
(2025) 10 OH CK 0010

Orissa HC

Case No: GUAP No. 13 Of 2024

Ajay Kumar Nanda @
Pintu

APPELLANT

Vs

Ashok Kumar Padhee
& Ors

RESPONDENT

Date of Decision: Oct. 23, 2025

Acts Referred:

- Guardians And Wards Act, 1890 — Section 17(3), 17(5), 25, 47
- Code Of Criminal Procedure, 1973 — Section 97
- Indian Penal Code, 1860 — Section 34, 302, 304(B), 498(A)
- Hindu Minority And Guardianship Act, 1956 — Section 13

Hon'ble Judges: G. Satapathy, J

Bench: Single Bench

Advocate: A. Mishra, S.P. Mishra, S. Mishra

Final Decision: Dismissed

Judgement

G. Satapathy, J

1. This appeal U/S.47 of the Guardians & Wards Act, 1890 (in short "the act") seeks to handover the custody of the child to the father-cum-appellant by removing him from the custody of maternal grandparents and uncle-cum-Respondent No.1 to 3 by setting aside the impugned order dated 31.08.2024 passed by learned Judge Family Court, Jharsuguda in GP No.05 of 2015 dismissing the claim of the father-appellant by continuing the lawful custody of the child with maternal grandfather- cum-R-1 till he attains majority with visitation right to the father-appellant on holidays or any other days with prior notice to grandfather, with further permission to the father-appellant to take the child out of the house of R-1 to 3 for recreation, entertainment or for shopping with concurrence of the child, in an application U/S.25 of the Act.

2. The brief facts involved in this case are that the appellant-Ajay Kumar Nanda @ Pintu is admittedly the husband of late Lipika Padhee, who was the daughter of R-1 and 2 and their marriage was solemnized on

5. 12.2013 and out of their wedlock, they were blessed with a child namely Rikun @ Rihaan on 26.09.2014 and thereafter, the R-1 and 2 took Lipika and the newly born baby to their house at Khajurtikra, Bargarh

after her discharge from the hospital (Patel Nursing Home, Burla) where the child was born. According to the appellant, he got information from R-1 over phone in the night on 29. 09.2014 about the ill health condition of Lipika and their child and both were removed directly to Jagyesini Hospital, Jharsuguda from Bargarh and on 03.10.2014, both mother and son after being discharged from Jagyesini Hospital were brought back to the house of the appellant at Buromal, Jharsuguda, but unfortunately the health condition of Lipika deteriorated and she passed away in the night of the same day on 03.10.2014 at DHH, Jharsuguda due to heart failure on account of Hypertension and Pulmonary Oedema. The death of Lipika was immediately intimated to R-1 over phone and his relatives reached at the house of the appellant and alleged against the appellant and his parents and other to have committed murder of Lipika by lodging an FIR at Jharsuguda Police Station on 04.10.2014 at about 09AM resulting in registration of Jharsuguda PS Case No.370 of 2014 corresponding to GR Case No.1380 of 2014 in which case the appellant was arrested.

2.1. It is alleged by the appellant that taking advantage of his arrest, R-1 to 3 and their relatives took away the newly born baby with them to their house at Bargarh with his credit card which was subsequently used by the Respondents for purchasing gold ornaments and on 01.11.2014, the elder brother of the appellant approached the police with an FIR, but his effort remains in vain, and thereafter the appellant filed a complaint against R-1 to 3 and four others in 1CC No.260 of 2015 before the learned SDJM, Jharsuguda. For the custody of the child, the appellant also approached the sub-Collector, Jharsuguda in an application U/S.97 of CrPC which was registered as case number 196 of 2014, which was allowed, but R-1 and 2 preferred Criminal Revision No.04 of 2015, which was allowed, but the appellant unsuccessfully challenged such order by preferring Criminal Revision No.231 of 2015 before this Court.

