V. Vinod Kumar Vs V. Arunadevi

Court: Madras High Court

Date of Decision: Nov. 30, 2015

Acts Referred: Civil Procedure Code, 1908 (CPC) - Section 10
Constitution of India, 1950 - Article 32
Contract Act, 1872 - Section 11
Criminal Procedure Code, 1973 (CrPC) - Section 205, 397, 401
Evidence Act, 1872 - Section 115
Family Courts Act, 1984 - Section 12
Guardians and Wards Act, 1890 - Section 17, 17(3), 19, 25, 4(2)
Hindu Marriage Act, 1955 - Section 12, 13(1)(ia), 26
Hindu Minority and Guardianship Act, 1956 - Section 10, 12, 13, 13(2), 2
Juvenile Justice (Care and Protection of Children) Act, 2000 - Section 2(j)
Protection of Women From Domestic Violence Act, 2005 - Section 12, 13, 14, 15, 18

Citation: (2016) 1 MLJ(Cri) 1

Hon'ble Judges: S. Manikumar, J.

Bench: Single Bench

Advocate: B. Vivekavanan, for the Appellant; S. Sridevi, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S. Manikumar, J.
Crl.R.C. No. 34 of 2015, is against the order, dated 08.01.2015, C.M.P. No. 1291 of 2014 in D.V. No. 7 of 2014,

on the file of the learned Judicial Magistrate, Ambattur, by which, the petition filed by wife/mother, under Section 21 of the Domestic Violence

Act, to grant interim custody of the minor child, Sanjana to her, till the disposal of the main petition, has been allowed.

2. Crl.R.C. No. 43 of 2015, is against the order, dated 02.12.2014, C.M.P. No. 2717 of 2014 in D.V. No. 7 of 2014, on the file of the learned

Judicial Magistrate, Ambattur, by which, the petition filed by Mr. V. Vinod Kumar, husband/father of the minor child, Sanjana and his mother,

Mrs. Shanthi, under Section 15 of the Protection of Women from Domestic Violence Act, 2005, to provide assistance of Medical and Welfare

Experts to the wife/mother and to evaluate/assess her mental ability and attitude to contest the proceedings before the learned Judicial Magistrate,

Ambattur, has been dismissed.

3. In both the revision petitions, the parties, pleadings and materials on record, are one and the same and therefore, they are taken up together and

disposed of by a common order.

4. The averments made in C.M.P. No. 2717 of 2014 in D.V. No. 7 of 2014, are that the wife is suffering from mental illness and taking psychiatric

treatment. The wife deserted her husband and child on 20.09.2013 and returned to matrimonial home on 09.10.2013. She picked-up quarrels

with her husband, parents-in-law and attacked them also. Parents of the husband took treatment in Government General Hospital, Chennai. In this

regard, a complaint has been lodged with the police, for further protection. Wife has not changed her character and attitude and hence,

husband/father has filed O.P. No. 3837 of 2013, before the 1st Additional Family Court, Chennai, on 10.10.2013, for divorce, under Section

13(1)(ia) of the Hindu Marriage Act, 1955.

5. Before the learned Judicial Magistrate, Ambattur, in C.M.P. No. 2717 of 2014 in D.V. No. 7 of 2014, it was the further contention of the

husband/father that though the wife was aware of the divorce proceedings, pending before the Family Court, she lodged a false complaint before

the All Women Police Station, Avadi, only on 19.10.2013. Subsequently, the Police called the husband/father on 20.10.2013 and conducted an

enquiry. On 24.10.2013, both the husband/father and wife/mother appeared and due to the aggressive attitude of the wife/mother, Police was

unable to conduct further enquiry. When the wife/mother tried to grab the child from the custody of the husband/father, it was prevented with the

help of Police.

6. Thereafter, the wife/mother filed a Habeas Corpus Petition No. 2827 of 2013, before this Court and when the same was listed on 13.11.2013,

a direction was issued to produce the child on 27.11.2013. On the said date, the child was produced and after hearing both the parties, this Court

dismissed the said petition, with liberty to the husband/father to keep the child with him, untill further orders. She was advised to approach proper

forum, for custody.

7. Before the learned Judicial Magistrate, Ambattur, husband/father has further contended that even at the time of counselling before the 1st

Additional Family Court, at Chennai, the attitude of the wife/mother did not change and she behaved in arrogant and rude manner. In one such

session, she slapped the child on the head. She continuously shouted at the husband/father and used filthy language against him. He has further

submitted that the wife/mother pulled his shirt and threatened him with dire consequences. Thus, he has pleaded that the mental health of the

wife/mother is severely affected. She was taking continuous treatment, which fact, she has deliberately and willfully suppressed before the learned

Magistrate. For the abovesaid reasons, the husband/father has filed C.M.P. No. 2717 of 2014 in D.V. No. 7 of 2014, for the relief, as stated

supra.

8. Before the learned Judicial Magistrate, Ambattur, the wife/mother, in her counter affidavit, has submitted that petition in C.M.P. No. 2717 of

2014, is not maintainable. In her counter affidavit, she has also stated that the said petition has been filed, on vexatious grounds, only to thwart her

claim for interim custody of the child. Wife/mother has submitted that due to the mental torture given by the husband/father and her in-laws, she

was forced to take treatment and took medicine only for few days.

9. Before the learned Magistrate, husband/father has relied on prescriptions, said to have been given by the Medical Consultant, ""Manashashra

Integrated Mind Care"". Bills have been produced. Upon perusal of Medicine Prescriptions, dated 05.09.2013, 19.09.2013 and 01.10.2013

respectively, the learned Judicial Magistrate, has observed that the wife/mother has been advised to take, (1) C. Prodep 20 Mg 1-0-0, (2)

T.Oxetol 1-0-1, (3) Tab.Epric 0.25 Mg., 0-0-1, for ten days. He has also recorded that prescriptions were only for 10 days.

10. While adverting to the pleadings, documents produced and submissions, the Court below has also observed that, apart from the above

mentioned prescriptions, for the limited period, no other material documents have been filed by the husband/father and even during the pendency of

C.M.P. No. 2717 of 2014, no document was produced by him, to prove that wife/mother was suffering from any mental illness. The Court below,

on her physical appearance, has also observed that she appeared to be an ordinary, normal and sound person. However, in order to make sure

about her mental health and to ascertain, as to whether, she requires attendance of any medical expert, on 26.11.2014, the learned Magistrate has

posed ten questions and recorded answers, in the presence of the parties to C.M.P. No. 2717 of 2014 in D.V. No. 7 of 2014 and the respective

learned counsel appearing for the parties.

11. After questioning, the Court below has arrived at a conclusion that the wife/mother was holding a degree in English Literature and during the

pendency of the proceedings, she was doing M.B.A., in Loyola College. Upon perusal of O.P. No. 3837 of 2013, filed by the husband/father,

under Section 13(1)(ia) of the Hindu Marriage Act, 1955, on 10.10.2013, the Court below has also observed that even in the cause title, the

wife/mother has been shown, without any assistance of any next friend, inferring that she was having a sound mental health, to prosecute the

litigation on her own.

12. During the course of hearing of C.M.P. No. 2717 of 2014, the learned Judicial Magistrate, Ambattur, has also recorded that though the

wife/mother has filed an application, seeking for interim custody of the child, before the Family Court, the same has been withdrawn. Thus, after

considering of the pleadings, evidence and submissions advanced, on behalf of the parties and by observing that the wife/mother is in normal state

of affairs and fit to proceed with the case, vide order, dated 02.12.2014, dismissed C.M.P. No. 2717 of 2014 in D.V. No. 7 of 2014, filed by the

husband/father and mother-in-law.

13. C.M.P. No. 1291 of 2015 in D.V. No. 7 of 2014, has been filed by the wife/mother, under Section 21 of the Domestic Violence Act, to grant

interim custody of minor child, Sanjana, to her, till the disposal of the main petition. In the above Miscellaneous Petition, she has contended that

D.V. No. 7 of 2014, has been filed by her, under Sections 18 to 22 for protection orders, residence orders, monetary reliefs, custody orders and

compensation orders, respectively, under the Domestic Violance Act. In the said petition, husband/father and mother-in-law of the wife/mother,

are the parties.

14. In C.M.P. No. 1291 of 2014, the wife/mother has submitted that the marriage between the spouses, was solemnized on 24.02.2008,

according to Hindu Rights and Customs, in the presence of the parents of both parties and relatives in P.T.R. Chellaya Chettiyar Thirumana

Mandapam. She has submitted that after marriage, her husband and his family members, ill-treated her and used to find fault for every act done by

her. Husband/father has verbally abused the wife/mother, and she was hurt, both physically and mentally. Child, Sanjana, was born on

02.01.2012, at her parents'' house. She returned to the matrimonial home, during August, 2012. She was not allowed to spend time with her

daughter. She was instructed by husband/father and in-laws, not to breast feed. Husband/father, did not behave as a dutiful husband.

15. While that be so, on 09.10.2013, she was assaulted by her mother-in-law and suffered injuries in the Knee, Shoulder and Toe. She was

treated in Rabindran''s Health Care Centre, Ambattur. Due to the above, she was constrained to leave the matrimonial home. Child was taken by

them. Though she made several phone calls, there was no response. She could not see the child. Therefore, she made a complaint on 19.10.2013,

to the All Women Police Station, Avadi. Husband/father, did not bring the child to the Police Station. She was advised to file a Habeas Corpus

Petition. During the course of hearing of the said petition, this Court advised to approach the Court for custody of the child. According to her, from

09.10.2013, she was not allowed to see the child.

16. Before the learned Judicial Magistrate, Ambattur, in C.M.P. No. 1291 of 2014 in D.V. No. 7 of 2014, wife/mother has averred that as the

child was 2 years and four months old and she has every right to take care and have custody of the child and hence, interim custody should be

given to her, till the disposal of the main D.V. No. 7 of 2014. She has further stated that the husband/father has deprived of her legitimate right of

having custody of the child, at the tender age of the child.

17. Husband/father, in his counter affidavit to C.M.P. No. 1291 of 2014, has contended that though on 20.10.2013, he had appeared before the

All Women Police Station and produced all the medical records and when the Inspector of Police directed both the parties to appear on

24.10.2013, for further enquiry, she did not produce any medical records, but chose to file H.C.P. No. 2827 of 2013, on 08.11.2013, for the

custody of the child. However, the said H.C.P., was dismissed on 27.11.2013. Husband/father, in his counter affidavit to C.M.P. No. 1291 of

2014, has further stated that, before the 1st Additional Family Court, wife/mother has already filed a petition, for interim custody of the child and

that the same was pending. Therefore, he has contended that the Family Court alone is competent to decide the issue of custody of child.

18. In C.M.P. No. 1291 of 2014, husband/father has further contended that the wife/mother was taking psychiatric treatment for mental illness,

from Manashashra Integrated Mind Care, Vanagaram and by suppressing the same, she has filed this petition. Before the learned Judicial

Magistrate, Ambattur, husband/father has also contended that he has already filed an interim application in I.A. No. 409 of 2014, in O.P. No.

3837 of 2013, under Section 12 of the Hindu Marriage Act, for assistant of medical and welfare expert to the wife/mother.

19. Before the learned Judicial Magistrate, Ambattur, it was the further contention of the husband/father that Dr.Shalini, has advised the

wife/mother to avoid breast feeding to the child. According to him, the child is affectionate to him and if the child is separated, it would affect the

child"s health and welfare. He is taking more care of the child. He has also submitted that there cannot be any parallel proceedings on the issue of

granting custody, on the same cause of action.

20. Before the learned Judicial Magistrate, wife/mother has argued that she was prevented from having custody of the minor child, aged 2 years

and four months, from 09.10.2013 and on legal advise, approached this Court, by way of a Habeas Corpus Petition. Though she has approached

the Family Court, for custody of the child, husband/father and mother-in-law were dragging on the proceedings and therefore, she was constrained

to file a petition under 21 of the Domestic Violence Act, for interim custody of the girl child. On the allegation that she was mentally unsound and

taking psychiatric treatment, she has argued that she is mentally sound, capable of prosecuting the proceedings, and to have the custody of the

minor child.

21. Arguments have been advanced, on her behalf that once the application filed before the Family Court, for interim custody, has been

withdrawn, there is no impediment for the learned Judicial Magistrate to pass an order, under Section 21 of the Act, granting interim custody.

Before the learned Magistrate, she has also added that the husband/father is working in a private concern and mother-in-law, an aged person, is

taking treatment for joint pain and heart disease and in the abovesaid circumstances, she would be the best person to have the custody of the minor

girl child Sanjana, to bring up the child.

22. Section 6(a) of the Hindu Minority and Guardianship Act, has also been pressed into service, in support of the contention that custody of a

minor, who has not completed the age of 5 years, shall ordinarily be with the mother, decision in Bhuvan Dua Vs. State of Uttarakhand and Smt.

Mohita Dua, , has also been relied on, supporting the contention that there is no bar to entertain a petition under Section 21 of the Domestic

Violence Act, for interim custody of the child.

23. Husband/father, in his written argument, has contended that filing of an application for interim custody is an abuse of process of law and

contention has also been made that the learned Judicial Magistrate has no jurisdiction to decide the custody of the child, pending Family Court

proceedings. Contention has also been made that O.P. No. 3837 of 2013, has been filed and pending before the learned 1st Additional Family

Court, Chennai and when this Court in H.C.P. No. 2827 of 2013, has already directed wife/mother, to approach the Family Court, for custody of

the child and having done so, she cannot seek for any parallel remedy.

24. Further contentions have been made before the learned Judicial Magistrate, Ambattur, that the behaviour of the wife/mother, before the Family

Court, would stand as proof of her mental instability. Husband/father has contended that psychiatric treatment, taken by the wife/mother, the

advise of the Doctor, to keep her away from the child, and to avoid breast feeding, were sufficient to prove her mental state of affairs, to prosecute

C.M.P. No. 1291 of 2014 and to have the custody of the minor child.

