N. Nirmala Vs Nelson Jayakumar

O.S.A. No. 20 of 1998

Court: Madras High Court

Date of Decision: Aug. 19, 1998

Acts Referred:
Guardians and Wards Act, 1890 â€" Section 10, 3, 7

Citation: (1999) 1 DMC 737 : (1998) 3 LW 626 : (1998) 1 LW 537 : (1998) 3 MLJ 619

Hon'ble Judges: K. Natarajan, J; C. Shivappa, J

Bench: Division Bench

Advocate: T.R. Rajagopalan, for the Appellant; R.S. Jeevarathinam, for the Respondent

Final Decision: Dismissed

Judgement

C. Shivappa, J.
This is an appeal against the order dated 21.1.1998 in O.P. No. 209 of 1996 (reported in 1998-1-LW 537) relating to

the custody of a minor girl, by name, N. Asha, aged about 12 years, whose parents have unhappily been living apart. The learned Single Judge

came to the conclusion that the custody of the minor girl should be with the father, and the mother now appeals to this Court.

2. In deciding the question as to the custody or upbringing of a minor, the Court must regard the minor''s ""welfare"" as the first and paramount

consideration and not the legal right of any particular party. In making order appointing a guardian for the person of minor, the tests ought to be -

what order under the circumstances of the case would be best for securing the welfare and happiness of the minor ? With whom will the minor be

happy ? Who is most likely to contribute to the well-being of the minor and look after her health and comfort ? Who is likely to bring up and

educate the minor in the manner required to develop the entire personality worthy of living, keeping the interest, well-being and happiness of the

minor in view. The Court must also give due weight to the possible effects of a change in custody, on the minor''s future happiness and sense of

security. What is ""proper"" custody depends upon the circumstances, and in particular , upon the minor''s position and prospects in life.

3. In Dhanwanti joshi v. Mahdav Unde, 1997-3-LW 161=I (1998) DMC 1, the Apex Court, referring to Lindley, LJ in Re. v. Mc. Grath

(Infants), 1893 (1) Ch.143, has held thus:

...The welfare of the child is not to be measured by money alone nor by physical comfort only. The word "welfare'' must be taken in its widest

sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."" ...As to

the ""secondary"" nature of material considerations, Hardy Boys, J., of the New Zealand Court said in Walker v. Walker and Harrison, (See 1981

N.Z. Recent Law 257) (cited by British Law Commission, working paper No. 96 para 6.10):... ""Welfare is an all-encompassing word. It includes

material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an

adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they

are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and

compassionate relationship, that are essential for the full development of the child''s own character, personality and talents.

4. In order to appreciate the question whether the appellant is entitled for the custody of her minor daughter, it is better to advert to certain facts

which are as under : The appellant and the respondent are Indian Christians married on 9.10.1985 at Madras as per Christians'' rites and

ceremonies and a daughter was born to them, for whose custody they are making their respective claim.

5. The appellant was employed as a stenotypist in Electronics Corporation of Tamil Nadu, commonly known as ELCOT, which is a State

Government Undertaking, at the time of her marriage. The respondent was employed as an Engineer in M/s. Hindustan Motors Limited, Trivellore,

Madras. He had given up his job as an Engineer and started and running a proprietary firm of his own, dealing in chemicals, under the name and

style ""Nirma Agencies"". After the marriage, the appellant lived with the respondent alongwith his parents at Vadapalani, for seven months, and

there after they were living separately at various places within the city and due to strained feelings they fell apart, started living separately since

1993 and the minor daughter continued to be in the custody of the respondent. The appellant sought permission under Ex. P.6 to resign her job on

1.9.1993 and permission was accorded to her on 15.9.1993 and thereafter, she remained unemployed. She has stated in her cross-examination

that her approximate income from tailoring and stitching work is Rs. 1,500/- p.m. but in the Family Court in F.C.O. No. 388/94, she has stated

that she has no income and she is not doing any tailoring or stitching work. She has admitted in. her evidence that the respondent is doing business

and earning about Rs. 8,000/- p.m. The respondent has house property of his own, his father and mother are alive, younger brother is employed

somewhere, father is also doing business in addition to his pension and also assessed to tax, but he is not an Income Tax assessee. Whereas, in the

case of the appellant, the mother and sister alone are there and all her brothers have already been married and residing separately elsewhere. The

respondent has specifically stated that the appellant. is not doing any work, not having any income and all that she received from her ex-employer

has been spent and now she is having no means.