2.2. According to the appellant, a settlement was made between the parties and a compromise agreement was executed on 07.04.2016 and pursuant to such compromise agreement, R-1 to 3 handed over the custody of the minor child to the appellant on 30.01.2017 and the child was accordingly admitted at FUN School at Sarbahal, Jharsuguda on 14.03.2017 and R-1 to 3 were also visiting to the house of the appellant to meet the child at some intervals, but it is alleged by the appellant that on 01.05.2017, R-3 along with his friends came to the house of the appellant and forcibly took away the child and the appellant accordingly lodged an FIR vide Jharsuguda PS Case No.251 of 2017 for removing his child from his lawful guardianship and also approached the CWC, Jharsuguda on 05.05.2017. It is further stated by the appellant that he made several efforts for return of the child, but in vain and in the 1st week of November 2017 when the child fell seriously ill, the appellant and his parents on being requested by R-1 to 3 over phone went to Bargarh and brought the child to Sambalpur and got the child admitted in Astha Nursing Home on 05.11.2017 and when the child was discharged on 08.11.2017 after treatment, the appellant paid the entire bill amount of the Nursing Home, but thereafter R-1 to 3 took away the child to Bargarh despite objection of the appellant.

2.3. The appellant claiming himself to be the natural guardian of the child has sought for the custody of the child by filing an application U/S.25 of the Act before the learned Judge Family Court, Jharsuguda in GP No.05 of 2015, which was resisted to by R-1 to 3 by alleging against the appellant and his family members for subjecting Lipika to physical and mental torture by demanding dowry of Rs.10,00,000/- and other articles. It is also alleged by R-1 to 3 that the in-laws of Lipika forcibly took her child to their house at Jharsuguda from the hospital in their absence and on 04.10.2014 gave poison to Lipika for which she died and thereafter, Jharsuguda PS Case No.370 of 2014 was registered against the appellant and his family members on their complaint for commission of offences U/Ss.498(A)/304(B)/302 and r/w Sec.34 of IPC. According to R-1 to 3, the learned Judge Family Court, Jharsuguda disposed of GP No.05 of 2015 by directing R-1 to 3 to give the custody of the child to the appellant, for which, being aggrieved, they have filed CMP No.1599 of 2018 before this Court which was allowed and the order passed in GP No.05 of 2015 was set aside and the matter was remitted back for fresh consideration. It is also claimed by R-1 to 3 that the High Court had directed to R-1 to 3 to appear personally with the minor child before this Court and after personally examining the child in the Chamber, this Court has dispensed with the personal appearance of the parties vide order dated 06.02.2019. According to R-1 to 3, the appellant has filed this Case intending to escape from the guilt of his misdeed, but the appellant has no real intention to take the custody of the child and maintain the child with care, love and affection. On the aforesaid assertion, R-1 to 3 had prayed to dismiss the guardian petition in GP No.05 of 2015.

3. On consideration of rival pleadings of the parties, the learned Judge Family Court has framed various issues inter alia the pivotal issue; whether the best interest of the child can be served in the company of the petitioner (appellant) or the OPs (R-1 to 3) ?. In the proceeding before the learned Judge, Family Court, Jharsuguda for custody of the child, both the parties had led oral and documentary evidence. Accordingly, the appellant has examined himself and another as PW.1 and 2 and proved 32 documents vide Exhibits 1 to 32 as against the oral evidence of R-1 and R-3 and documentary evidence of exhibits A to T by R-1 to 3. The OP No.4 (R-4) being the State represented by the District Magistrate and Collector, Jharsuguda has neither contested the case nor has led any evidence.

4. After having considered the rival pleadings and evidence upon hearing the parties and analyzing the same with reference to the provision of law, the learned Judge Family Court, Jharsuguda by the impugned judgment has dismissed the claim of the appellant and being aggrieved, the appellant is before this Court in this appeal.