25. After hearing the learned counsel for both the parties, learned Judicial Magistrate, Ambattur, in C.M.P. No. 2717 of 2014, dated 02.12.2014,

has ordered as follows:

Subsequently, the respondent/wife preferred complaint before the Protection Officer and it resulted in presentation of the case before this Court

on 12.02.2014 the Protection Officer and in that case for both parties, the learned counsels have been engaged. The respondent/wife has filed

petition, seeking for custody of the child, the learned counsel for the respondent/wife submitted that the petition before the Family Court was

withdrawn. In such circumstances in this Court has to evaluate the fitness of mental condition of the respondent/wife to proceed this case as a

normal human soundness of mind. As already mentioned above apart from the medical prescription, dated 19.09.2013, no other medical evidence

produced by the petitioner/husband, in such circumstances from the answers given by the respondent/wife this Court is satisfied that she is with

normal mental soundness and fit the proceed this case. For the abovesaid reasons, this Court considers that the present petition deserves for

dismissal consequently this petition is dismissed.

26. In C.M.P. No. 1291 of 2014 in D.V. No. 7 of 2014, dated 08.01.2015, the learned Judicial Magistrate, Ambattur, at Paragraph 10, has

ordered as follows:

10. This Court after an full enquiry, rejected the contention and claim of the respondents that the petitioner/wife is mentally ill-person and

concluded that the petitioner herein is in normal mental soundness and fit to proceed case and consequently, C.M.P. No. 2717 of 2014 was

dismissed on 02.12.2014. Therefore, this Court has no reason to say that the petitioner/biologically mother is otherwise disqualified to have

custody of the baby child now aged 3 years as per Section 6(a) of the Hindu Minority and Guardianship Act. Further, this Court taking into

consideration of the averments, ""1st petitioner-husband is working in the private concern, holding a reasonable position and a breadwinner of the

Family. In further, the 1st petitioner unable to concentrate on his day to day work and he unable to take care of his family, because he used to

appear before the 1st Additional Family Court, Chennai, as well as before this Hon"ble Court. The 2nd petitioner herein is the mother of the 1st

petitioner, aged about 53 years, she is residing at Ayappakkam and taking treatment for joint pain and heart disease etc.,"" in the affidavit filed

before this Court in support of the petitioner U/s.205 Cr.P.C., by both the respondents herein in C.M.P. No. 1669 of 2014, consider that the

petitioner/mother is in a better position to devote more time, care, upon her child. Therefore, taking into consideration of the tender age of the child

and child''s welfare more particularly of the child''s need of physical and emotional touch of the Biological mother, it is fit and proper to grant the

baby child now aged 3 years into the custody of the petitioner/biological mother herein. Further, this Court consider that the child should not be

deprived of her biological father''s care, therefore, this Court find fit to entrust the custody of the child to the petitioner herein with a visiting right to

the 1st respondent herein to see the child, with this observation the custody of child is granted by way of interim custody order to the

petitioner/mother, till the disposal of the main D.V. No. 7 of 2014 or till the competent Civil Court/Family Court pass an order on the issue of

custody of child, whichever happen in earlier point of time.

27. Assailing the correctness of both the impugned orders, made in C.M.P. No. 2717 of 2014 in D.V. No. 7 of 2014, dated 02.12.2014 and

C.M.P. No. 1291 of 2014 in D.V. No. 7 of 2014, dated 08.01.2015 respectively, Mr. Vivekavanan, learned counsel appearing for the

husband/father, submitted that the marriage between the parties was solemnized on 20.12.2008, in P.T.R. Chettiar Thirumana Mandapam, in a

grand manner and all the marriage expenses were borne by the parents of both the spouses. The spouses started living at Door No. 8543, 10th

Main Road, Ayyapakkam TNHB, Chennai - 600 077. Subsequently, she demanded for a separate house and started fighting with the parents of

the husband/father. She started insulting the husband. She refused to discharge her duties, as wife and that the mother of the husband/father has to

do all the domestic works. She became pregnant in May'' 2011 and went to her mother''s house for delivery. Baby girl, ""Sanjana"" was born on

02.01.2012 at ""Sundaram Medical Foundation"" Anna Nagar. Even after delivery, she refused to come to the matrimonial home. Finally, on the

efforts of the husband/father, she returned to the matrimonial home only on 12.08.2012, along with the child.

28. Learned counsel appearing for the husband/father further submitted that after returning to the matrimonial home, her behaviour was totally

changed. She picked up quarrels with her husband, for worthless matters and used filthy language against him. As she had no control, she started

even physically assault. She has also threatened that she would commit suicide. On 02.09.2013, when the husband/father was about to go to his

Office, she started fighting with him and used filthy language, and removed the thaali and threw it on his face. She also took a knife and threatened

the family members, with dire consequences and further threatened that she would kill herself. She finally left the matrimonial home on 20.09.2013,

on her own. Though the father of the wife/mother was aware of her mental state, he could not control her. They informed the husband/father that

they would continue her treatment and till the treatment is completed, baby, Sanjana can be kept in the matrimonial home.

29. Learned counsel for the husband/father further contended that on 09.10.2013 around 7.00 A.M., wife/mother suddenly returned to the

matrimonial home, along with few unknown people and started fighting with the husband/father and his parents. She used unparliamentary words

against him and slapped the parents-in-law. Neighbours, who tried to protect, were also injured. Parents of the husband took treatment in Dr.

Kamatchi National Hospital, Chennai 600 001, and further treatment in Government General Hospital (G.H.), Chennai. They lodged a complaint

on 10.10.2013, against the wife/mother, her brother, Kathiravan and father, Muniasami, to the Hon''ble Chief Minister''s Cell, State of Tamil

Nadu.

30. Learned counsel for the husband/father further submitted that as there was no peace in the family and as the marriage was broken, due to the

act of cruelty, husband/father has filed O.P No. 3837 of 2013, under Section 13(1)(ia) of the Hindu Marriage Act, 1955, for divorce, on the

grounds of cruelty, before the 1st Addl. Family Court at Chennai. First hearing in O.P. No. 3837 of 2013, was fixed on 08.12.2013. Though legal

notice, dated 19.10.2013, was sent to the wife/mother, intimating the Family Court proceedings, she refused to receive the same, but chose to

prefer a false complaint, dated 19.10.2013 to the All Women Police Station, Avadi, alleging domestic violence. According to him, while making

the said complaint, she was aware of the Family Court proceedings, instituted for divorce.

31. Taking this Court through the medical prescriptions, dated 05.09.2013, 19.09.2013 and 01.10.2013 respectively, learned counsel for the

husband/father reiterated that the wife/mother is suffering from mental disorder and that therefore, considering the paramount interest of the child,

custody ought not to have been ordered.

32. He further submitted that marriage was solemnised on 20.12.2008 and the Domestic Violence complaint was given on 19.10.2013, after five

years, only as a counter blast to the divorce proceedings. The said Domestic Violence case has been filed with an intention, to evade the divorce

petition in O.P No. 3837 of 2013 filed before the 1st Additional Family Court, Chennai. O.P. No. 3837 of 2013, came up on 17.02.2015 and on

that day, the wife/mother did not appear before the 1st Additional Family Court, Chennai, for the enquiry in I.A. No. 409 of 2014, filed by the

husband/father for Assistance of Medical and Welfare experts to the wife/mother. The case was adjourned to 15.04.2015 for enquiry. By citing

the above, he submitted that the wife/mother was not willing to conduct the case before the 1st Additional Family Court, Chennai, because as per

the procedure, followed by the Family Court, party alone can appear.

33. Learned counsel for the husband/father submitted that the wife/mother has filed M.C. No. 57 of 2014 before 1st Additional Family Court on

04.02.2014, giving the address of the husband/father as Waltax Road, Chennai - 79. However, the same has been withdrawn on 19.06.2014. He

further submitted that filing and withdrawal of the maintenance petition has been suppressed. Earlier, she was residing at Door No. 72/2, F1 -

Jayalakshmi Apartments, Oragadam, Ambattur, Chennai-53. She filed the Habeas Corpus Petition, with the same address. Now, she has changed

her address to G3, Fortune Arcade, Plot No. 6, Mounasam Madham, Ambattur, Chennai, to evade the legal proceedings.

34. Inviting the attention of this Court to the complaint, dated 19.10.2013, lodged by wife/mother and the photograph enclosed in the typed set of

papers, learned counsel for the husband/father submitted that in the photograph, she has a bandage/leg guard in the right leg, but actually, there was

no injury and no treatment details were produced before the All Women Police Station, Avadi. He therefore submitted that the wife/mother has

created photographs and medical records, for the purpose of filing Domestic Violence case.

35. Learned counsel for the husband/father further submitted that submitted that the wound certificate, dated 09.10.2013, enclosed in the typed set

of papers, filed by the wife/mother, was not submitted before the learned Judicial Magistrate, Ambattur. He therefore, submitted that the treatment

records, should not be entertained.

36. Learned counsel for the husband/father further submitted that after the directions in H.C.P. No. 2827 of 2013, directing the wife/mother to

approach the 1st Additional family court for custody of child, wife/mother has filed I.A. No. 410 of 2014, for custody of the child. Inviting the

attention of this Court to the prescribed format of the Domestic Violence Incident Report, under Rule 5(1) and 5(2) of the Act, he submitted that

there is no prima facie case and therefore, Domestic Violence case, is not maintainable. According to him, the whole complaint is false. The

Protection Officer has not signed the prescribed form.

37. Placing strong reliance on the prescriptions and bills enclosed in the typed set of papers, filed along with the criminal revision cases, learned

counsel for the husband/father submitted that the wife/mother is not in a position to maintain the child and it is not the suitable time to handover the

child to her. He also submitted that there is no restriction to visit the child.

38. Learned counsel for the husband/father further added that wife/mother has not taken any interest to visit the child, even in the Court premises.

She has not co-operated to conduct the case before the 1st Addl. Family Court and habitually shouted and misbehaved, in the court premises.

Despite several special counseling on various dates, her behaviour did not change. She has also threatened to commit suicide. Attention of this

Court was also invited to Page No. 30 (Paragraph No. 10) and Page No. 45 (Paragraph No. 5) of the typed set of papers, filed by the husband.

39. Learned counsel for the husband/father further submitted that the provision of section 6(a) of the Hindu Minority and Guardianship Act, can be

invoked by the wife/mother, only before the Family Court or District Court. When she has deliberately avoided the Family Court, application

under Section 21 of the Domestic Violence Act, for interim custody, ought to have been rejected.

40. Placing reliance on the decisions in Sumedha Nagpal Vs. State of Delhi and Others, and Vadivel v. Umamaheswari reported in , 2014 (4)

CTC 450 , learned counsel for the husband/father submitted that the learned Magistrate ought to have relegated the parties to work out their

respective rights in the appropriate forum, a Family Court or the District Court, in a proceedings under section 25 of the Guardians & Ward Act,

r/w. Section 6 of the Act. He further submitted that the wife/mother has no financial source and, whereas husband/father, has regular income, and

therefore, if the custody is left with the husband/father, the paramount welfare of the child would be taken care of. In this context, he relied on Smt.

Radha alias Parimala Vs. N. Rangappa, .

41. Learned counsel for the husband/father further submitted that though the wife/mother has adduced evidence, before the learned Judicial

Magistrate, on 26.11.2014 that she has completed B.A English literature and was also doing M.B.A., in Loyola College, there was no

documentary evidence, supporting her testimony. He further submitted that her statement is false. According to him, when I.A. No. 409 of 2014,

filed by husband/father, was pending, since 10.12.2013, before the 1st Additional Family Court, which according to him, the competent Court and

since the wife/mother was not cooperating, to prosecute the said petition, C.M.P. No. 2717 of 2014 was filed under Section 15 of the Domestic

Violence Act, to provide medical and welfare experts and to evaluate the wife/mother, which ought to have been ordered.

42. Learned counsel for the husband/father further submitted that the child is so attached with the husband/father, and was going to play school

every day, since July 2014 at ""Little Genius"", Plot No. 166, VGN Platina, Ayapakkam, Chennai-77 and husband/father got admission for L.K.G.

at ""Velammal Vidyalaya"" Velammal Avenue, Mel Ayanampakkam Road, Ayanampakkam, Chennai - 95. He also submitted that since the

wife/mother has left the matrimonial home voluntarily and did not take care of the child and not in a sound mind, on account of her mental illness,

the learned Judicial Magistrate, Ambattur, ought not have given custody of the child to her. Learned counsel further submitted that the learned

Judicial Magistrate is not a medical expert to assess the medical soundness. For the abovesaid reasons, he prayed to set aside the impugned

orders.

43. Opposing the prayer sought for in the revision petitions, Mrs. S. Sridevi, learned counsel appearing for the wife/mother admitted that the

marriage was solemnized on 24.02.2008, but denied the contention of the marriage expenses were borne by both parents. According to her, as

per the community, to which the parties belong, it is customary that the marriage expenses have to be borne only by bride"s family and they had

spent nearly Rs. 6 lakhs, towards marriage expenses, apart from providing 35 sovereigns of jewels and other household articles. Minor Sanjana

was born on 02.01.2012 at Sundram Foundation at Annanagar.

44. Learned counsel appearing for the wife/mother has denied the allegations of change in the attitude, behavior and usage of filthy language and on

the contra, submitted that it is the in-laws of the husband treated her cruelly and driven her out of the matrimonial home, without her child. She

denied the allegations of assault of the parents of the husband/father, along with some unknown persons. Per contra, she submitted that they

assaulted the wife/mother.