6. The respondent herein filed a petition for divorce in the Family Court, alleging adultery against the appellant. He would state that she used to

avail leave continuously on the ground that her child was suffering from illness, when verified, it was found that she was frequently going outside

with the company of one Aasai Thambi, who was her boss in the office, who has been made as a co-respondent in the divorce petition. It is in

evidence that she used to return home very late under the guise of over-time work in her office, but on verification, the respondent was informed

that she left the office earlier and was also not found in the house. He has imputed a bad reputation alleging that she did not go to the office for a

period of one year and when he enquired about the same in her office, he was told that it was because of her relationship with her boss Aasai

Thambi, which the entire office came to know and, after that, she resigned even without informing the respondent. According to his evidence, she

stayed with him only one day in a week and the other days her whereabouts were not known. The landlord wanted her to vacate the house

because of her activities in the locality and certain grown up boys used to visit her house and the people in the locality complained of nuisance and

misbehaviour, which led to a dispute between the landlord and the appellant.

7. The grievance of the respondent was that the appellant belongs to Jehovah faith and never went to the Church, inspite of repeated requests

which fact was admitted by the appellant. He has also stated that the child is more interested in going to Church alongwith him and in celebrating

the functions, like Christmas, New Year, Easter, etc. It is his grievance that she never used to show any love or affection towards the child and

prevented the child front celebrating those functions and also not to take part in the sports activities in the school. It is his apprehension that she is

taking Jehovah witnesses, which is not advisable to his daughter and if she is given to her custody, she may not be brought up in a proper

atmosphere.

8. It is in her evidence that on 11.11.1994, the respondent took the child, which led to the complaint, but only in February, 1995. She had also

filed H.C.P. No. 1198 of 1995 before this Court and it ended in dismissal. Even in H.C.P. proceedings, the child when produced before this

Court declined to go with the mother and expressed her desire to be with her father only. It is also in evidence that the child when produced before

the Family Court in the proceedings in F.C.O.P. No. 388 of 1995 on 8.8.1995, she elected to be with the father.

9. The learned Counsel for the appellant assailed the impugned order, inter alia contending that the mother is better suited and is entitled for the

custody, especially when the minor has recently attained puberty. When the minor being a female child, the claim of the mother should be given

much weight. The unsubstantiated allegation of adultery should not be taken note of, while deciding the custody of the minor, so also, the

preference of the minor, as the minor was under the influence of the father with whom she was and is living. It is his grievance that while deciding

the claim of the mother for custody of the minor the learned Judge on the Original Jurisdiction of this Court ought to have looked into these

aspects, but has not considered in the proper perspective.

10. The learned Counsel for the respondent contended that the father is the natural and lawful guardian of the minor under the personal law, and he

is entitled to act as such, until by an order of a competent Court he is deprived of his right. It is only in extreme case of illiteracy, poverty or

delinquency of the father that his claim to the custody of the child can be disregarded. Where in addition to the fact that father is the natural

guardian, the welfare of the child also demands that she should continue to be in the custody of her father, it would not be appropriate to disrupt

the continuity of the ward, permitting the mother to meet her at a specified place for a specified time. Where the father and mother are living apart

and there is nothing to justify the Court in depriving the father of his natural legal right for the custody of his own child and when he had all the

means to look after the welfare of the child, the father should be appointed as the guardian, unless the father is shown to be unfit or the minor is of

a tender age, which is not so, in the instant case, where the minor had already attained puberty.

11. Having regard to the facts and circumstances of this case, to promote the welfare of the minor, it is appropriate to consider the financial

position, educational qualification, religious background, the impact of the imputations on character, surrounding circumstances of the parties and

also security of the minor, including the preference expressed by the minor.