5. Rival counsels have advanced extensive oral arguments in addition to filing written notes of submissions and citations, but the arguments which require consideration in the context of existing the custody dispute between the parties are stated hereinafter. In support of the claim for custody of the child, Mr. Asutosh Mishra, learned counsel appearing for the appellant-father has inter alia urged the following points:-

(i) R-1 & 2 being the elderly maternal grandparents and R-3 being the married maternal uncle having own child cannot be considered to be best persons to continue with the custody of the child for its best interest, but the appellant being the father and residing in joint family can look after the welfare of the child in best possible way and the child was in fact enjoying the company of the appellant and his family members during its short stay with them.

(ii) R-1 to 3 have never allowed the appellant to meet the child-cum-his son despite direction of this Court and the child was never brought to the mediation center even for once and the mediation failed due to non-attendance of the respondents and therefore, the plea of respondents about the appellant not having shown any keen interest for his son is nothing, but a bald statement.

(iii) In a custody matter, the child's opinion is not the sole determinative factor, but welfare of the child is paramount consideration and a child of 10 years age as in this case can never be able to decide how and where his future is secured and where his interest is best protected.

(iv) There is no materials to indicate that the appellant-father is unfit to take care of the child and the learned trial Court having found the appellant to be financially sound in paragraph 35 of the impugned judgment, it should have considered the appellant to be squarely fit and financially sound to take care of the custody of the child and in view of the provision of the Act, the Court should not have continued the custody of the child with R-1 to 3.

(v) The case of the appellant is squarely covered by the judgments in Vivek Kumar Choudhary and another Vs. State of UP and others; 2025 INSC 159 and Tejaswini Gouda Vs. Sekhar Jagdish Prasad Tiwari & others; AIR 2019 SC 2318.

5.1. Mr. S.P. Mishra, learned Sr. Counsel who is being assisted by Mr. S. Mishra, learned counsel for R-1 to 3 has inter alia urged the following points in support of the impugned order:-

(i) In a matter concerning the dispute of the custody of a minor child, the best interest of welfare of such minor child is paramount consideration and the learned trial Court has rightly held the best interest of welfare of the child with the grandparents by interpreting the law which in fact finds support from the decision in Anjali Kapoor Vs. Rajib Baijal; (2009) 7 SCC 322, Sheoli Hati Vs. Somnath Das; (2019) 7 SCC 490, Rosy Jacob Vs. Jacob A. Chakramakkal, (1973) 1 SCC 840 & Nil Ratan Kundu & another Vs. Abhijit Kundu; (2008) 9 SCC 413.

(ii) The impugned judgment not only underscores the importance of the child express preference/consent, but also mirrors the circumstances of the present case where the child has expressed a clear emotional bond

with the maternal relatives and its unwillingness to reside with biological father.

(iii) The father being the natural guardian is not the sole decisive factor to decide the custody of the child, especially when the child is unwilling to stay with his father and his custody being with the grandparents since the time of his birth till today.

(iv) The grandparents being financially sound and the child being continuously residing with them, it would not be in the best interest of child to change its custody to father after such a long gap of around 11 years.

6. After having bestowed an anxious and careful consideration to the rival submission upon perusal of record, before delving the present matter on merit, it is to be reminded that the principal consideration in deciding a matter for custody of a minor child like in this case in exercise of parens patriae jurisdiction of the Court would be the "best welfare" of such minor child. The aforesaid principle is in fact backed by the provisions of law which flows from Sec.17 of the Act and the same is extracted as under:-

Section 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 parents, 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.

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

7. The aforesaid principle of welfare of minor to be paramount consideration gets statutory recognition from Sec.13 of the Hindu Minority and Guardianship Act, 1956 which prescribes that in 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 and Sub Sec.2 of it limits that no person shall be entitled to be guardianship by virtue of the provision of this Act or any law relating to guardianship in marriage among Hindus, if the Court is of the opinion that his or her guardianship will not be the welfare of the minor. In this context what would be the parameters of welfare of a minor and the principles that is required to be considered by the Court has been succinctly laid down by Apex Court in Nil Ratan Kundu (supra) wherein, while deciding the question of the custody of the minor children, the Apex Court in Paragraphs 52, 55 & 57 has held as under:-

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 wellbeing 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.