45. According to the learned counsel appearing for the wife/mother, after marriage, the parties were living at Door No. 8543, 10th Main Road,

Ayyapakkam TNHB, Chennai - 600 077, and the marriage took place in PTR Kalyana Mandapam, Ambattur. She further submitted that when

they lastly resided together in Ambattur, husband/father chose to file a case before the Family Court, Chennai, by giving a false address, as if, he

was residing at Door No. 35/20-A, V.O.C. Salai, Waltax Road, Sowcarpet, Chennai - 600 079.

46. Learned counsel appearing for the wife/mother submitted that there was no intention to suppress the filing of I.A. No. 410 of 2014 in O.P. No.

3837 of 2013, under Section 26 of the Hindu Marriage Act, for the custody of the child. She further submitted that in M.C. No. 57 of 2014, the

husband/father filed a Memo, agreeing to pay Rs. 3,500/- as maintenance. However, as the wife/mother did not want his money and hence, the

petition was withdrawn.

47. Learned counsel appearing for the wife/mother submitted that though I.A. No. 410 of 2014, was filed by the wife/mother for interim custody,

the husband/father filed I.A. No. 409 of 2014, for assistance of medical and welfare experts and to evaluate her, in order to prevent the family

Court from the deciding the petition for custody of the child and having regard to the provisions of the special enactment, where the proceedings

have to be completed within a specific period, wife/mother has filed C.M.P. No. 1291 of 2014 in D.V. No. 7 of 2014, for interim custody of the

child, under Section 21 of the Domestic Violence Act and during the pendency of the said petition, I.A. No. 410 of 2014, was withdrawn.

48. Learned counsel for the wife/mother denied the contention that the wife/mother was taking continuous treatment. According to her,

husband/father had taken her forcibly to the hospital on 05.09.2013 for consultation with Dr.Shalini and she gave pills for peaceful sleep, in nights

and asked her to bring her mother in law also, for consultation. Taking advantage of the medicines prescribed for a short period, husband/father

filed a petition, under section 12 of the Family Courts Act, on 10.12.2013, to assess her mental ability with ulterior motive to a prevent the court

from deciding the custody of the child, in I.A. No. 410 of 2014, filed by her, under Section 26 of the Hindu marriage Act.

49. Learned counsel for the wife/mother further submitted that there is no procedural irregularity in entertaining a petition under the Domestic

Violence Act. According to her, Section 6(a) of the Hindu minority and Guardianship Act, 1956, states that the custody of minor, who has not

completed the age of 5 years, shall ordinarily be with the mother and therefore, the husband/father is having illegal custody of the child.

50. Learned counsel for the wife/mother further submitted that the child was forcibly taken and she is under the custody of the husband/father from

19.09.2013. At that time, the child was more than one and half years. Child has been deprived of getting even mother''s milk, at the tender age,

which gives her immunity. She further submitted that wife/mother is a graduate in English literature and completed LIBA and at present, working as

a spoken trainer and earning sufficiently to look after her child. She is living in a joint family, along with her sister, and her family and hence, the

child will grow in a good atmosphere.

51. Learned counsel for the wife/mother further submitted that as the child is aged below five years and hence, she is entitled to custody of the

child. She has also relied on few decisions,

(i) Pushpa Singh Vs. Inderjit Singh, ,

(ii) Smt. Nirmala Manohar Jagesha Vs. Manohar Shivram Jagesha, ,

(iii) Dhanwanti Joshi Vs. Madhav Unde, ,

(iv) Asha Varghese Vs. Leelama Pailo and Others, ,

(v) Rajesh K. Gupta Vs. Ram Gopal Agarwala and Others, ,

(vi) Gaurav Nagpal Vs. Sumedha Nagpal, ,

(vii) R. Syed Mahbool Vs. Parveen Sultana, , and

(viii) Roxann Sharma Vs. Arun Sharma .

According to her, welfare and future of the child would be well protected, if the custody is with the wife/mother. For the abovesaid reasons, she

prayed to sustain the orders passed by the learned Judicial Magistrate, Ambattur.

Heard the learned counsel for the parties and perused the materials available on record.

52. Before adverting to the facts of this case, it is necessary to have a cursory look at the provisions dealing with the appointment of guardian to a

minor and custody, under the Hindu Minority and Guardianship Act. Section 6 of the Hindu Minority and Guardianship Act deals with natural

guardians of a Hindu Minor and it reads as follows:

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.

53. Section 13 of the Hindu Minority and Guardianship Act deals with welfare of minor to be paramount consideration and the said Section is

extracted hereunder:

(1) In the appointment of 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.

54. The Protection of Women from Domestic Violence Act, 2005, 2005 (Act 43 of 2005), is enacted to provide for more effective protection of

the rights of women guaranteed under the Constitution, who are victims of violence of any kind occurring within the family and for matters

connected therewith or incidental thereto.

55. Section 15 of the Act, deals with the Assistance of welfare expert and the said Section is extracted hereunder:

In any proceeding under this Act, the Magistrate may secure the services of such person, preferably a woman, whether related to the aggrieved

person or not, including a person engaged in promoting family welfare as he thinks fit, for the purpose of assisting him in discharging his functions.

56. Section 21 of the Domestic Violence Act, deals with the custody orders and the same is extracted hereunder:

Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for

protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person

making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent: Provided that if

the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to

allow such visit.

57. The moral, physical welfare and the ties of natural affection cannot be allowed to be snapped, while considering the question of custody, which

is one of the paramount welfare of the child, which factors do apply to both parents. Father''s right to be the guardian of a minor child is statutorily

recognised, so also the custody of the child, below five years, with the mother, unless she is found fit.

Let me consider the decisions relied on by the parties and few decisions on the aspect.

58. The rationale in incorporating the word, ""ordinarily"" recognises that the custody of a child of tender age should be with the mother. In Zainab

Bibi v. Abdul Kareem reported in , AIR 1926 Lah. 117 , custody was given to the mother. The same view was expressed in Tara Bai v. Mohan

Lal reported in AIR 1932 Bombay 405.

59. In Saraswatibai Shripad Ved Vs. Shripad Vasanji Ved, , where the custody of a minor child was given to the mother as against the father,

while not disturbing the father''s guardianship. Beaumont, C.J., remarked:

I think the law on question of this sort is the same in this country as in England, though, of course, social habits may be different. The modern view

of Judges in England is that it is impossible, in the case of a young child, to find any adequate substitute for the love and care of the natural

mother..... If the natural mother is a suitable person, the Courts in England will as a general rule handover the custody of a child of tender years to

the mother.

The mother''s position is regarded as of much more importance in modern times than it was in former days, when a wife was regarded as little

more than the chattel of her husband. The view of society in India as to the position of women may not have advanced so far or so fast as in

England. But at the same time, the right of the mother to the custody of her young children is undoubtedly recognised in this country However, the

paramount consideration is the interest of the child, rather than The rights of the parents. Human nature is much the same all the world over, and, in

my opinion, if the mother is a suitable person to take charge of the child, it is quite impossible to find any adequate substitute for her for the custody

of a child of tender years.

60. In Mt. Sakina Begam Vs. Malka Ara Begum, , the term ""ordinarily"" was reiterated.

61. A Hon''ble Division Bench of this Court in Kaliappa Goundan Vs. Valliammal, , directed that custody of a minor girl should be handed over to

the mother as against the father, while not disturbing his guardianship'' and holding that it is impossible to find an adequate substitute for the mother

for the custody of a child of tender years, and that it is in the interests of the child, whose interest should be the paramount consideration, the

mother should have the custody.

62. In Samuel Stephen Richard Vs. Stella Richard, , this Court held that in the tender years of the child needs the care, protection and guidance of

the most interested person, the mother has to be preferred.

63. In Medai Dalavoi T. Kumaraswami Mudaliar Vs. Medai Dalavoi Rajammal alias Valliammai Anni, , the distinction pointed out between the

guardianship of the father and the custody of the infant with the mother for the welfare of the infant was reiterated and given effect to, with

reference to two minors, whose mother was appointed as the guardian, but it was modified into one of merely giving the custody of the two minors

to the mother, while retaining the guardianship of the father.

64. In Rosy Jacob Vs. Jacob A. Chakramakkal, , the Hon''ble Apex Court, held as follows:

Section 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which

term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which

necessarily involves due protection of the right of his guardian to properly look after the ward''s health, maintenance and education this section

demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian, the

necessary assistance from the court in effectively discharging his duties and obligations towards his ward so as to promote the latter''s welfare If

the court under the Divorce Act cannot make any order with respect to the custody of the wards and it is not open to the court under the

Guardians and Wards Act to appoint or declare guardian of the person of his children under Section 19 during his lifetime, if the court does not

consider him unfit, then, the only provision to which the father can have resort for his children''s custody is Section 25 . The court''s power under

Section 25 of the Guardians and Wards Act is to be governed primarily by the consideration of the welfare of the minors concerned. The

discretion vested in the court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and

circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this

respect being seldom if ever identical.

In considering the question of the welfare of the minors due regard has of course to be paid to the right of the father to be the guardian and also to

all other relevant factors having a bearing on the minor''s welfare. There is a presumption that minor''s parents would do their best to promote their

children''s welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of

the natural selfless affection normally expected from the parents for their children.

Where there is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their

welfare, 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. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then he

cannot claim defeasible right to their custody under Section 25 merely because there is no defect in his personal character and he has attachment

for his children - which every normal parent has Merely because the father loves his children and is not shown to be otherwise undesirable cannot

necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife

who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her

profession and financial resources, may be in a position to guarantee better health, education and maintenance for them.

..... The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they get their due

share of affection and care form both the parental home. Where, however, family dissolution due to son unavoidable circumstances, becomes

necessary, the Court has to come to a judicial decision of the welfare of the children on a full consideration of all the relevant circumstances.

Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare

of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her

children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to

guarantee better health, education and maintenance for them. The children are not mere chattels : nor are they mere play-things for their parents.

Absolute right of parents over the destinies and the lives of the 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 a case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirement of welfare

of the minor children and the rights of their respective parents over them.

65. In Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka, , it was observed:--

17. The principles of law in relation to the custody of a minor appear to be well established. It is well settled that any matter concerning a minor,

has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor,

the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor''s interest. In

considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor.

66. In Suresh Babu Vs. Madhu, , the question came up for consideration and it was held that the expression ""welfare"" must be read in its widest

amplitude as meaning and including every circumstances which must be taken into consideration. The welfare of the child, particularly of an infant

of about two years of age cannot merely be measured on the scales of yardstick of money or by physical comfort only. The physical well-being of

the infant is not doubt important but that is not all. The claim of the husband that he is very well-to-do may be well founded. He may be in a

position to employ any number of servants to look after the child. This indicates that there is every probability of the infant child being consigned to

the mercy of the servants at home. So, the physical or material comfort by itself is not the welfare of the minor. This Court, held as follows:

Section 6 proceeds to enumerate who the natural guardians of Hindu minor in respect of minor''s person or property (excluding his or her

undivided interest in joint family property) are. In the case of a boy or an unmarried girl, the father, and after him, the mother would be the natural

guardian under Section 6(a) of the Hindu Minority and Guardianship Act. The proviso to Section 6(a) states that the custody of a minor who has

not completed the age of five years, shall ordinarily be with the mother. Section 6(b) and (c) are not relevant for purposes of this case. It is thus

seen that even Section 6 which purports to specify who the natural guardians of a Hindu minor with reference to his person or property are, makes

a distinction between ''guardianship and custody. The father is first declared to be the natural guardian in the case of a boy or an unmarried girl.

Only thereafter, the claim of the mother as a guardian is provided for. In other words, the father so long as he is alive will be the natural guardian in

the case of a, boy or an unmarried girl and only after his death, the mother would step in.

This is with reference to guardianship, which. in its ordinary connotation, would take in custody and care of the minor which could be equated to

guardianship of the person and custody and control of the pro. party which is really guardianship ''with reference to the property of the minor. in so

far as the father who is declared as the natural guardian under Section 6 is concerned. Ordinarily he would be entitled to the guardianship of the

person as well as the property of a minor. Only after the lifetime of the father, the mother becomes so entitled to the guardianship of the person as

well as the property of the minor as it natural guardian. But the proviso carves out a special right relating to custody in favor of the mother in cases

where the infant child has not completed the age of five years. In such oases, a preferential claim for custody is conferred statutorily on the mother

and that would moan that the father, though he would still be the natural guardian of the infant under S. 6, would not be as of right entitled to the

custody of the infant, if the infant child has not completed the age of five years subject of course. to the paramount consideration of the Welfare of

the child.

It is thus seen from S. 6(a) and the proviso hereunder that even that provision in the statute contemplates the father being the natural guardian of the

infant, who has completed the age of five years, while the mother is entitled ordinarily to have the custody of such a minor. Obviously, therefore, in

such a case, the father would still be for all practical purposes the natural guardian as defined in S. 4(c) of the Hindu Minority and Guardianship

Act. with reference to the custody of the infant, who has not completed the age of five years, for which the mother is ordinarily entitled to under the

proviso to S. 6(a) of the Hindu Minority and Guardianship, Act, inasmuch as she is one who is statutorily entrusted with the care and custody of an

infant, who has not completed the age of five years, she would also fulfil the requirements of. a ""guardian"" under the first part of Sec. 4(b) of the

Hindu Minority and Guardianship Act as a person having the care of a person of an infant. This difference made even in the statute in -S, 6 (a) is

important.