12. In support of his contention that the mother alone is entitled for the custody of the daughter, the learned Counsel relied upon the decision in

Rosy Jacob Vs. Jacob A. Chakramakkal, , wherein, the custody of the daughter aged about 13 years was held to be beneficial with the mother,

but that was a case, where the mother was running a school and also had facilities to make her two children live in an academic atmosphere, rather

than the father. The Apex Court kept in view the academic qualification of the mother, her financial status and held that ""the financial position of the

wife is far superior to that of the husband who according to his own submission has yet to establish himself in his profession"". In Thrity Hoshie

Dolikuka Vs. Hoshiam Shavaksha Dolikuka, , the girl child was given to the custody of the mother till the age of 16 years. In that case, the

daughter developed an aversion for the father and expressed her desire to live with the mother. It was not in dispute that the mother has a great

deal of affection for her daughter and the daughter was also very fond of the mother. Having regard to the age of the child, the Apex Court thought

that the proper and the best way of serving the interest and welfare of the child will be to remove the child from such atmosphere of acrimony and

tension and to put the child in a place where the embittered relationship between her parents does not easily and constantly affect her tender mind.

In Chandrakala Menon (Mrs) and Another Vs. Vipin Menon (Capt.) and Another, of the judgment, the Apex Court gathering her wish, sentiments

and her liking for her maternal grand parents, came to the conclusion that it would be in the interest and welfare of the minor that she should be in

the custody of her mother. In Smt. Mohini Vs. Virender Kumar, , the father of the appellant since well-to-do, the Apex Court thought that the

welfare of the minor is financially and affectionately safe in the hands of the appellant mother and an undertaking was taken that the minor shall be

looked after properly and will be put in a good educational institution.

13. Mary Vanitha Vs. Babu Royan, , was a case where the first child was studying in Rosary Matriculation School, Santhome, Madras and the

petitioner secured admission for the second boy child in the same school, whereas, the father shifted his residence from Madras in the early May,

1991 and was living at Trichy Road, Coimbatore and he was op a transferable job. But the mother had a steady income being employed in a

Company and the Court thought that keeping in view the age of the minors, viz., 5 and 3 respectively, the mother is the proper guardian. Mohd.

Buhari Vs. Rahamathunissa, , was a case where the father was living abroad having married another wife after divorcing the mother of the minor,

and in such a situation, the Court held that the father is not entitled to the custody of the minor. Mrs. Umamaheswari Vs. V. Sekar, , was also a

case where the financial, educational, physical, moral and religious background of the mother having sufficient income, weighed with the Court to.

entrust the custody of the children to her. In Karuppannan Vs. Sudhamathi, both the mother and maternal grand mother are educated persons and

having regard to the age of the infant, i.e., not even completed the age of 5 years, the Court thought that mother''s lap is God''s own cradle for a

child of this age and entrusted the custody to the mother. Sau Anusuya Bai v. Trymbak Balwant Rakshe, II (1985) DMC 60, was a case where

there were no grown up women in father''s house, child was aged about only 5 years and the wife obtained an order against her husband for

maintenance of minor children, the husband not made payment but applied for custody of the children. In such a circumstance, the Court thought

that the interest of the minor was not safe at the hands of the father and held that the mother not to be deprived of custody of minor merely on the

ground of poor financial condition. In C.S. Reddy Vs. Yamuna Reddy, having regard to the facts of that case, since the children are being

educated in one of the best schools at Madras and there are no allegations touching the character of the mother and from the beginning the children

have been in the care and custody of the mother, the Court held that it is not proper to give custody to the father. In that case, the girl aged about

12 years and the boy aged about 10 years were practically brought up by their mother from their birth and in that situation, the mother has come to

be preferred to others.

14. Jijabai Vithalrao Gajre Vs. Pathankhan and Others, , the mother was managing the affairs, though father was not taking care of the child, and in

such situation, the father was deprived of his right of custody.

15. The learned Counsel for the respondent relied on the decision in Lekh Raj Kukreja Vs. Raymon, , wherein the Delhi High Court has taken the

view that the father is entitled to the custody, where there is a conflict in claim. It is only in extreme case of illiteracy, poverty or delinquency of the

father that his claim to the custody of the child can be disregarded. Otherwise, father as natural guardian, is entitled to the custody. Ordinarily,

custody should go to the natural guardian unless he is unfit to lookafter the welfare of the child. Every other consideration must be subordinated to

this paramount consideration.

16. In Mt. Ulfat Bibi Vs. Bafati, , the Allahabad High Court took the view that ""where a person is entitled to the custody of the minor as natural

guardian, the proper method is, not to dislodge the custody unless circumstances are there to point that the father is not better suited to have the

custody of the minor child"". Where the mother abandoned the marital home either by her own free will or as a result of her conduct, that too,

having distanced herself from her parental home, also living in a rental house where the landlords have taken action or complained about her way of

life. In such a situation, as there is no conducive atmosphere promoting all-round development of the child in the eyes of law, she has lost the right

to assert the claim against the father of the child.