¶55. We are unable to appreciate the approach of the courts below. This Court in a catena of decisions has held that the controlling consideration governing the custody of children is the welfare of children and not the right of their parents.¶

¶57. In our opinion, in such cases, it is not the "negative test" that the father is not "unfit" or disqualified to have custody of his son/daughter that is relevant, but the "positive test" that such custody would be in the welfare of the minor which is material and it is on that basis that the court should exercise the power to grant or refuse custody of a minor in favour of the father, the mother or any other guardian.¶

8. In Rosy Jacob (supra) the Apex Court in paragraph no.15 has held as under:-

¶15. "The contention that if the husband (father) is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading.¶

8.1. How to assess the welfare of the child in a lis for custody has been discussed and well clarified by Apex Court in the decision in Col. Ramneesh Pal Singh Vrs. Sugandhi Aggarwal; 2024 IN SC 397, wherein at paragraph 12 the Apex has held as under:-

¶12. Accordingly, in view of the aforesaid not only must we proceed to decide the present lis on the basis of a holistic and all-encompassing approach including inter alia (i) the socio-economic and educational opportunities which may be made available to the Minor Children; (ii) healthcare and overall-wellbeing of the children; (iii) the ability to provide physical surroundings conducive to growing adolescents but also take into consideration the preference of the Minor Children was mandated under Section 17(3) of the Act. Furthermore, we are equally conscious that the stability of surrounding(s) of the Minor Children is also a consideration to be weighed appropriately.¶

9. The logical conclusion that flows from the precedents as referred to above and the provision of law is that the welfare of the child is paramount consideration in deciding the custody dispute of the children between the parties, but what would be the best interest of child lies in its welfare. It cannot be disputed or denied that children are the gift of the god and future of the nation and probably the purest in the society, but at the same time are easily subject to tutoring or getting biased by their near and dear, however, the toughest decision for a Court is to decide the custody of the child more particularly in a matrimonial dispute between the parties inasmuch as one wrong decision would ruin the life of the child, so also deprive the society from getting the service of such child when he would become young. Children are innocent, but they become vulnerable in custody disputes since a right decision in deciding custody of the child would take him to zenith, but wrong decision would throw him to nadir. Besides, deciding the custody dispute of the children between their parents and their in-laws is most difficult job inasmuch as a child is not an inanimate object like a ball in tennis court to be tossed from one side to other side till a point is scored and, therefore, while deciding a custody matter, a Court is to very careful and cautious to decide the same without any biases and prejudices in finding out the best welfare of the child. In addition, while deciding the welfare of the child in custody matter, it is equally important to see the right of the child to love, affection, protection and guidance and in case the welfare of the child so demands, the technical objection cannot come in the way and the Court is required to decide the best welfare of the child on the basis of what is the best for the child. Child especially of tender age of 10 years requires love, affection, company and guidance and these are not only requirement of the child, but also its basic human rights and need.

10. Keeping in view the avowed object of welfare of the child which is the sole determinative factor in deciding the custody matter in the light of the settled principles as discussed above by prioritizing the needs of the child, it appears in this case that the learned trial Court in deciding the custody of the minor child has predominately considered the core issue of the best interest of the child which appears to be the correct approach, since the welfare of minor child is to be considered in the background of facts and circumstances of each case irrespective of precedents as it differs in factual situation. True it is that a father in law to be presumed to be the better suited to look after the welfare of the child, but it has got no universal application and the custody of child can be given to other relatives, if the welfare of the child so demands. Law is also