In the case of an infant who has not completed the age of five years. in the absence of any disqualification, the mother will be ordinarily entitled to

the custody of the infant, while the father, in respect of the infant''s property, would be such a natural guardian. It is not. therefore, necessary in

every case where the statutory recognition of the preferential claim of the mother to the custody of an infant child who has not completed the age of

five years is sought to be enforced, that the father should be found to be disqualified or that there should be a prayer for the removal of the father

as the natural guardian and for the appointment of some other person as a suitable guardian. In cases of infants who had not completed the age, of

five years, the application made by the mother in regard to the custody of such infants is only to recognize, give effect to and enforce the statutory

right conferred upon the mother in such cases and there is no need to say that the father had disqualified himself from being the natural guardian of

the infant or that he should be removed from his capacity as the natural guardian or some other suitable per son should be appointed instead.

Looked at from this point of view, the right asserted by the respondent, in this case is only that right provided in favour of the mother as a

preferential right to the custody of an infant, who has not completed the age of five years and no more. That is not tube mixed up with the

guardianship of the infant as a whole. ''Indeed, there are many decisions which have recognized the distinction between guardianship and custody.

In Bai Tara Vs. Mohanlal Lallubhai, , the mother was given the custody of a boy seven years'' old as against the father, while not disturbing the

rather''s guardianship, as it was in his interests, and for his welfare that he should have his mother''s care.

67. In D. Rajaiah Vs. Dhanapal and Another, , this Court that the welfare of the minor children is not to be measured only in terms of money and

physical comforts. The word ""welfare"" must be taken in its widest sense. The morality and ethical welfare of the child must also weigh with the

Court as well as its physical well being. Whenever a question arises before a Court pertaining to the custody of a minor child, as already noticed,

the matter is to be decided not only on consideration of legal rights of parties, but on the sole and predominant criterion of what would best serve

the interest and welfare of the minor. The legal rights of the father must be understood subject to the provisions of Section 17 of the Act, which

says that the Court should be guided by the sole consideration of the welfare of the minor and what would be for the welfare of the minor must

necessarily depend upon the facts and circumstances of each particular case.

68. In Ram Narain Gupta Vs. Rameshwari Gupta, , husband, alleging that the wife was a schizophrenic and was suffering from such a mental

disorder, sought for a decree of divorce. At Paragraph 10, the Hon''ble Apex Court, observed as follows:

The context in which the ideas of un-soundness of mind and mental disorder occur in the section as grounds for dissolution of a marriage, require

the assessment of the degree of mental disorder"". Its degree must be such as that the spouse seeking relief cannot reasonably be expected to live

with the other. All mental abnormalities are not recognised as grounds for grant of decree. If the mere existence of any degree of mental

abnormality could justify dissolution of a marriage few marriages would, indeed survive in law.

Though the said judgment has been rendered in a proceeding for divorce, yet this Court is of the considered view that the principles stated supra,

can be made applicable, to the extent, as to whether, the degree of mental abnormality of the wife/mother, is of such magnitude, to dislodge her

claim for the custody of the child.

69. In Pushpa Singh Vs. Inderjit Singh, , while considering the custody of the child, below the age of five years and taking note of the paramount

interest of the child, the Hon''ble Supreme Court, held as follows:

The age of the child is admittedly less than five years. The child undoubtedly needs affection of his mother for which there is no adequate

substitute. We fell that the High Court has not approached the problem in the correct perspective.

Holding that the mother is entitled to the custody of the minor child, less than five years, the Hon''ble Supreme Court granted visitation rights to the

father.

70. In Mary Vanitha Vs. Babu Royan, , this Court held as follows:

Human nature is much the same all the world over, and in the opinion of the court if the mother is a suitable person to take charge of the child, it is

quite impossible to find any adequate substitute for her for the custody of a child of tender years. Applying the above test on the facts and

circumstances of the present case, the best way to serve the welfare and interest of the minors, who are aged about 5 years and 3 years

respectively would be to remove the child from the custody of the father. The mother had a steady income, out of which she was in a position to

meet all the expenses of her children.

71. In Kirtikumar Maheshankar Joshi Vs. Pradipkumar Karunashanker Joshi, , the Hon"ble Apex Court, at para 56, held as follows:

56. 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.

72. The Hon"ble Supreme Court in the case of Chandrakala Menon (Mrs) and Another Vs. Vipin Menon (Capt.) and Another, , after observing

the fact that the father is the natural guardian of the minor child, held that the question regarding the custody about the minor child cannot be

decided on the basis of the legal rights of the parties; the custody of a child has to be decided on the sole and predominant criterion of what would

best serve the interest and welfare of the minor.

73. In Karuppannan Vs. Sudhamathi, , father sought for custody of the child, aged about 2 1/2 years, at the time of filing of the petition and aged 6

years, at the time of decision by this Court. Dealing with the rights of the parties, inter-se, in terms of Section 6 of the Hindu Minority and

Guardianship Act, 1959, at Paragraph 9, this Court held as follows:

there is a distinction between guardianship and custody based on the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1959.

The above said Section which purports to specify who is the natural guardian of a Hindu Minor with reference to his person or property, makes a

distinction between guardianship and custody. The father is first declared to be the natural guardian in the case of a boy of an unmarried girl. Only

thereafter the claim of the mother as a guardian is provided for. This is with reference to guardianship which in its ordinary connotation would take

in custody and care of the minor which could be equivated to guardianship of a person and custody and control of the property which is really

guardianship with reference to the property of the minor. The proviso to the Section carves out a special right relating to custody in favour of a

mother in cases where the infant child has not completed the age of five years. In such a case a preferential claim for custody is conferred

statutorily on the mother and that would mean that the father, though he would still be the natural guardian of an infant under Section 6 , would not

be as of right entitled to the custody of the infant if the infant child has not completed the age of five years. It is thus seen from Section 6(a) and the

proviso thereunder that the statute contemplates the father being the natural guardian of an infant who has not completed the age of five years while

the mother is entitled ordinarily to have the custody of such a minor. Obviously, in such a case the father would still be for all practical purposes the

natural guardian as defined in Section 4(c) of the Hindu Minority and Guardianship Act. Indeed, there are many decisions including that of Ratnam,

J. In Suresh Babu Vs. Madhu, , which have recognised the distinction between guardianship and custody. This difference made even in the statute

in Section 6(a) makes it clear that it is not necessary in every case where the boy has completed five years, his custody must pass on to the father.

So the provisions of Act 32 of 1956 are no bar to entrust the custody of a six years old child with the mother.

While considering the mandate of law, i.e., welfare of the child and answering the question, as to whether, mother should be entrusted with the

custody of the child, at Paragraph 10, this Court further held as follows:

10. The only question in this case is whether it is for the welfare of the minor that his custody should be entrusted with his mother. It is unfortunate

that owing to the differences between the father and mother it has become necessary to consider this question. The endeavour made by this Court

with the assistance of Counsel on both sides to pursuade the father and mother to live together in the interest of the welfare of the infant child

proved futile. But, it is still possible that in future these differences may be made up and that the interest of the minor may be advanced by the

cooperation of both the spouses. The boy has just completed six years and all along he has been under the care of his mother. As we have already

seen, both the mother and maternal grandmother who is residing with the mother are educated persons residing in Namakkal Town. Even though

the child has crossed five years of age, it still requires motherly care and affection. It is impossible in the case of a young child to find any adequate

substitute for the love and care of the natural mother. The mother''s position is regarded as of much more importance in modern times than it was in

former days, when a wife was regarded as little more than the chattel of her husband. Be it also noted that the paramount consideration is the

interest of the child rather than the rights of the parents. The expression ''Welfare of the minor'' though has not been denned, yet undoubtedly has to

be given a very wide meaning. It ought not to be measured in money only or by physical comfort alone. It has many facets, such as financial,

educational, physical, moral and religious welfare. It would not be right to snatch this child of tender age from his mother and force it to make a

new start with his father. In my view, so long a child is young enough to need the day to day care of his mother, it is better to leave the child with

the mother, unless mother is entirely unsuitable person. If mother is a suitable person to take charge of the child, it is quite impossible to find an

adequate substitute for her for the custody of a child of tender years. The mother''s lap is God''s own cradle for a child of this age, and that as

between father and mother, other thing being equal, a child of such tender age should remain with mother. It is the mother who would have the

interest of the minor most at heart, the tender years of the child needing the care, protection and guidance of the most, interested person viz., the

mother, who has come to be preferred to others. The affection, love and sympathy which the children require cannot be given by the father in the

same measure as can be given by the mother.

Dehors the inter-se preferential rights of the mother or father, as the case may be, the observations of this Court, regarding the care, love and

protection required for a child, squarely apply to the facts on hand and considering the entire material on record, wife/mother cannot be held to be

an unsuitable to have the custody of the child.

74. In Aloke Sarkar Vs. Anindita Sarkar Nee Basu, , the Calcutta High Court held as follows:

16. In the matter of deciding the custody of the child, whether under the Hindu Marriage Act, or under the Guardians and Wards Act or Hindu

Minority and Guardianship Act, the paramount consideration is the welfare of the child. Such position of law, now being well settled through

judicial precedence both of the Supreme Court as also of different High Courts can hardly be disputed by anybody and indeed in the instant case,

the same is not disputed by either of the parties.

75. In L. Chanaraj Vs. T. Rajammal, , this Court held that,

Right of natural guardian - Primary concern of Court while considering application should be welfare of minor child - Mere fact that father is

natural guardian does not clothe him with any unfettered right to custody of ward if welfare of ward is opposed to it.

76. In Dhanwanti Joshi Vs. Madhav Unde, , the parents were separated. An ex-parte order was passed, under the Guardian and Wards Act,

1890, giving permanent custody of the child to the mother. Superior financial position was one of the grounds, urged by the father, to claim

custody. The Hon''ble Supreme, while adverting to the above, held that having superior financial capacity cannot be the sole consideration for

change of custody from mother to father. On facts, the Hon''ble Apex Court held that no substantial change in the circumstances having been

established, the previous order made in favour of the mother was binding on the father and the subsequent proceeding was barred by res judicata.

In the reported case, the father contended that he would provide better education to the child in America.

77. In Mary Sumathi, No. 128/5 Emerald Flats, Anna Nagar West, Chennai-40 Vs. Charles Asirvatham No.36 Anna Street, Taramani Chennai-

113, , mother filed a petition for custody of the minor child. She was a Doctor. The child was with her for nine years. It was the contention of the

mother that even the paternity of the child was disputed at one point of time and marriage between them was also dissolved. Father of the child

made reckless allegation, while objecting to the custody of the child. In the above background, this Court, while answering a question as to

whether the appointment of the mother, as the guardian would be in furtherance of the welfare of the minor child and having regard to the conduct

and assertion of the respondent therein that he had not fathered the child and that it was born to the mother with another person, at paragraph 6,

held that when the husband has made such wild allegations, disowning the parentage of the child, such type of person, not only wants to impress

upon the court with recently developed love and affection from the child, which obviously must be only a pretense. At Paragraphs 10 and 11, the

Court further held that the rights of the parties are only secondary to the paramount consideration and welfare of the minor and held as follows:

10. Now it is well settled proposition in law that so far as appointment of guardian is concerned the rights of the parties are only secondary and it

is not a question of vindication of right of the husband or wife but the paramount consideration must be only the interest and welfare of the minor,

on the basis of which alone the court can chose the guardian whether it is mother or father. It cannot be also stated father has got a preferential

claim than the mother. After all both are equal partners and therefore it cannot be stated that father has got a better claim to be the guardian or

given custody of the minor child than the mother. Interest and welfare of the minor child consists in providing necessities and comforts which would

ensure that the child grows up in proper atmosphere so that in course of time the child will stand on her own leg and will be an useful addition to

the society and the family. Provision of basis necessities and comforts are only one of the aspects that has to be taken into consideration while

choosing the guardian to be appointed.....

11. Besides, meeting the basic needs, the child must be brought up in proper atmosphere and the conditions in the house must be conducive to her

ever growing personality. Nothing can be said in this capacity. The averments made by the respondent against the petitioner are made in a reckless

manner. No importance can be attached to the allegations made by the respondent against the petitioner. Since it has been proved that the

respondent is in the habit of making reckless allegations against the petitioner..... Under such circumstances, it will be cruel to snatch the child

from the mother, namely the petitioner with whom the girl has been very much attached and with whom she has been living for the past nine years.

The girl has been brought to the court and even though she is a small girl to be asked to give her option or to choose intelligently it is apparent that

she is deeply attached to her mother and she is very comfortable in the company of her mother and grand parents.

Though the said decision has been rendered on the facts and circumstances of the case, where reckless allegations have been made, against the

wife therein, the observations of the Court, regarding the requirements of the child, can be taken note of.

78. In Sumedha Nagpal Vs. State of Delhi and Others, , decision relied on by the learned counsel for the husband/father, question was whether,

the Hon''ble Apex Court can interfere child custody dispute in writ jurisdiction. Mother contended that she was deprived of the custody of child.

Whereas, father contended that she abandoned the child. At the time of hearing of the case, before the Apex Court, the child was aged two years.

In the reported case, Article 32 of the Constitution of India, was invoked. While observing that writ proceedings are summary in nature, and

disputed questions cannot be decided in the course of such proceedings, the Hon''ble Supreme Court, at Paragraph 3, held as follows:

3. Without expressing any view on the pleadings raised in this case and making it clear that it is neither appropriate nor feasible in the present case

to investigate the correctness of the same and decide one way or the other, we propose to relegate the parties to work out their respective rights in

an appropriate forum like the Family Court or the District Court in a proceeding arising under Section 25 of the Guardians & Wards Act read with

Section 6 of the Act or for matrimonial relief.

79. No doubt, an application under Section 25 of the Hindu Minority and Guardianship Act, 1956, read with Section6 of the Act, is maintainable,

still the rights of the wife/mother, to seek for interim custody of the child, under Section 21 of the Domestic Violence Act, 2005, pending disposal

of the main petition, is not curtailed. Moreover, the said decision has been rendered prior to the special enactment, and therefore, with due respect,

it cannot be applied to the facts on hand. Further the objections of the husband/father, on the ground of mental illness of the wife/mother has been

considered, evidence adduced by him, has been taken note of, and after considering his submissions, interim custody has been ordered.

