persona on real time basis. There is unanimity between all the protagonists that live streaming of Supreme Court proceedings at least in respect of cases of constitutional and national importance, having an impact on the public at large or on a large number of people in India, may be a good beginning, as is suggested across the Bar.

9. Live streaming of court proceedings is feasible due to the advent of technology and, in fact, has been adopted in other jurisdictions across the world. Live streaming of court proceedings, in one sense, with the use of technology is to "virtually" expand the courtroom area beyond the physical four walls of the courtrooms. Technology is evolving with increasing swiftness whereas the law and the courts are evolving at a much more measured pace. This Court cannot be oblivious to the reality that technology has the potential to usher in tangible and intangible benefits which can consummate the aspirations of the stakeholders and litigants in particular. It can epitomise transparency, good governance and accountability, and more importantly, open the vista of the courtrooms, transcending the four walls of the rooms to accommodate a large number of viewers to witness the live court proceedings. Introducing and integrating such technology into the courtrooms would give the viewing public a virtual presence in the courtroom and also educate them about the working of the court.

54. It may be desirable to keep in mind other measures to be taken for efficient management of the entire project such as:

54.1. Appoint a technical committee comprising the Registrar (IT), video recording expert(s) and any other members as may be required, to develop technical guidelines for video recording and broadcasting court proceedings, including the specific procedure to be followed and the equipment to be used in that regard.

54.2. Specialist video operator(s) be appointed to handle the live broadcast, who will work under the directions of the court concerned. The coverage itself will be coordinated and supervised by a court-appointed officer.

54.3. The focus of the cameras in the courtroom will be directed only towards two sets of people:

54.3.1. The Justices/Bench hearing the matter and at such an angle so as to only show the anterior-facing side of the Justices, without revealing anything from behind the elevated platform/level on which the Justices sit or any of the Justices' papers, notes, reference material and/or books;

54.3.2. The arguing advocate(s) in the matter and at such an angle so as to not to reveal in any way the contents of notes or reference material being relied upon by the arguing advocate(s). This will also apply to parties-in-person arguing their own matter;

54.3.3. There shall be no broadcast of any interaction between the advocate and the client even during arguments.

54.4. Subject to any alteration of camera angles for the purpose of avoiding broadcast of any of the aforesaid papers, notes, reference materials, books and/or discussions, the camera angles will remain fixed over the course of the broadcast.

54.5. This Court shall introduce a case management system to ensure inter alia that advocates are allotted and adhere to a fixed time-limit while arguing their matter to be live streamed.

54.6. This Court must retain copyright over the broadcasted material and have the final say in respect of use of the coverage material.

54.7. Reproduction, re-broadcasting, transmission, publication, re-publication, copying, storage and/or modification of any part(s) of the original broadcast of court proceedings, in any form, physical, digital or otherwise, must be prohibited. Any person engaging in such act(s) can be proceeded under, but not limited to, the Copyright Act, 1957, the Penal Code, 1860, the Information Technology Act, 2000 and the Contempt of Courts Act, 1971.

51. The nature of comments made do not aid to improve the justice delivery system. It indirectly extends threat to lawyers and tarnishes the image of the Courts and it is easy to pass a comment for a mint fresh attention on the fence without realizing the facts and to have a misplaced sense of collective pride. Therefore, considering the entire facts situation, we refer the matter to the Registrar General of this Court, who will in coordination with the Registrar (Computerization)/CPC, take appropriate measures in respect of scripts with flaws and if need be contempt notices be issued to the persons who posted the proceedings of the Court in the social media and who made the derogatory comments against the pleading Advocates, Court and the Judges, after identifying them with the help of Cyber Cell Team of the State of Chhattisgarh. Thereafter, Registrar (Judicial) is directed to register appropriate proceedings separately and place it before this Court.