well settled that while dealing with the custody matter, a Court is neither bound by the statutes nor by strict rules of evidence or procedure nor by precedents as held in Nil Ratan Kundu (supra) and the Court is required to give due weightage to child ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. In addition, the socio economic and educational opportunity which may be made available to the minor child, health care and overall wellbeing of the child, ability to provide physical surroundings conducive to growing adolescence and the preference of minor child as mandated U/S.17(3) of the Act, so also the stability of the surroundings of the minor child are to be weighed properly. From the admitted pleadings and evidence, there are no disputes about the appellant marrying with the daughter of the R-1 & 2, a child born out of their wedlock and the mother of the child dying within a week of delivery. It is also a fact that on the next date of the death of the wife, a FIR was lodged against the appellant at Jharsuguda which was registered vide PS Case No.370 of 2014 and the custody of the child remained with R-1 to 3 from its birth, but if the assertion of the appellant is to be believed, the custody of the child was handed over to the appellant on 30.01.2017 and such custody of the child continued till 01.05.2017 with the appellant and thereafter, as per the allegation of the appellant, the child was forcibly taken away from the house of the appellant on 01.05.2017 and the child is in the custody of R-1 to 3 till today since then. The above narration of the pleadings of the appellant reveal that the custody of the child was with him only for around three months, but right now the child is about to complete 11 years, however, the evidence and admitted pleadings go to disclose the bitter relationship between the parties. The learned trial Court has found from the evidence that the child is residing with R-1 to 3 and they have observed all the ceremonies like 21st day of birth(Ekoisia), Namakaran(Naming ceremony) and Annaprasanna, which was never demolished/disputed by the appellant. It is also not disputed that the child is continuing his education at Bargarh. It is also found from the evidence and pleadings on record that the child is continuously residing in his maternal uncle's house since birth till today except for a brief period of around three months from 30.01.2017 to 01.05.2017 when he was 2 years and 7 months and some days old and therefore, it would not be exaggerated to say that the child must be acquainted with the people and environment of the locality i.e. Bargarh and it would be detrimental for the child to swap his custody to appellant only to see him in a new environment without any compelling reason and unless the environment of the child is not conducive to grow or is for his wellbeing, he should not normally be compelled to change his environment and, therefore, the stability of the surroundings of the minor child in this case is considered to be better for him at Bargarh.

11. One of the important factors to be looked into in the matter relating to custody dispute of children is the socio economic and educational opportunity which may be made available to the minor children, but it appears from the pleadings and evidence on record in this case that both the parties are financially sound and at present R-1 to 3 are providing educational support to the minor child at Bargarh, however, it is not disputed by the appellant that R-1 to 3 are financially not self-sufficient to provide better education to the child in question and it is also elicited from the mouth of OPW1(R-3) in cross-examination at Paragraph-28 that he is a Graduate, so also his father and his mother is an intermediate. It, therefore, goes to say that R-1 to 3 are educated persons and they can well support the child in question for his education at home after the school hour. Similarly, while coming to the other factors of health care and overall wellbeing of the child and the ability to provide physical surroundings conducive to growing as adolescent, it appears that both the parties are financially sound, but the child in question is in custody of R-1 to 3 from its birth till today except for a brief period of three months as claimed by the appellant, which has not been properly established and R-1 to 3 has no disqualification in providing healthcare and overall wellbeing to the child, so also physical comforts to it. These factors squarely favour R-1 to 3 for keeping the child in their custody as compared to the appellant who although being financially sound and not unfit to keep the child in his custody, but has failed to succeed the "positive test" as contemplated in Paragraph-57 of Nil Ratan Kundu (supra). On coming to the intelligent preference of the child in question, it is settled by law that the version of the child in the matter of custody dispute cannot be the sole decisive factor, but at the same time it is one of the dominant considerations as provided in Sec. 17(3) of the Act while granting or refusing custody of the child inasmuch as child of tender age may have the capacity to express their intelligent preference, but such preference has to be considered along with other circumstance as required for deciding the welfare of the child. The contention of the appellant in this case is that a child of 10 years can never decide how and where his future is better secured and where his interest is best protected, but the aforesaid submission itself speaks about the stand of the appellant against the preference of the child and the learned trial Court while deciding the welfare of the child has personally interacted with the child in question who