80. In R.V. Srinath Prasad Vs. Nandamuri Jayakrishna and Others, . It was held that the issue relating to custody of minor is a sensitive issue

involving the emotions of the parties concerned and the Court must strike a balance between such emotions and the welfare of the minor, which is

a matter of greater importance.

81. In Smt. Radha alias Parimala Vs. N. Rangappa, , the application, filed by the father, under Section 25 of the Hindu Minority and Guardianship

Act, was ordered. The facts which weighed the mind of the Court, to order custody to the father, is extracted hereunder:

16. In the backdrop of the principles noticed above governing the appointment of guardian and entrusting the custody of minor to a parent or

others, let us have a look at the facts of this case in order to decide whether the welfare of the minor child will be better served by entrusting his

custody to the mother or to the father. On the date of institution of G and WC No. 5 of 2000, the child was more than 7 years old; the child was

with the father upto 21-9-2000, the date on which he was arrested and kept in judicial custody in pursuance of the registration of Crime No. 39 of

2000; the father is employed as an Assistant in Oriental Insurance Company and has a regular income to support himself and the minor as well as

the appellant. The respondent on the date of institution of G and WC No. 5 of 2000 was serving in Shimoga and subsequently he was transferred

to Chitradurga and in both the places good academic institutions are available for educating the child properly. As against this, the appellant mother

was admittedly a housewife as on the date of institution of G and WC No. 5 of 2000; she was residing with her parents in Kogalur Village in

Channagiri Taluk; admittedly she has no independent source of income to support herself or to support the minor; she has read only upto PUC.

When we weigh these admitted facts and balance plus and minus points, keeping in our mind the welfare of the minor as the paramount

consideration, we are of the considered opinion that the welfare of the minor would be served better if we entrust the custody of the minor to the

father. Although the learned Counsel appearing for the appellant made a feeble attempt before us that the parents of the appellant are financially

sound and they have financial resources to provide residence for the appellant and the minor in Shimoga and to give good education to the minor in

Shimoga, that submission of the Counsel is not acceptable to us, because, that plea remains to be a plea only without proof in this case, the parents

of the appellant are not examined before the Court below, nor any documentary evidence is produced before the Court below to show the

financial resources of the parents of the appellant to provide residence to the appellant and the minor in Shimoga for the purpose of educating the

minor. Alternatively, it needs to be noticed that even assuming that the parents of the appellant have financial resources to provide residence in

Shimoga for the appellant and the minor, that fact itself cannot be a valid justification for the Court to deny the right of custody of the minor to the

respondent, particularly he being a natural guardian of the minor. Further, the claim now made by the appellant that the parents of the appellant are

having financial resources to support her and the minor does not seem to be correct statement, because, it is pointed out that in the application filed

by her for maintenance, she has stated that she has no independent income to support herself or to support the minor. Thus, it is quite clear that

there are no weighty considerations to deny the father his preferential right to the custody of the minor. The father being a natural and lawful

guardian of the minor, he has a legal right to control and direct the education and bringing up of the minor until he attains majority, and the Court

will not interfere with him in the exercise of his paternal authority except where by his gross moral turpitude he forfeits his rights or where he has by

his conduct abdicated his paternal authority or where he by his actions creates impediments on the path of the minor for his growth and

development. Such a case is not made out in this case against the father.

82. Reverting to the case on hand, it is the contention of the wife/mother that though she had earlier filed a maintenance petition, husband/father

offered a sum of Rs. 3,500/- and she withdraw the application, as she did not want the money. She is educationally qualified and stated to be a

spoken English trainer. On facts and circumstances of the case, it cannot be held that she has no financial support to take care of the child.

Moreover, better financial position, alone is not the deciding factor, while considering the paramount welfare of the child.

83. In Asha Varghese Vs. Leelama Pailo and Others, , in a Habeas Corpus Petition, a Hon''ble Division Bench of this Court, at Paragraphs 5 and

7, held that mother should have custody of minor child of less than five years, whether male or female. The above paragraphs are extracted,

5. It is the law, that till the completion of the year of five of any child, the child whether male or female must be with the custody of the mother and

even thereafter, if the child is a female child, till such time, that the child attains puberty or the mental make up, so as to withstand and take care of

herself without anybody''s help, only then, the question as to with whom the child has to be left, that would also arise only between the father and

mother of the child.

7. Coming to the facts, this Court is able to assess on its interrogation with the parties, that some difference of opinion is still in existence in

between the husband and wife, and on the husband''s family side, they would like to take custody of the child with them. On the other hand, the

wife, that is the mother of the child is very keen in getting the child and keep it along with her and in such event, as already explained, the position

of law is in favour of the mother and even though, the father has got a priority regarding the custody of the children, from among the father and

mother, still, considering the age of the child being hardly three, the child has to be nursed in many ways, particularly regarding the suckling babies

and therefore, the law has been designed to the effect, that till the completion of fifth year of age, the child whether male or female must be with the

mother and if it is a female child, even thereafter, till it attains puberty or the mental make up, that is required to have its existence of their own, it

should be with the mother, which question shall be decided by the Court at the appropriate time. Now, because of the above clarification

rendered, it is easy to arrive at the conclusion that the child in question in the above Habeas Corpus Petition, shall be left with only the mother,

particularly, in view of the fact, that no other better or valid reasons being offered on the part of the respondents herein, this Court is of the view

that the child should be handed over only with the mother for the up keep and maintenance of the same and hence, the same is ordered

accordingly, besides handing over the child physically with the custody of the petitioner.

In the above reported case, though the father has contended that he is entitled to the custody of the child, having regard to the legislative intent and

the need to nurture a girl child, aged three years, custody was decided in favour of the mother. Reverting to the case on hand, the girl child

Sanjana, was just two years and four months, at the time of filing of the petition. Prima facie, the said decision can be made applicable to the facts

of the present case. However, paramount welfare of the child is the guiding principle.

84. In Rajesh K. Gupta Vs. Ram Gopal Agarwala and Others, , father filed a writ of Habeas Corpus for custody of his minor daughter. He alleged

that his wife was suffering from serious mental dis-order. Before the Hon''ble Supreme Court, contentions were made that the mother was given

treatment for the disease, paranoid schizophrenia with which she was suffering. Contention has also been made that life and health of the baby girl,

would not be safe, she was remained in the custody of the mother. Father has also contended that his mother was living with him and she would be

able to look after the child. Refuting the contentions, mother therein has contended that she was in perfect health and not suffering from any medical

ailment and the baby girl was being well looked after, she was in fine condition and that the apprehension of the father that she would not get

proper care from her mother, had no basis. Adverting to the above, the Hon''ble Supreme Court, while rejecting the contentions of the

husband/father, allowed custody of the child, with the mother. It is worthwhile to reproduce Paragraphs 7 and 8, of the judgment, which are as

follows:

7. It is well settled that in an application seeking a writ of habeas corpus for custody of minor child, the principal consideration for the court is to

ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody

should be changed and the child should be left in the care and custody of someone else. It is equally well settled that in case of dispute between the

mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the

parties [see Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, and Syed Saleemuddin Vs. Dr. Rukhsana and Others, . It is, therefore,

to be examined what is in the best interest of the child Rose Mala and whether her welfare would be better looked after if she is given in the

custody of the appellant, who is her father.

8. The medical reports of Smt. Aruna Gupta regarding her treatment in some hospitals in U.S.A. are mostly of the year 1984 and the doctor of

Holy Cross Hospital, U.S.A. recorded his assessment as under: -

Borderline personality disorder with no obvious medical problems on examination or in the laboratory.

PLAN:

No further medical intervention is necessary.

The medical reports of All India Institute of Medical Sciences, which are of the year 2000, do not show that she has been suffering from any such

mental ailment, which may be termed as serious. In fact, according to the appellant himself Smt. Aruna Gupta is a case of paranoid schizophrenia

and not any kind of serious mental ailment.

85. It could be deduced from the above judgment that though the mother therein, was treated in a hospital, reports of the All India Institute of

Medical Science produced therein, showed that she was not suffering from any medical ailment, which may be termed as serious and considering

the medical evidence, the Hon''ble Apex Court allowed the custody of the mother. Reverting to the case on hand, it could be seen that the

wife/mother is said to have taken anti-depressants only for a short duration and that there is no medical report to prove that she was suffering from

any mental ailment, that may be termed as serious and that the life and health of minor Sanjana, aged about 2 years and four months, at the time of

filing of the petition, would not be safe, if the mother is allowed to have the custody of the child.

86. There can be a mental suffering, such as, falling in depression. Sickness on account of an event in life, cannot be said to be disability of mind. In

the case on hand, treatment taken for short duration, would not give rise to any conclusion that she was suffering from any mental illness or in a

state of mind, either to defend any litigation on her own or to bring up the child. At this juncture, it should also be noted that the suggestions of the

husband/father is that the parents of the mother/wife, requested them to retain minor Sanjana, till the treatment is completed. In the averments,

husband/father has contended that the wife/mother is not in a position to maintain the child and it is not the suitable time to hand over the child to

her.

87. Thus, from his own averments, it could be deduced that unsuitability is not for ever, but due to taking medicines and the alleged aggressive

attitude. The Doctor, who had prescribed anti-depressants has not even suggested that the wife/mother was suffering from serious mental decease.

Unlike in the Apex Court judgment, it is also not the contention of the husband/father that the child would not be safe, if custody is given to the

wife/mother.

88. In Lekha Vs. P. Anil Kumar, , after divorce, mother re-married. The trial Court granted custody of the child to the mother. High Court

reversed the same. The child was aged 12 years and interviewed. Child preferred to stay with the mother. The Hon''ble Supreme Court, while

directing restoration of custody to the mother and also granting visitation rights to the father, reiterated the guiding principles in the matter of

custody of the child, ie., the paramount welfare of the child and also taken note of the decision of the Apex Court in Samuel Stephen Richard Vs.

Stella Richard, , wherein, it has been held as follows:

In deciding the question of custody, the welfare of the minor is the paramount consideration and the fact that the father is the natural guardian

would not "ipso facto" entitle him to custody. The principal considerations or tests which have been laid down under Section 17 , in order to

secure this welfare are equally applicable in considering the welfare of the minor under Section 25 .

The application of these tests casts an "arduous" duty on the court. Amongst the many and multifarious duties that a Judge in Chambers performs

by far the most onerous duties are those cast upon him by the Guardians and Wards Act. He should place himself in the position of a wise father

and be not tired of the worries which may be occasioned to him in selecting a guardian best fitted to assure the welfare of a minor and thereafter

guide and control the guardian to ensure the welfare of the ward-a no mean task but the highest fulfillment of the dharmasastra of his own country.

It is only an extreme case where a mother may not have the interest of her child most dear to her. Since it is the mother who would have the

interest of the minor most at heart, the tender years of a child needing the care, protection and guidance of the most interested person, the mother

has come to be preferred to others.

In Samuel Stephen Richard"s case (cited supra), this Court, while considering the inter-se rights and the need to provide care, protection and

guidance, to a child of tender age, observed that mother should be preferred to others. As stated supra, in Lekha"s case, wife re-married, after

divorce. While considering the feeling of the natural father, to have custody, vis-Ã¯Â¿Â½-vis, the mother"s care, at Paragraph 20, the Hon"ble Supreme

Court, observed as follows:

A man in his social capacity may be reckless or eccentric in certain respects and other may even develop a considerable distaste for his company

with some justification but all that is a farcry from unfitness to have the natural solace of the company of ones own children or for the duty of

bringing them up in proper manner. Needless to say the respondent- husband, in this case, seems to be anxious to have the minor child with him as

early as possible in order to look after him properly and to provide for his future education. The feelings being what they are between the

respondent and the appellant we think it is also natural on the part of the husband to feel that if the minor child continues to live with his former

wife, it may be brought up to hate the father or to have a very adverse impression about him. This certainly is not desirable. Needless to say, this

Court is not called upon to find that the respondent-husband has been entirely blameless in his conduct and few occasions referred to in this case

and by the boy at the time of interview, it is not the duty of this Court even to ascertain whether the respondent is of responsible and good citizen

and a preferred individual. Many people have shortcomings but that does not imply that they are not deserving of the solace and custody of their

children.

The operative portion of the observation, can also be applied to the case on hand and thus, even if the wife/mother is stated to be aggressive, still,

the natural love, care and affection of a mother to her child, cannot be said to be non-existent.

89. In Sharli Sunitha Vs. D. Balson, , this Court, held that,

While economic condition of a claimant to the custody is an important factor, no less important a factor is: which of the rival claimants to the

custody show greater concern for the welfare of the child? Neither economic affluence nor a deep mental or emotional concern for the well-being

of the child, by itself, is determinative of, where the welfare of the child lies. When the mother is not interested in the welfare of the minor child, she

is not entitled to have custody of the minor child, who will be better placed in the custody of the father.

90. In J. Selvan v. N. Punidha reported in 2007 (4) MLJ 967, this Court has held that,

It is by now well Settled that in all such matters, the interest and welfare of the minor children are of paramount importance, rather than the

conflicting claims and interests of the parents. The right of the parents is not what is to be decided in these applications, but the right of the children

to have a healthy environment and a physical, emotional and financial support for the development of their integrated personality, that is to be

decided in these applications. [Para 12]

The American Academy of Child and Adolescent Psychiatry has published a summary of the Practice Parameters for Child Custody Evaluation.