17. In Panni Lal Vs. Rajinder Singh and Another, , the Apex Court has held that the father is the natural guardian and mother could be considered

as natural guardian, only if the father is not taking any interest in the affairs of the minor and the minor is in the exclusive custody of the mother.

18. Following AIR 1914 PC 41, in Shanti Devi and Another Vs. Gian Chand Har Sukh Rai, the Punjab High Court has held that ""second marriage

by the father does not per se render him unfit to be the guardian of his son nor does the fact that he has sons from his second wife alter the position

materially. It is not suggested on behalf of the appellants that his real father and his step-mother are persons who are not likely to treat the minor

properly and a mere suspicion that it may so happen in future is not sufficient ground for denying the real father his right and duty to have the

custody of his son and to educate him"". There is no rule of law that a child of tender years should remain with the mother. Whether it is better for

the child to be with the mother or the father,-depends upon the particular circumstances of each case.

19. In the present case, the father is economically affluent, living with his parents who are also doing business, besides, his father is a pensioner and

the father is presently giving education to the minor in a good school. Whereas, the mother has no secured income, dependent on her mother, her

brothers are residing elsewhere and her sister''s income is the only source of earning. If we balance the economic position of the father and the

mother and the family situation, we feel that in order to promote the education of the minor daughter, it is better that she be continued in the

custody of the father. By this, we do not mean and make it a principle that affluence is always an inevitable circumstance to determine the welfare

of the minor. We are also conscious that affluence, at times, may tempt the ward to succumb to easy life and become wavered. In that sense, it is

said that economic affluence is always not an inevitable circumstance. But, where there is proper supervision, father is educated and is an Engineer,

his parents are also educated, there is possibility to presume that the minor will be taken care of better by the father.

20. In a similar situation, the Karnataka High Court in Radha Laxmi v. Dr. M. V.C. Sastri, AIR 1953 Mys 123, held that ""in appointing guardian,

the personal law of the parties should be considered and the father is primarily entitled to be the guardian. When the female child is living with

father in good circumstances, ever since estrangement between the father and the mother it is appropriate to entrust the custody of a child to the

father keeping in view the education etc. that too, where the mother is not in a position of any means and is dependent on others. If the child

expresses its preference for father, it is not in the interest of the child to disturb its stay with the father and hand over its custody to the mother. In

1933 Mys. HCR 226'', a Bench of that Court held that ""a father as a natural guardian is entitled to have the custody of the infant as against other,

relations inclusive of even the mother, and his claim must be allowed to prevail unless.... the Court is judiciously satisfied that the welfare of the

child requires that the parental right should be superseded"".

21. This is not a case of attempting to take away the child from the mother, but a case in which the question is whether a child who has been away

from the mother for a long period is forced to go back to her mother against the inclinations of the minor, as ascertained by the learned Single

Judge. It may look cruel to refuse the mother''s request, but no less painful would it be to snatch the daughter from the father in whose custody and

care she is taking education. Sympathy and sentiment apart, under the circumstances, we think that it is not in the interest of the minor to disturb

her stay with the father.

22. In Ma Thein Me v. Maung Po Gywe, 1915 Ind Cas 890, the parties to the suit are husband and wife living apart. The suit had been brought

by the wife to recover the custody of her child, a girl who was 7 years of age, whom the father retained and refused to give her back. The father

has natural right to the custody of the child. The Court dismissed the application of the mother on the ground that the child was an comfortable with

the father as she would be with the mother, and decided to leave her to remain with the father.

23. In Shanti Devi and Another Vs. Gian Chand Har Sukh Rai, it has been held that the father of the minor being the natural guardian, has the right

of custody unless the Court comes to the conclusion that the father is unfit to have the custody and that it is not for the welfare of the minor that the

father should be allowed to exercise his right. Guardianship is in the nature of a sacred trust, and any entrustment is essentially a revocable

authority. There is no allegation, either before this Court or in the pleading of the suit, that the father is unfit to have the custody and that it is not for

the welfare of the minor that the father should be allowed to exercise this right of his. In such a situation, there is no justification to displace the right

of the father, that too, when the minor is in the custody, taking education, living alongwith her grand parents and expressed her preference to stay

with the father.