during such interaction in presence of the parties could not recognize the appellant-father as stated by the learned trial Court in the impugned judgment. It is also stated by the learned trial Court that during interaction with the child exclusively in the Chamber in absence of both the parties, the child appears to be more mature than his age and expressed that he is not willing to live with his father nor he is willing to go to the house of his father. It is also in dispute that the child in question was in fact produced before this Court in another proceeding in CMP No. 1599 of 2018 in earlier litigation between the parties where the learned trial Court by the impugned judgment therein has granted custody of the child to the appellant, but such judgment was successfully challenged by R-1 to 3 in this Court and the matter was remitted to the learned trial Court for fresh decision for the custody of the child, however, the child in question had come to this Court in the said proceeding along with his maternal grandfather, who was petitioner in CMP and maternal grandmother, but no order sheet was recorded with regard to the preference of the child. It is, however, submitted by Mr. Mishra, learned counsel for the appellant that when the child was produced before this Court on 06.02.2019, he was around four years and some month and, therefore, he might not be in a position to express his preference. Be that as it may, since the preference of the child in question was not recorded by this Court when he was produced on 06.02.2019 in CMP No. 1599 of 2018, this Court has only left with the opportunity to take the observation of the learned trial Court with regard to preference of the child in question, inasmuch as the same being not disputed by the appellant by producing any material to that effect and, therefore, it can be considered that the child has expressed his preference on 25.06.2024 before the learned trial Court to be interested in staying with R-1 to 3 as found from the impugned judgment. The bottom line, therefore, is that the child preference is in favour of R-1 to 3.

12. The learned trial Court has, of course, taken up many other issues like the validity of compromise agreement dated 07.04.2016, R-1 to 3 taking away the child forcibly from the possession of the petitioner(appellant) on 01.05.2017, child living happily with the petitioner(appellant) from 30.01.2017 to 1. 05.2017 and petitioner(appellant) not suffering from any legal deficiency to get the custody of the minor child, but these issues although decided against the appellant has in fact no bearing conclusively to decide the welfare of the child which is otherwise decided explicitly from the evidence and pleadings and the findings on these issues by the learned trial Court are only incidental to the main issues of welfare of the child, since the validity of compromise agreement dated 07.04.2016 between the parties is not the real question to decide the welfare of the child, rather the same being with regard to the disputes and rancor between the parties which surfaced after the death of the wife of the appellant, but the bottom line is that the custody of the child is with R-1 to 3 since its birth till today and even the assertion of the appellant is considered to be true, the custody of the child was temporarily handed over to him for a paltry period of three months which loses its significance in the admitted facts and evidence. The fitness/suitability of the appellant with regard to any disqualification to get the custody of the child is not the conclusive factors to decide the issue of the custody of the child, since it is already held that the positive test that the father is required to pass for custody of the child which is even otherwise crystalized in the precedent referred to above with regard to selecting proper guardian of minor, but the Court is neither bound by statute nor by strict rules of evidence or procedure nor by precedent [See Nil Ratan Kundu (supra)]. Besides, the preference of the child in question, albeit is not the sole determinative factor while deciding the custody dispute of the child, but it is of seminal importance since Sec. 17(5) of the Act prescribes that the Court shall not appoint or declare any person to be a guardian of a minor against his will, but such statutory guideline may be in addition to the principal component of welfare of child which is paramount consideration in granting or refusing custody of the child.

13. The learned counsel for the appellant has of course relied upon Paragraphs-33 & 34 of the decision in Tejaswini Gouda(supra) which reads as under:-

“33. As observed in Rosy Jacob (AIR 1973 SC 2090) earlier, the father’s fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well-being of the guardian, child’s ordinary comfort, contentment, health, education etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated persona and is working in a reputed position. His economic condition is stable.