The summary was developed by the Work Group on quality issues. It is seen from the abstract to the summary, that it was presented as a guide

for clinicians evaluating the issues surrounding a child custody dispute. The study identified the issues that are common to all child custody disputes

as ""continuity and quality of attachments, preference, parental alienation, special needs of children, education, gender issues, sibling relationships,

parents'' physical and mental health, parents'' work schedules, parents'' finances, styles of parenting and discipline, conflict resolution, social

support systems, cultural and ethnic issues, ethics and values and religion. [Para 13]

The issues that have arisen for consideration in this petition, have to be decided on the basis of the ability and willingness on the part of either of the

parties to provide to the minor children, a healthy environment, good parental care and guidance and a physical, emotional and financial support for

the development of their integrated personality. [Para 15]

91. In Hareendran Pillai Vs. Pushpalatha, , though an application was filed under Section 6 of the Hindu Minority and Guardianship Act, while

dealing with the custody of a child, below the age of five years, a Hon''ble Division Bench of the Kerala High Court, at Paragraph 4, held as

follows:

4. Section 6 of the Hindu Minority and Guardianship Act, 1956 states that the natural guardian of a Hindu minor in respect of the minor''s person

as well as in respect of the minor''s property are in the case of a boy or an unmarried girl, the father, and after him, the mother. Proviso has been

added to Clause (a) of Section 6 which says that custody of a minor who has not completed the age of five years shall ordinarily be with the

mother. The apex court in Rosy Jacob Vs. Jacob A. Chakramakkal, , held that the controlling consideration governing the custody of the children

is the welfare of the children and not the right of the parents.

While doing so, the Hon''ble Division Bench of the Kerala High Court, has also taken note of the judgment of the Hon''ble Apex Court in Jijabai

Vithalrao Gajre Vs. Pathankhan and Others, , wherein, mother and father had fallen out and were living separately and the minor daughter was

under the care and protection of her mother. The Hon''ble Apex Court held that the mother could be considered as the natural guardian of the

minor girl. In Hareendran Pillai''s case (cited supra), the Hon''ble Division Bench of Kerla High Court, has also observed as follows:

We may also indicate, though the father is the natural guardian of the minor above five years on that ground alone he cannot have any preferential

claim since the paramount consideration is the welfare of the minor. Family Court will have to take into consideration all the aspects of the matter

and decide to whom the custody of the minor has to be given.

92. In Mausami Moitra Ganguli Vs. Jayant Ganguli, , the Hon''ble Apex Court has held that a heavy duty is cast on the court to exercise its judicial

discretion judiously in the background of all relevant facts and circumstances, bearing in mind the welfare of the child as the paramount

consideration.

93. In Nil Ratan Kundu and Another Vs. Abhijit Kundu, , the Hon''ble Apex Court has observed that has observed that in determining the

question as to who should be given the custody of a minor child, the paramount consideration is the ""welfare of the child"" and not the rights of the

parents under a statute for the time being in force. It is further held as follows:

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. 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, may

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, 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.

94. In Gaurav Nagpal Vs. Sumedha Nagpal, , dealing with Sections 6 and 13 of the Hindu Minority and Guardianship Act, 1956, the Hon''ble

Supreme Court, at Paragraphs 43, 46, 47 and 50, held that the principles in relation to the custody of a minor child are well settled. The

paramount consideration of the Court in determining the question, as to who should be given custody of a minor child, is the ""welfare of the child

and not rights of the parents under a statute for the time being in force or what the parties say. 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. Mature thinking is indeed necessary in such a situation.

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 also relevant for deciding the issues. The object and purpose of the 1890

Act is not merely physical custody of the minor but due protection of the right of the Ward''s health, maintenance and education. The power and

duty of the Court under the Act, is the welfare of minor. In the reported case, the child was living with the father, for a long time and contentions

were made that the custody to be with him, but the same was not accepted by the Hon''ble Apex Court. While doing so, the Hon''ble Supreme

Court considered the law relating to the custody in various countries, which are worth reproduction.

English Law

29. In Halsbury''s Laws of England, Fourth Edition, Vol. 24, para 511 at page 217 it has been stated:

Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must

regard the minor''s welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the

father''s claim in respect of that custody or upbringing is superior to that of the mother, or the mother''s claim is superior to that of the father.

(emphasis supplied)

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

30. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to

be kept in view by a writ-Court is ''welfare of the child''.

31. In Habeas Corpus, Vol. I, page 581, Bailey states:

The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from

superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification;

and yet the interests of the child may imperatively demand the denial of the father''s right and its continuance with the mother. The tender age and

precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek

for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the

place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the

most liberal allowance of nurses'' wages could possibly stimulate.

It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be for

the best interests of a child to grant its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

32. In Mc Grath, Re, (1893) 1 Ch 143 : 62 LJ Ch 208, Lindley, L.J. Observed:

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only

nor merely physical comfort. The word ''welfare'' must be taken in its widest sense. The moral or religious welfare of the child must be considered

as well as its physical well-being. Nor can the tie of affection be disregarded.

(emphasis supplied)

American Law

33. Law in the United States is also not different. In American Jurisprudence, Second Edition, Vol. 39; para 31; page 34, it is stated:

As a rule, in the selection of a guardian of a minor, the best interest of the child is the paramount consideration, to which even the rights of parents

must sometimes yield.

(emphasis supplied)

In para 148; pp.280-81; it is stated:

Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not

involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in

passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian,

but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just.

Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of

an adult, but on the Court''s view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence,

a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after

careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. In short, the child''s welfare is the supreme

consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court,

and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes

the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to

award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

(emphasis supplied)

34. In Howarth v. Northcott 152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758; it was stated:

In habeas corpus proceedings to determine child custody, the jurisdiction exercised by the Court rests in such cases on its inherent equitable

powers and exerts the force of the State, as parens patriae, for the protection of its infant ward, and the very nature and scope of the inquiry and

the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity.

It was further observed:

The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as

contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its

judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in

the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate.

(emphasis supplied)

It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out

for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child.

45. In Saraswatibai Shripad Ved Vs. Shripad Vasanji Ved, ; the High Court of Bombay stated:

It is not the welfare of the father, nor the welfare of the mother that is the paramount consideration for the Court. It is the welfare of the minor and

the minor alone which is the paramount consideration.

(emphasis supplied)

46. In Rosy Jacob Vs. Jacob A. Chakramakkal, , this Court held that object and purpose of 1890 Act is not merely physical custody of the minor

but due protection of the rights of ward"s health, maintenance and education. The power and duty of the Court under the Act is the welfare of

minor.

In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody

of the father cannot promote the welfare of the children, he may be refused such guardianship.

47. Again, in Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka, , this Court reiterated that the only consideration of the Court in deciding

the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the Court. Mature

thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.

41. In Smt. Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and Another, , this Court held that Section 6 of the Act constitutes father as a natural

guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. [See

also Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw and Another, ; Chandrakala Menon (Mrs) and Another Vs. Vipin Menon (Capt.) and

Another, .

After considering the principles to be followed in the matter of adjudication of custody or guardianship, the Hon''ble Supreme Court in Gaurav

Nagpal''s case, at Paragraph 48, held as follows:

48. Merely because there is no defect in his personal care and his attachment for his children-- which every normal parent has, he would not be

granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the

conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they

toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield

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.

On the duties and responsibilities of the Courts in deciding custody and guardianship, the Hon''ble Apex Court, at Paragraphs 50 and 51, further

held that,

50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to

look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on

what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently i n M ousami Moitra

Ganguli''s case (supra), the Court has to due weightage to the child''s ordinary contentment, health, education, intellectual development and

favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more

important than the others.

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 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 parens

patriae jurisdiction arising in such cases.

95. At this juncture, this Court deems it fit to take note of the judgment of the Hon''ble Apex Court, in Smt. Anjali Kapoor Vs. Rajiv Baijal, ,

wherein, the Apex Court considered the views of the Courts in United Kingdom, America and New Zealand, as hereunder:

15) In McGrath (infants), Re (1893) 1 Ch 143: 62 LJ Ch 208 (CA), it was observed that, ""... The dominant matter for the consideration of the

court is the welfare of the child. But the welfare of a child is not to be measured by money only, or by physical comfort only. The word welfare

must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the ties

of affection be disregarded.

16) In American Jurisprudence, 2nd Edn., Vol. 39, it is stated that an application by a parent, through the medium of a habeas corpus proceeding,

for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear

that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody.

In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the

child, if it has sufficient judgment.

17) In Walker v. Walker & Harrison, 1981 New Ze Recent Law 257, The New Zealand Court (cited by British Law Commission, Working

Paper No. 96) stated that ""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 relationships that are essential for the full development of

the child''s own character, personality and talents.

96. In Halsbury, Laws of England, 3rd Ed. Vol. 21, the Law is succinctly stated in para 428 at Pp.193-194 in the following terms:

428. ""Infant''s welfare paramount. In any proceeding before any Court, concerning the custody of upbringing of an infant or the administration of

any property belonging to or held on trust for an infant or the application of the income, therefore, the Court must regard the welfare of the infant as

the first and paramount consideration, and must not take into consideration, whether from any other point of view, the claim of the father, or any

right at common law, possessed by the father in respect of such custody upbringing administration or application is superior to that of the mother,

or the claim of the mother is superior to that of the father. This provision applies whether both parents are living or either or both is or are dead.

97. In Vikram Vir Vohra Vs. Shalini Bhalla, , there was a mutual decree for divorce. Husband had the custody of the child. After getting

employment, wife filed a petition, to take back the child. The trial Court allowed the same, after interviewing the child. Husband challenged the

order that visitation rights, granted to the wife earlier, cannot be altered. High Court also interviewed the child, aged about 7 years, who expressed

his desire to stay with the mother. On appeal filed by the father, the Hon''ble Supreme Court, at Paragraph 23, observed as follows:

Every person has a right to develop his or her potential. In fact a right to development is a basic human right. The respondent-mother cannot be

asked to choose between her child and her career. It is clear that the child is very dear to her and she will spare no pains to ensure that the child

gets proper education and training in order to develop his faculties and ultimately to become a good citizen. If the custody of the child is denied to

her, she may not be able to pursue her career in Australia and that may not be conducive either to the development of her career or to the future

prospects of the child. Separating the child from his mother will be disastrous to both.

98. In D. Govindasamy Vs. The District Collector, , a learned single Judge of this Court, while considering the role of a mother, in bringing up the

children, has observed as follows:

The role of mother in bringing up the children is very essential and that too for daughters, the love and affection and care of mother are essential.

Mother''s role is very important during attainment of puberty as well as during delivery. Petitioner''s children lost their mother''s care, love and

affection throughout their life and the same cannot be estimated in terms of money. The loss of irreparable and no one could play the role of

mother"". That is the reason why an ancient Tamil poem describes ""mother and father"" as first god.

Though the abovesaid observation is made, in a matter pertaining to awarding compensation to the legal representatives of the deceased mother,

yet this Court is of the view that the said observations can be considered, insofar as the care and protection, which a girl child requires.

99. In Mr. S. Anand @ Akash Vs. Ms. Vanitha Vijaya Kumar and Mr. Anand Rajan, , while considering the inter-se rights of the parents, seeking

custody of children, the allegations and counter allegations, levelled against each others therein and taking note of the United Nations Convention

on Rights of the Children, at Paragraphs 29 to 33, this Court held as follows:

29. Therefore, for the purpose of the interim application, I wish to proceed on the basis that both parties are not disqualified from having the

custody of the minor child. Though both parties have painted each other with a brush, broomed out of animosity, I prefer to ignore them for the

present, in view of the fact that a person who is a bad child to his/her parents, a bad partner to his/her spouse or a bad samaritan to his/her

neighbours, could still be a good parent. Similarly, a person who is too good to his/her parents, his/her spouse and his/her neighbours, may prove

to be a bad parent. Therefore, for the purpose of deciding this interlocutory application, I have to take it that both parties have not suffered any

serious disqualification, to have the custody of the child. This is borne out by the very conduct of both parties from June 2007 till

November/December 2010, during which period, the child had shared its quality time with the applicant as well as the first respondent without any

issues.

30. If both parties are not disqualified from having the custody of the child, then it is their duty, under normal circumstances, to draw up a parenting

schedule and share the responsibility of co-parenting to bring up the child in a healthy and happy environment. The United Nations Convention on

the Rights of the Child, which entered into force on 2.9.1990 stipulates under Article 9.3 that ""States Parties shall respect the right of the child,

who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis except if it is

contrary to the child''s best interest"". Article 18.1 of the Convention states as follows :

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing

and development of the child. The parents or as the case may be legal guardians, have primary responsibility for the upbringing and development of

the child. The best interest of the child will be their basic concern.

Therefore, in an ideal situation, the parents themselves should come forward to draw up ""parenting schedules"" so that both the parents share the

responsibilities for bringing up the child. But in cases where they themselves are not matured enough to reach an understanding and draw up a

parenting schedule, it becomes the duty of the Court to do so, keeping in mind, the interest and welfare of the child.

31. It is quite unfortunate that the Courts still dabble with the age old concepts of custody and visitation rights. These terms emanate from a rights

regime rather than a responsibilities regime. Today the emphasis has shifted from the regime where we were concerned with the rights of the

parents over the child, to a regime where we should be concerned about the responsibilities of the parents towards the child. After the advent of

the Children Act, 1989 in U.K., the old terminology of ""custody"", ""guardianship"" and ""custodianship orders"", have gone {see Cheshire and North''s

Private International Law-Thirteenth Edition-Lexis Nexis Butterworths Publication (page 857)}. Instead, Section 8 of the Act, uses the terms

residence"" and ""contact"" (or access). Taking the law from the rights regime to the responsibilities regime, the Hague Conference concluded a

Convention in 1996 known as ""Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental

Responsibility for the Protection of Children"". The provisions of this Convention lay emphasis on parental responsibility and it requires that the child

should be treated as an individual and not simply as an appendage of its parents.