24. A mother who is away from her parents, having minimum means of livelihood, once residing in a rental house, and her reputation being

surrounded with suspicion, though not proved, need not be relied upon, but to be kept in view when judging the entire facts and circumstances in

the given case. In that aspect of the matter, a father, who is having his own business, affluent economically, owning house, living with his parents,

giving education to the child all these years and the minor''s preference to be with her father, in such a situation, is better suited than the mother to

have the custody of the minor daughter. The girl is not of tender years, but has attained puberty, nor is it shown that on other grounds, it would be

distinctly in her interest to be handed over to the mother. We feel, when there is no disqualification for the father, having regard to his family

composition, the child''s welfare is better promoted and protected in his custody than in the custody of the mother.

25. The learned Counsel for the appellant in support of his contention that allegation of adultery is not a proof and on that basis, it is not desirable

to deprive the mother of the custody, relied on the decisions in Rosy Jacob v. Jacob (supra), Mohd Buhari v. Ranamthunnisa (supra), and

Umamaheswari v. Sekar (supra), wherein, the Courts have taken the view that mere allegation of adultery should not be the basis to deprive the

mother of the custody. So also, the Apex Court has held that allegation of adultery need not weigh with the Court while deciding the custody

claimed by the mother. All that it means is that in the absence of credible evidence regarding immorality, the Court should not come to the

conclusion on the sole ground that such allegation has been made against the mother. But, as has been held in Mansa Ram v. N.T. Naurati, AIR

1925 Lah. 427, where there is a great deal of reliable indirect evidence touching the reputation of the mother, without going to decide the

credibility of such imputations. Keeping in view the proceedings in the Family Court and the reputation the mother gained in the locality, which led

to eviction proceedings by the landlord on the ground of nuisance, if judged from the point of conducive atmosphere, for the proper upbringing of

the minor child, such allegations assume some importance. But, it does not mean that the allegation of adultery completely weighted with us. On this

aspect, we do not wish to express our view, except viewing it from the point of proper atmosphere to the ward in the custody of the mother.

26. But, this Court in Venkamtna v. Savitramma, ilr (1889) Mad. 57, took the view that leading an immoral life is a ground to deny the custody.

Where there are averments that certain boy friends used to visit the house of the appellant at one point of time, without going into the credibility of

those imputations, we think it proper to allow the minor to live in an imputation free atmosphere, in her own interest.

27. It is the contention of the learned Counsel for the respondent that in the formative years, the child ought to have the benefit of religious

upbringing and the minor should be with the father, who has a religious bent of mind, as it is more beneficial to the minor to be with him, than with

the atheist mother.

28. The father has every right to bring up his child in the religious atmosphere to which he belongs. The Court should also look to the spiritual

welfare of the minor, in which context, the religious upbringing may be an element of great importance. It is in evidence that the mother has

embrased to Jehovah faith. The father was and is opposed to such faith and the daughter is attending the Church regularly alongwith her father and

is also observing all the ceremonies of Christian religion. In wordship proceedings, while considering the welfare of an infant, the element of

religious upbringing is of great importance. When the mother is practising a different cult than the religion of the father and the father has every right

to bring up his daughter according to his religion in order to have a religious upbringing, in this context, entrusting the minor to the custody of the

mother has every possibility of making a change of conversion to the cult which she is professing and, therefore, the genuiness of the conscientious

feelings of the father appears to be reasonable and also in the interest of the infant. Even on this ground, keeping in view the religious upbringing as

an element of great importance, for proper moulding of the attitude in life, the cultural and religious atmosphere always plays a major role. It is

always said that personality is a combination of environment and cultivation, and heredity is of less consequences. Since the father and the daughter

have faith in Christian religion, in order to provide proper environment with a cultural and religious background, it is appropriate to allow the child

to live with the father.

29. It is settled in law that normally due to immaturity, in the sense, not able to form an independent decision or opinion, the preference of the

minor should not control the Court as a decisive fact in deciding the custody of the minor. But, where the child who has been away from the

mother for a long period, should not be forced to go back, against the inclination of the minor, as it may have an adverse effect on the mind of the

minor. Therefore, under what circumstance the preference of the minor to be taken into consideration always depends upon the facts and

circumstances of each case.