34. The welfare of the child has to be determined owing to the facts and circumstances of each case and the court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is liable to take care of the child.â€■

This Court has no hesitation to accept the aforesaid position of law as held by Apex Court in the decision relied on by the appellant, but from the pleadings and evidence on record in this case, this Court has not found the appellant to have satisfied these conditions to take the custody of the child in question from R-1 to 3 who have been continuously keeping the custody of the child since its birth till today. In addition, the learned counsel for the appellant has relied upon the decision in Vivek Kumar Choudhary(supra), but on respectable consideration of the facts and principle as laid down therein, the same is found distinguishable from the facts of the present case inasmuch as, the custody of the child in relied on case was with the parents for about ten years till the death of the mother, but subsequently the child was not in the company of his father for around more than three years and the grand parents had initiated a proceeding for maintenance claiming Rs.20,000/- per month for the child which was a factor to consider the inability of the grand parents to look after the child by themselves, but such situation is not here in the present case in which the custody of the child at best is for around three months with the parents, out of around 11 years of custody by the grandparents. Besides, the Apex court in the relied on case has not granted the custody of the child immediately to the father and retained the custody of the child with the grandfather to complete the academic years which is one of the circumstances to consider as the welfare of the child.

14. From the analysis of discussions made hereinabove together in the impugned judgment vis-À-vis the rival pleadings and evidence, since the custody of the child being with grandparents from the date of its birth till today except for a brief period of three months, if the assertion of the appellant is considered to be true and the child having expressed his intelligent preference before the learned trial Court to remain with its grandparents and the child having attained the age of 11 years, it appears that the best welfare of the child lies its custody with R-1 to 3, but subject to visitation right to the appellant-father and, therefore, this Court having found the impugned judgment to be in accordance with law considers it undesirable to interfere with it. It is, however, clarified that the endeavor of this Court so also the learned Family Court is for finding out the welfare of the child in a custody dispute between the parties, but neither this Court nor the learned Family Court has ever intended to separate the father from his son, who also deserves love, affection and care of the father, however, the rancor and hostility between the parties arise after the sad demise of the mother of the child leading to the custody dispute of the child, but this Court does not consider it proper to deprive the child from fatherly love, affection and care which are also for the best interest of the child. This Court hopes and trusts that the gap between father and son would be abridged by efflux of time before the child attains majority and therefore, the child must be given some opportunity to familiarize and develop an emotional bonding with meaningful relationship with his father and the same can be achieved by allowing the child to meet its father or to remain with him for brief period of seven to fifteen days during vacations. This is the precise reason for which the learned trial Court has granted visitation right to the father, but this Court considers it better to allow the father to take the child for vacation trips during vacation holidays in Puja Vacation, Winter Vacation and Summer Vacation. Accordingly, in addition to the visitations right granted to the appellant by the impugned judgment, he is further permitted to take the child for outings during vacations for a period not exceeding seven days initially for three occasions, but which would subsequently extend for a fortnight, however, the aforesaid vacation outings must be with the convenience and wish of the child with prior intimation/notice to him before one month. Before taking the child for outings as aforesaid, the tour plan must be made available to R-1 and R-3, who may be allowed initially for three times to accompany the child as per its desire during such vacations, but whose expenses for travel, stay and food shall be borne by the appellant commensurate to their standard of living. It is further clarified that after the initial three vacation tours, the appellant may be permitted to take the child only for subsequent vacations. It is made clear that the child after attaining the majority would be at liberty to take decision to stay with whom, either with R-1 to 3 or with the appellant

and the custody of the child would remain with R-1 till the child attains majority.

15. In the result, the appeal stands dismissed on contest, but without any costs. The impugned judgment is hereby confirmed with modified visitation right indicated in the preceding paragraph.