32. Therefore, I wish to fix responsibility on both the parents, as an interim measure, in view of the fact that the homes of the applicant as well as

the respondents provide different sets of advantages (as well as disadvantages) to the child. While the home of the applicant provides the

advantage of an affectionate father focussing on a single child, with a devoted grandmother, the home of the respondents provides the advantage of

an affectionate mother with two younger siblings of the minor child, available for him to share love, affection and the hard realities of life.

33. But unfortunately, right from the beginning, it was contended by the applicant that the child, who is now aged more than 9 years, is refusing to

go with the respondents. According to the applicant, the child is intelligent enough to make a preference and that due to an aversion that the child

had developed towards the second respondent (step father), it is refusing to go with the respondents.

At Paragraphs 40 to 42, this Court has further held as follows:

40. Sub-Section (3) of Section 17 of the Guardians and Wards act, 1890 prescribes that if the minor is old enough to form an intelligent

preference, the Court may consider that preference. But, the weight to be accorded to the preference of the minor, depends upon various other

factors. While the intelligent preference of the minor could be one of the several factors, it could never be the controlling factor.

41. Article 12 of the United Nations Convention on the Rights of the Child reads as follows :

1. States Parties shall assure to the child, who is capable of forming his or her own views the right to express those views freely in all matters

affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child; and

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the

child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of the National Law.

42. What is statutorily provided under Section 17(3) is what is reflected in Article 12 of the Convention on the Rights of the Child. Therefore, it

has become customary for the Courts to speak to the child for a few minutes, especially while deciding interlocutory applications. But, when the

Court is confronted with a stubborn child, the execution of a decision to hand over the child to one of the parents, against the wishes of the child,

becomes a herculean task.

In the above reported case, though an interim order was passed by this Court, directing interim custody to the mother, the minor son refused to go

with the mother and turned violent. On the psychiatric assessment of the child, by the Head of the Department of Child Guidance Clinic, attached

to the Government Children''s Hospital, Chennai, to find out, whether (i) the child has any deep rooted problems in going with the respondents or

(ii) the child was acting under external influences, it was reported that the parenting style of the mother is authoritative, while the father provides a

permissive environment. After referring to Chapter, relating to ""Parenting Styles and Children''s Behaviour"", from the Book, ""Child Psychology, A

Contemporary View Point"" - Third Edition by the authors E. Mavis Hetherington and Ross D. Parke and the report of the psychiatrist that the

mother was an authoritative parent, a learned single Judge of this Court was of the view that the mother will groom the child into a disciplined,

focussed and ambitious person.

100. Though on the facts and circumstances of the reported case, the learned Judge of this Court has observed that both parents were not

disqualified from having the custody of the child, still, after comparison of the parenting styles and children''s behaviour, has observed that mother

will take all possible steps, effectively, in the best interest of a child, at the younger age. In the instant case, before this Court, the girl child was

aged two years and four months, at the time of petition. In the case on hand, all along, the girl child is with the father. Quite understandably, there

could be some reluctance and refusal by the child, to be with any person, including the mother, for some time.

101. In R. Syed Mahbool Vs. Parveen Sultana, , father of the minor, sought for the custody of a girl child and also for, guaradianship. The Family

Court dismissed the application and held that the appointment of guardian was not necessary, as the father was admittedly the natural guardian. On

appeal, before this Court, the appellants therein placed reliance on the judgments in (i) Shyamrao Maroti Korwate Vs. Deepak Kisanrao Tekam, ,

(ii) Gaurav Nagpal Vs. Sumedha Nagpal, , and (iii) Salamat Ali and Another Vs. Smt. Majjo Begum, . However, the wife drew the attention to the

judgment in Nil Ratan Kundu and Another Vs. Abhijit Kundu, , wherein, the Apex Court held that in deciding a difficult and complex question, as

to the custody of a minor, the Court of law should keep in mind the relevant statutes and the rights flowing there from. After considering the

material on record, at Paragraph 17, the Hon''ble Division Bench of this Court in R. Syed Mahbool''s case, observed as follows:

As already stated in the case of custody of the minor child, the paramount consideration is the only welfare of the child. The word welfare does

not mean physical comfort alone. Further, the financial position is also not a criterion to grant custody to the party. It is also not in dispute that

father is the natural guardian of the child. However, merely because the father is the natural guardian, he is not entitled to claim the custody on the

strength of the legal rights.

Having regard to the law applicable to the parties, the Hon''ble Division Bench of this Court rejected the prayer of the appellant/father and

accordingly, dismissed the appeal.

102. In Vadivel v. Umamaheswari reported in , 2014 (4) CTC 450 , husband has filed H.M.O.P., for divorce, resisted by wife. She filed an

application, under Section 25 of the Guardian and Wards Act, for custody of the minor child, aged 7 years. At that time, child was with the father.

Interlocutory application has been filed by the father, for protection order that the mother should not forcibly take the child from him. He has also

filed an application under Section 26 of the Hindu Marriage Act, 1955, for interim custody. On her endorsement that she would not forcibly take

the child, an order has been passed, permitting the child, to be with her custody, on every 2nd and 4th Saturday, in a month and handover the child

to the father, on the ensuing Sunday, pending disposal of the proceedings. On contest, the learned Judge passed an order, in the Guardianship

petition, directing custody to be given to the mother. After considering the statutory provisions and the age of the minor, 7 years, at Paragraphs 68,

this Court held as follows:

68. It is already held that the respondent cannot seek the remedy of the custody of the Minor child above five years under Section 25 of the

Guardianship Act. The reasoning of the Court below for allowing such Application is not based on the paramount consideration of the welfare of

the child. Therefore, the Order of the Court below is unsustainable and liable to be set aside. However, the Respondent is at liberty to seek for

remedy either under Section 26 of the Hindu Marriage Act, 1955 or under Section 7 of Guardians and Wards Act, 1890, r/w. Sections 6 & 13(2)

of Hindu Minority and Guardianship Act, 1956.

103. One of the provisions, which this Court applied to the facts and circumstances of the reported case and stressed in the instant case, is that, ""In

case of Hindu mother, in whose custody a minor, who has completed the age of 5 years, shall remain, is removed, either forcibly or otherwise, can

also move the Court as she is entitled to such custody under Section 6 of the Hindu Minority and Guardianship Act and such an application shall

be filed before the District Court or Family Court, read with Section 25 of the Guardianship Act. The abovesaid reported judgment is not

applicable to the facts on hand, as admittedly, the child is below five years of age.

104. In Roxann Sharma Vs. Arun Sharma , the Hon''ble Supreme Court, while considering the import and amplitude of guardianship, and the

aspect of custody of children below the age of five years, at Paragraphs 5 to 9, 12 and 13, held as follows:

5. We shall consider the import and amplitude of the legal concept of Guardianship on first principles. Black Law Dictionary 5th Edition contains a

definition of Guardianship which commends itself to us. It states that - ""A person lawfully invested with the power, and charged with the duty, of

taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self control, is

considered incapable of administering his own affairs. One who legally has the care and management of the person, or the estate or both, of a child

during its minority"". Thereafter there are as many twelve classifications of a guardian but we shall reproduce only one of them, which reads - "" a

general guardian is one who has the general care and control of the person and estate of his ward; while a special guardian is one who has special

or limited powers and duties with respect to his ward, e.g., a guardian who has the custody of the estate but not of the person, or vice versa, or a

guardian ad litem"". Black''s Law Dictionary also defines ''Custody'' as the care and control of a thing or person. The keeping, guarding, care,

watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of

the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility

for the protection and preservation of the thing in custody. In terms of Black''s Law Dictionary, Tenth Edition, ''Visitation'' means a non-custodial

parent''s period of access to a child. Visitation right means a noncustodial parent''s or grandparent''s Court ordered privilege of spending time with

a child or grandchild who is living with another person, usually the custodial parent. A visitation order means an order establishing the visiting times

for a non-custodial parent with his or her children. Although the non-custodial parent is responsible for the care of the child during visits, visitation

differs from custody because non-custodial parent and child do not live together as a family unit. In our opinion, visitation rights have been ascribed

this meaning - In a dissolution or custody suit, permission granted to a parent to visit children. In domestic relations matters, the right of one parent

to visit children of the marriage under order of the court.

6. Several other statutes also contain definitions of ''guardian'' such as The Juvenile Justice (Care & Protection) Act, 2000 which in Section 2(j)

states that - "" ""guardian"", in relation to a child, means his natural guardian or any other person having the actual charge or control over the child and

recognized by the competent authority as a guardian in course of proceedings before that authority."" Since the Juvenile Act is principally concerned

with the welfare of the juvenile the accent understandably and correctly is on the ""person"" rather than the estate. The Tamil Nadu Elementary

Education Act, 1994 defines the term guardian as - ""any person to whom the care, nurture or custody of any child falls by law or by natural right or

by recognized usage, or who has accepted or assumed the care, nurture or custody of any child or to whom the care, nurture or custody of any

child has been entrusted by any lawful authority"".

7. The Guardianship postulates control over both the person as well as the assets of a minor or of one and not the other. This is obvious from a

reading of the definitions contained in Section 4(2) of the Guardians & Wards Act, 1890 (G&W Act) and Section 4(b) of the HMG Act which

clarifies that ""Guardian"" means a person having the care of the person of a minor or of his property or of both his person and property. Section 9

contemplates the filing of an application in respect of the guardianship of the person of the minor and Section 10 specifies the form of that

application. Section 12 deals with the power to make interlocutory order for protection of the minor and interim protection of his person and

property. Section 14 is of importance as its tenor indicates that these controversies be decided by one court, on the lines of Section 10 of the CPC

which imparts preference of jurisdiction to the first court. Section 17 gives primacy to the welfare of the minor. Sub-Section 2 thereof enjoins the

court to give due consideration 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. Since Thalbir is of a very tender age, the advisability of determining his wishes is not relevant at the present stage; he is not old

enough to form an intelligent reference. Section 25 covers the custody of a ward being removed from the custody of the guardian of his person,

and adumbrates that if the Court is of the opinion that it will be for the welfare of the ward to return to the custody of his guardian shall make an

order of his return.

8. Section 26 is of special significance in that it casts an omnibus embargo even on a guardian of a person appointed or declared by the Court from

removing the ward from the limits of its jurisdiction. This is because when a dispute arises between the parents of a minor, the court steps in as

parens patriae and accordingly appropriates or confiscates to itself the discretion earlier reposed in the natural parents of the minor. This provision

appears to have been violated by the Father. These provisions continue to apply in view of the explicit explanation contained in Section 2 of the

HMG Act.

9. Section 3 of the HMG Act clarifies that it applies to any person who is a Hindu by religion and to any person domiciled in India who is not a

Muslim, Christian, Parsi or Jew unless it is proved that any such person would not have been governed by Hindu Law. In the present case, the

Mother is a Christian but inasmuch as she has not raised any objection to the applicability of the HMG Act, we shall presume that Thalbir is

governed by Hindu Law. Even in the proceedings before us it has not been contested by the learned Senior Advocate that the HMG Act does not

operate between the parties. Section 6 of the HMG Act is of seminal importance. It reiterates Section 4(b) and again clarifies that guardianship

covers both the person as well as the property of the minor; and then controversially states that the father and after him the mother shall be the

natural guardian of a Hindu. Having said so, it immediately provides that the custody of a minor who has not completed the age of 5 years shall

ordinarily be with the mother. The significance and amplitude of the proviso has been fully clarified by decisions of this Court and very briefly

stated, a proviso is in the nature of an exception to what has earlier been generally prescribed. The use of the word ""ordinarily"" cannot be over-

emphasised. It ordains a presumption, albeit a rebuttable one, in favour of the mother. The learned Single Judge appears to have lost sight of the

significance of the use of word ""ordinarily"" inasmuch as he has observed in paragraph 13 of the Impugned Order that the Mother has not

established her suitability to be granted interim custody of Thalbir who at that point in time was an infant. The proviso places the onus on the father

to prove that it is not in the welfare of the infant child to be placed in the custody of his/her mother. The wisdom of the Parliament or the Legislature

should not be trifled away by a curial interpretation which virtually nullifies the spirit of the enactment.

....

12. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses

cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardised if the

custody retained by the mother. Section 6(a) of HMG Act, therefore, preserves the right of the father to be the guardian of the property of the

minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in

contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We

must immediately clarify that this Section or for that matter any other provision including those contained in the G&W Act, does not disqualify the

mother to custody of the child even after the latter''s crossing the age of five years.

13. We must not lose sight of the fact that our reflections must be restricted to aspects that are relevant for the granting of interim custody of an

infant. The Trial is still pending. The learned Single Judge in the Impugned Order has rightly taken note of the fact that the Mother was holding a

Tenured College Professorship, was a post-graduate from the renowned Haward University, receiving a regular salary. Whether she had a Bi-

polar personality which made her unsuitable for interim custody of her infant son Thalbir had not been sufficiently proved. In the course of present

proceedings it has been disclosed that the Father has only passed High School and is not even a graduate. It has also not been denied or disputed

before us that he had undergone drug rehabilitation and that he was the member of Narcotics Anonymous. This is compounded by the fact that he

is not in regular employment or has independent income. As on date he is not an Income tax assessee although he has claimed to have earned

Rupees 40,000 to 50,000 per month in the past three years. We must again clarify that the father''s suitability to custody is not relevant where the

child whose custody is in dispute is below five years since the mother is per se best suited to care for the infant during his tender age. It is for the

Father to plead and prove the Mother''s unsuitability since Thalbir is below five years of age. In these considerations the father''s character and

background will also become relevant but only once the Court strongly and firmly doubts the mother''s suitability; only then and even then would

the comparative characteristic of the parents come into play. This approach has not been adopted by the learned Single Judge, whereas it has been

properly pursued by the learned Civil Judge.