30. The learned Counsel for the appellant relied on the decisions in Thirty Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka (supra), and Elizabeth

Dinshaw v. Arvand M. Dinshaw, , which relate to preference of the ward, where the Court held that due to the tender age of the minor and their

total immaturity, they are not able to form any independent opinion and such preference should not be considered. Even in Rama Iyer v. Nataraja

Iyer, AIR 1048 Mad. 294, it has been held that a child of 13 years cannot form an intelligent preference in matters relating to custody. So also, in

Venkatarama Ayyangar Vs. Thulasi Ammal, , it has been held that the preference expressed by a boy or girl of 13 or 14 years, is not entitled to

much or any weight at all. Mohd. Buhari v. Rahamathunnisa, (supra), is a case which refers to the wish of the child which does not control the

Court, and the Court can even disregard the preference.

31. In Saraswathi Ammal v. Dhanakoti Ammal AIR 1924 Mad. 873, this Court observed ""that the opinion of an intelligent grown up child will

weigh in the estimation of the Court. The age of discretion, the notion of any intellectual precocity in an individual female child, and when her

election is to be adopted, if so, how ? are considered in In re Andrews, (1882) 8 QB 153 = 28 LT 353 = 21 WR 480. In each case, the Court

must decide with reference to the interests and welfare of the minor. If an infant who is capable of forming an intelligent opinion, expresses its

views, the Court is bound to take them into consideration. In weighing the question what is for the benefit of the child, this will form an important

element and the degree of child''s mental development must to a certain extent weigh with the Judge in deciding how far its wishes shall be given

effect to. In the same way, the age of the child is also an important factor. It seems to be that the rule that fixes and inflexible limit in regard to age is

too artificial, and even if the contention is correct that such a rule obtains in England, we are emphatically of the opinion that there is no warrant for

the extension of the doctrine to India where different considerations may apply and different conditions do prevail"". We have paid necessarily, as

any Court will pay, great attention to the expressed wishes of an infant who is soon to reach the age of discretion, viz., 16. She is in a position to

decide for herself and she expresses her desire to remain in the custody from which she has been produced. When she is able to form a judgment

as to what is in her own interest and for her benefit, then it is not desirable to take her away from the surroundings in which she has been

accustomed and to place her in the custody against her will.

32. So far as the intelligent preference of a minor is concerned, it is always better to bear in mind the age and also the capability of the minor

forming an intelligent preference. That is why, the selection of guardian by such an infant is according to the statutory provisions, subject to the rule

of the Court. The Court may disapprove the selection made by the minor when, in its judgment, the person selected is not the proper person to be

the guardian. But ordinarily, it is the duty of the Court to appoint the person so selected, if he is competent and suitable, although the Court may be

of the opinion that some other person would fill the position better. Unless the Court is satisfied that the choice of the minor is detrimental to her

interest or contrary to law, she should be permitted to exercise her right. Even then, the minor who is under the age of 11 or 12, does not have the

absolute right to select her guardian. If she is able to form an intelligent preference, it is proper that her wishes should be consulted in connection

with the selection of the guardian. Any preference exercised by the minor should not be accorded weightless, unless-it is also intelligent. The wishes

of the minor may not carry weight but it does help the Court in exercising its direction in case any contingency arises. Further, the Court is not

bound to ascertain from the minor her wishes, where the minor is of a tender age. It may under the exercise of its discretion, very-well restrain itself

from seeing and questioning her. If the minor has indicated her preference for the family circle, that too, preference for the father, her wishes must

be given due weight.

33. While judging the preference, it is also not inappropriate to bear in mind the advantage of having grand parents with the father, as it serves the

welfare and interest of the minor better. If she lives in the immediate family circle, that too, in the company of elders, it provides an advantage of

understanding the family surroundings and their traditions, since the child has to live ultimately in that atmosphere. If the minor exercises her choice,

the Court will have to take the wishes into consideration generally and not to make an order for custody against the wishes of the minor, as it may

have a psychological impact and may develop an aversion to the surrounding or atmosphere, which is thrust on the minor and develop hostility

which will have an unsavoury effect on the future life and may even be disadvantageous to the child. That having regard to the minor"s stay with the

father since 1994, receiving education and not voiced any grievance against him, nor is there is pleading at the instance of the appellant that the

ward was not looked after properly, in this proceeding, a mere impression, de horsing the consideration of totality of circumstances, does not

prevent the Court from accepting the preference. Therefore, having regard to the facts and circumstances of this case, we find that the contention

of the learned Counsel for the appellant that preference of the ward should be totally ignored, has no relevance and it is not a criteria to be taken

into consideration.

34. In the instant case, the minor girl, on more than one occasion expressed her preference to be with the father before the learned Judges of this

Court. Even in the H.C.P. proceedings filed by the appellant, when the minor was produced, the detenue (minor) expressed her preference to be

with the father and the habeas corpus petition ended in dismissal. But, we are not attaching much importance to the dismissal of the habeas corpus

petition, because the petition was dismissed on a narrow ground that the custody of the child was not illegal and the Court did not consider the

welfare of the child in its paramountcy in that proceedings. But, the dismissal of the habeas corpus petition is not a criteria to be ignored on the

principle that preference expressed by the ward in any judicial proceedings is a factor to be taken note of, in view of the decision in Dr. (Mrs.)

Veena Kapoor Vs. Shri Varinder Kumar Kapoor, .

35. The next aspect of the case is whether the visiting right to be kept intact to the appellant. In the impugned order, since both the parties were

living in Madras and the girl was Studying in 6th standard, the petitioner was granted visiting right to visit her daughter on every Saturday; five days

during Christmas vacation and 15 days in summer vacation, but not on Sundays, that day being a Sabbath day, as she had to go to the Church

alongwith her father.

36. In Chandrakala Menon And Anr., v. Vipin Menon (Capt.) and Anr., (supra), the Supreme Court has ordered the custody of the minor child in

favour of the mother who was residing in USA alongwith her parents, rather than the father, who have since become divorced, taking into

consideration the fact that both the families are well-to-do, and in the interest and welfare of the minor girl, she shall be left in the custody of the

mother in USA. The Court has also conceded the right of the father by directing the mother to permit the child to visit India atleast once in a year

and see her father.

37. ""Custody"" and ""occasional visit"" are two different concepts. Custody implies an unfettered an unembarassed control and care of the infant,

whereas, visiting is only just to see and enquire. It does not admit stay in a place other than the guardian to whose custody the child has been

entrusted. Continuous stay exceeding momentary visit offends the order and it may even create a hostile impression on the father and even anything

undesirable may happen. The mind of the minor should not be exposed or subordinated to the instructions of a person other than those in whose

custody she had been entrusted.

38. Visiting right can be given where the parents have differed, but they never quarrelled. But, where they have quarrelled, and estranged feelings

are so high, there is every possibility that the deprived guardian setting up the ward against the guardian in whose custody the ward is given. If a

minor is entrusted to a guardian, he must have the freedom to bring up the child in the best interest of the child promoting development of all

aspects to make the child a good person. Where the father and the mother are not on talking terms, the bitter feelings are such, living apart for

several years, visiting right may serve as an opportunity to the deprived guardian to settle scores against the other and the child becomes a medium.

These aspects since lost sight of by the learned Single Judge, we are viewing them, because, interest of the ward is paramount and the Court acts

as a ""wise parent"", but, we are conscious of the view that the litigant ought not to be placed in a worse position that she would have been, if not

taken, resource to file this appeal before this Court. This is true, where the rights are static, all is well between the parties and finally adjudicated. In

the wordship proceedings, the custody being temporary, misuse of custody may result in removal of the guardian. There, the question of worsening

any party''s position does not arise. When the Court acts as a ""wise parent"", it is just and reasonable to modify the visiting rights, by curtailing it. In

the instant case, while granting the visiting right, keeping the welfare of the minor in its paramountcy, the Court has to be reasonable and practical,

so as to prevent possible apprehensions of disastrous mental harassment though not fatal in consequence immediately. Where the daughter has

elected to be with the father, the sight of the mother may create an unsavoury impact on the mind of the child. The child should not be subjected to

such distasteful atmosphere or situation. In order to ensure that the child will not be subjected to any torture, evil influence or poisoning of the mind

by evil thoughts to set up the child against the father, it is appropriate while conferring such visiting rights to limit it to a particular hour alongwith the

company of some person of the family of the father or with the supervision of the guardian appointed by the Court. Such a situation does not arise

in this case, because, even according to the appellant, though the child was taken to the custody by the father in the year 1994, the grievance was

not voiced till February, 1995. The appellant was also not aware of the school in which the child was studying, and it is not her case that as to how

she is going to give a better affection or better facility or a better atmosphere to the child, keeping the child in her custody having visiting rights.

Therefore, we think that it is proper to take away the visiting right, having regard to the relationship which had been built up between the parties, in

view of the election of the ward to be with the father. A plant will grow well if it is nursed, protected and cared by one person, than being meddled

with by more than one, as there will be every possibility of damage than protection. So, is the life of an infant.

39. In all the cases by the learned Counsel for the appellant, wherein, the custody was given to the mother, the Courts have found that either the

mother was an academician, running schools, having settled with an appointment and having fixed income, or the father married again and living

elsewhere, father in a transferable job having no fixed place, the income not sufficient to the father and nobody was there in the father''s house to

look after the children and even though where the mother is poor, the other backgrounds, like, religious background, etc., the time left at her

disposal, the tender age of the minor, all these things weighed with the Courts while determining the custody. In the present case, evidence was

adduced relating to means, educational qualification, aptitude, respectability, family surroundings, affection shown, prospects and welfare of the

ward etc. The facts as projected would show that the father has a steady income, his father is a pensioner, his parents are educated and living with

him, he is having a permanent roof and doing a private business, whose income is between Rs. 5,000/- and Rs. 8,000/- p.m. also having a religious

bent of mind, giving education to the minor child in a good school, her grand mother is there at home all the time, and the child who is staying with

the father since 1994 has opted to be with the father only and expressed her disinclination to go with the mother. Whereas, the appellant is

unemployed, earning an income by way of tailoring and stitching which comes to Rs. 1,000/- to Rs. 1,500/- p.m. having no house to live in, but is

only living at the mercy of her mother and sister and there are no male member to take care of her mother and sister, since her brothers are married

and residing elsewhere.

40. Even ignoring the allegation touching adultery or immorality, these facts when contrasted between the parties, keeping in view the welfare of the

child, the preference of the minor for the father stands first than the claim of the mother, as the father is not suffering from any disability or is any

way disentitled for the custody of the minor.

41. It is not the case that the child has suffered any injury from being with the father, and there is no suggestion that she will suffer any injury if

continued to be with the father. There is also no averment that the father is of bad character, instead, the mother herself has stated that he is a good

person with a social service minded outlook. Therefore, if the totality of the circumstances are taken into consideration, after all the ward is not a

young child, but has attained puberty. In these days, where complaints of eve-teasting are common, the presence of the father will be a shield and

the daughter is more secured in his custody and care.

42. That having regard to the totality of the circumstances projected in this case, keeping in view the minor''s position and prospects, we are of the

view that the father is most likely to contribute to the well-being of the minor, which includes education, health care and development of the entire

personality with a sense of security.

43. Normally, the Appellate Court should not interfere with the discretion of the learned Single Judge who had not misdirected himself and there

was no rule of law for the custody of the child being given to the mother. We should not substitute our discretion to that of the learned Judge.

Where the Trial Court Judge"s decision, in an infancy case, has resulted in exercise of discretion illegally or opposed to the facts and circumstances

of the case and the findings are preverse, only in rarest of circumstances, the Appellate Court can interfere. We think, it is not one such case and it

does not call for interference with the conclusion arrived at by the learned Single Judge. Where the discretion of the Trial Judge was the one, with

which, consideration being evenly balanced, even then, the Appellate Court would not interfere, as it was not established that the discretion was

exercised wrongly.

44. Before we part with this case, we feel it proper to place on record that we suggested to both the learned Counsel to advice their clients to

reconcile their differences to create a congenial matrimonial home, keeping the interest and welfare of the , minor. Though the appellant and the

respondent appeared before the Court, for reasons best known to them, reconciliation did not materialise, but their presence before us in a way

gave an insight to reflect on the visiting right accorded to the mother.

45. For reasons aforestated, we see no merit in this appeal and confirm the order impugned, but with a modification depriving the mother of her

visiting right. In the result, the appeal is dismissed. Parties to bear their- own costs. Consequently, the connected miscellaneous petitions are also

dismissed.