105. Depression in life, is not uncommon. Anybody can have depression. If matrimonial relationship is strained, one may get depression.

Overcoming the same, depends upon the individual. Loneliness adds to the degree and anger may associate. Admittedly, during the period, when

the disputes between the spouses started, she was in the matrimonial home, where in-laws also stayed. Husband/father had time to spent in his

office. Whereas, the wife/mother, was alone. When the differences between the spouses lead to bitterness, wife/mother appeared to have

depression. The Doctor, who treated the wife/mother, could have even advised her not to breast feed the child and eventually, the in-laws could

have asked her not to feed the child.

106. Though medical theory is that the level of medication, that is likely to be transferred to the baby, through breast feeding, is stated to be low,

she should have been encouraged to overcome the depression and continue breast feeding, but in the case on hand, it is the case of the

wife/mother that she was prevented from breast feeding and on the contra, it is the allegation of the husband/father that she stopped breast feeding

the child. At this juncture, it should be noted that the husband/father, in his written arguments, before the learned Judicial Magistrate, Ambattur, has

stated that she was advised by the Doctor, to stop breast feeding and quite contrary, he has made applications.

107. Breast feeding is not totally prohibited, while taking anti-depressants. Either the wife/mother could have stopped breast feeding on her own or

in-laws, could have prevented breast feeding, fearing that medication could affect the child. At this juncture, it should be noticed that the child was

born on 02.01.2012 and differences between the spouses, though stated to have existed, even prior to the child''s birth, that is a matter to be

considered in the proceedings before the Family Court. But certainly, after she came back from her parental house, which according to the

husband/father, after six months, trouble seemed to have started.

108. There cannot be any better person, in this world to take care of a baby, than the mother and that too, at the tender age. As she has nurtured

the baby in the womb for nearly 10 months, with pain and suffering, the feeling of a woman, being a mother, is inexplicable. It would be the anxiety

of any mother to feed the child and if one has to be prevented or she herself had stopped, owing to taking anti-depressants, due to the friction

between the spouses, then in the considered opinion of this Court, it may even aggravate depression. The very fact that she wanted to breast feed

the child, even during medication and could not do so, for any of the above mentioned reasons, shows the love and care for the child.

109. From the date, on which, the marriage was solemnized, till she returned to the matrimonial home, after delivery, there is no medical history,

that she was taking any treatment for any ailment or depression. Short duration of treatment, without any further medical record, in the considered

view of this Court, would not give rise to any cause, for concluding that she is not in a fit state of mind, to defend herself in any legal proceedings or

to bring up the child, with love and affection.

110. As per the Proviso to Section 6(a) of the Hindu Minority and Guardianship Act, custody of a minor, who has not completed the age of 5

years, shall ordinarily be with the mother. Courts have consistently held that the guardianship and custody are two different concepts. As per the

statute, father can be the natural guardian of a minor, but ordinarily the custody of a minor, below the age of five years, should be left with the

mother, unless she is found to be disqualified, due to any mental or physical ailment, which is not conducive for the upbringing of the child, below

the age of 5 years. The fact that the husband/father is very much attached to the minor child alone cannot be a ground to negative the claim of the

wife/mother to claim custody. It should be kept in mind that the wife/mother would also be longing for the child to shower her love and affection.

111. The term ""ordinarily"" employed in the proviso to Section 6(a) of the Act, should be understood in the context, in which, it is used, in contrast

to the word, ""extraordinary"". At this juncture, this Court also deems it fit to extract few decisions, as to how, a Section has to be interpreted, in the

context and text, in which it is used.

(i) In the case of Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others, , the Hon"ble Apex Court held :

Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is

what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the

contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and

then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the

glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different

than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover

what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a

statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its

place.

(ii) In Balram Kumawat Vs. Union of India (UOI) and Others, , the Hon"ble Supreme Court held that, ""Contextual reading is a well-known

proposition of interpretation of statute. The classes of a statute should be construed with reference to the context vis-Ã¯Â¿Â½-vis the other provisions

so as to make a consistent enactment of the whole statute relating to the subject-matter. The rule of ""ex visceribus actus"" should be resorted to in a

situation of this nature.

(iii) In State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and Others, , the Hon"ble Supreme Court held that,

..... It is well settled principle that the intention of the legislature must be found by reading the Statute as a whole. Every clause of Statute should

be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole

Statute. It is also the duty of the Court to find out the true intention of the legislature and to ascertain the purpose of Statute and give full meaning to

the same. The different provisions in the Statute should not be interpreted in abstract but should be construed keeping in mind the whole enactment

and the dominant purpose that it may express.

112. Though Section 6(a) of the Act, speaks about both guardianship and custody of a minor, proviso to the same, makes it clear that there should

be some extraordinary circumstances, warranting the Court to take a decision, entrusting the custody of a child, below the age of five years, to the

father. While making the above observation, this Court is of the conscious of the guiding principle that it is the paramount welfare of the child,

which should be kept in mind, while deciding the matter, relating to custody.

113. Custody of the child below the age of five years, may be normally given to the mother. But if the custody of such child is with the father, it

cannot be contended that it is illegal, and hence, contention of the wife/mother, to that extent is not accepted. Legislative intent is only indicative of

the preferential right of custody of the mother, when the child is below five years of age and at the same time, the Court has to consider the

paramount welfare of the minor child.

114. While considering the evidence adduced by the parties, claiming custody of the minor child, if the Court arrives at a conclusion that either of

the parties, does not have the physical and mental capacity, to have the custody of the minor child, then the Court can accordingly decide. Though

the learned counsel for the husband/father contended that the wife/mother has adduced false evidence before the learned Judicial Magistrate,

Ambattur, regarding the educational qualification of the wife/mother, considering the tender age of the child and the legislative intent, regarding the

custody of the child below five years, to be with the wife/mother, contentions regarding educational qualifications do not require any serious

consideration, for claiming custody of the minor child. Notwithstanding the educational qualifications, it is the desire of everyone that a child of

tender age, has to be given the utmost importance. Both the lower and middle class, strive to generate financial resource, by working. Even in such

contingency, nobody can dispute the services of a mother to a child, than the father of a child, particularly, when the child is below the age of five

years. Legislative wisdom to have the custody of a child, below five years of age, to be with the mother, cannot be said to be against the moral

responsibility of the father, subject of course to mother''s fitness, either physical or mental, if there is no adequate evidence to substantiate any of

the above, the Court, dealing with the custody of the child, has to ordinarily entrust the custody of the child to the mother, considering the

paramount welfare of the child.

115. In the case on hand, husband/father, is working in a private concern and naturally, most of the time, the child would be left with the in-laws. A

girl child certainly requires care and affection of the most devoted person, mother. Father''s financial position, may even be better off, than the

mother, but nobody can substitute mother, unless she is totally unfit, both physical and mental, to bring up the child or disqualified under any law.

There is no circumstances, warranting deprivation of his parental right to have guardianship of the child, but considering the tender age of the minor

child, care, love and affection, required from the mother, this Court is of the view that father''s right to have custody of the child of tender age,

should be subservient to his legitimate right to have guardianship, whatever be the differences or disputes, between the spouses. On the facts and

circumstances of the present case, this Court is of the view that it has not been established that the wife/mother is unfit to have the custody of the

minor child.

116. Contention of the husband/father that this Court in H.C.P. No. 2827 of 2013, dated 27.11.2013, has directed the wife/mother to approach

only the Family Court, for custody of the child and therefore, the application filed under Section 21 of the Domestic Violence Act, is not

maintainable and the further contention that there was a suppression of material fact, in not bringing it to the notice of the learned Judicial

Magistrate, Ambattur, about the filing of I.A. No. 410 of 2014, for custody of the child, cannot be countenanced for the reason that any

observation made by this Court, while disposing of the Habeas Corpus Petition, would not curtail the rights of an aggrieved person, to seek for

interim custody of the child, under Section 21 of the Domestic Violence Act.

117. That apart, perusal of the pleadings in C.M.P. No. 1291 of 2014, dated 08.01.2015, on the file of the learned Judicial Magistrate, Ambattur,

shows that the wife/mother has stated that she has filed a petition, for interim custody of the child. Therefore, there is no suppression of any

material fact. The contention that she has filed M.C. No. 57 of 2013, for maintenance and lateron, it was withdrawn and that the same has not

been disclosed in the petition filed before the learned Judicial Magistrate, Ambattur, cannot be termed as willful suppression, for the purpose of this

case. It may be a ground to contend on her financial position, but the said aspect has been considered in the foregoing paragraphs.

118. No doubt, at the time of filing of the petition in C.M.P. No. 1291 of 2014 in D.V. No. 7 of 2013, before the learned Judicial Magistrate,

Ambattur, petition in I.A. No. 410 of 2014, for interim custody, filed before the Family Court, was pending and at that time, it was open to the

husband/father to raise an objection that there cannot be any parallel proceedings, for the same relief of interim custody, but when the wife/mother

has taken out a separate petition in C.M.P. No. 1291 of 2014, under Section 21 of the Domestic Violence Act, for interim custody of the girl

child, aged two years and four months, it is always open to her to withdraw the petition, pending before the Family Court and pursue her remedy

under the provisions of the Domestic Violence Act. It cannot be contended that having filed a petition before the Family Court, wife/mother has no

right to withdraw the same and pursue her remedy under the provisions of the Domestic Violence Act. Observations made while disposing of a

case, are not binding precedent. Useful reference can be made to a decision in The State of Orissa Vs. Sudhansu Sekhar Misra and Others, , the

Hon''ble Supreme Court explained as to when a decision can be taken as a precedent, which as follows:--

A decision is only an authority for what it actually decides. What is of the essence of a decision is its ratio and not every observation found therein

nor what logically follows from the various observations made in it. On this topic, this is what Earl of Halsbury LC said in Quinn v. Leathem,

reported in 901 AC 495.

''Now before discussing the case of Allen v. Flood, reported in 1898 AC 1 and what was decided therein, there are two observations of a general

character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the

particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be

expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is

that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically

from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not

always logical at all.

It is not profitable task to extract a sentence here and there from a judgment and to build upon it.

119. Therefore, the contention of the husband/father, regarding the observations made by this Court and the objections to the maintainability of

C.M.P. No. 1291 of 2014, is contrary to the rights guaranteed to her, under the Special Laws. Needless to state that the maxim, generalia

specialibus non derogant can also be made applicable to the facts of this case. Few decisions, on the abovesaid aspect, are considered.

(i) In Fitzgerald v. Champneys (1861) 30 L.J. Ch. 777 at p. 782, quoted with approval in Re Smith''s Estate, Clemens v. Ward, 35 Ch.D. 389,

Wood V.C., said as follows:

In passing the special Act the Legislature had their attention directed to the special case which the Act was meant to meet, and considered and

provided for all the circumstances of that special case, and having done so, they are not to be considered, by a general enactment passed

subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus

carefully supervised and regulated.

(ii) Lord Hobhouse in Baker v. Edgar reported in [1898] AC 748, held that when the legislature has given its attention to a separate subject, and

made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it

manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.

(iii) Wood V.C., in London and Black Wall Rly v. Limehouse District Board of Works reported in (1856) 26 LJ 164, said thus,

The Legislature, in passing a special Act, has entirely in its consideration some special power which is to be delegated to the body applying for the

Act on public grounds; and the preamble of every statute of this kind contains a recital of its being for the public convenience that the particular

powers should be granted. When a general Act is subsequently passed, it seems to be a necessary inference that the Legislature does not intend

thereby to regulate all cases not specially brought before it; but, looking to the general advantage of the community, without reference to particular

cases, it gives large and general powers, which in their generality might, except for this very wholesome rule of interpreting statutes, override the

powers which, upon consideration of the particular case, the Legislature had before conferred by the special Act for the benefit of the public.

(iv) In Siha Singh v. Sundan Singh reported in AIR 1921 Lah. 280, the Court held that, ""A general statute is presumed to have only general cases

in view, and not particular cases, which have been already otherwise provided for by special or local Act.

(v) While considering the applicability of the maxim, ""Generalia specialibus non derogant"" in relation to the operation of two statutes passed in the

year, Section 115 of the Indian Evidence Act (Act 1 of 1982) and Section 11 of the Indian Contract Act, in Khan Gul v. Lakha Singh reported in ,

ILR 9 Lahore 701 (FB) , the Court opined as follows:

This brings us to the remaining but really substantial point, viz., whether the specific provision of the substantive law (S 11 of the Contract Act)

which declares a minor''s contract to be void, can be rendered nugatory by a general provision embodying the rule of estoppel found in a

procedural Code like the Evidence Act. In order to find a satisfactory answer to this question two fundamental principles must be borne in mind.

The first is embodied in the great maxim generalia specialibus non derogant which has frequently been applied to resolve the apparent conflict

between provisions of the same statute or of different statutes. In such cases, the rule is that wherever there is a particular enactment and a general

enactment and the latter, taken at its most comprehensive sense, would overrule the former, the particular statute must be operative, and its

provisions must be read as excepted out of the general.

120. Though the husband/father has questioned the wife/mother to have the custody of the minor child, solely on her mental capacity, to bring up

the child, while evaluating the evidence, produced by the husband/father and on that aspect, the learned Judicial Magistrate, Ambattur, has decided

to examine the wife/mother, in the Open Court, in the presence of parties and their respective learned counsel, in C.M.P. No. 2717 of 2014 in

D.V. No. 7 of 2014. The questions and answers are reproduced hereunder:

121. It is the contention of the learned counsel for the wife/mother that C.M.P. No. 2717 of 2014, dated 02.12.2014, filed by the husband/father

and his mother, is not maintainable, both on law and facts. The learned Judicial Magistrate, Ambattur, on facts, has observed that even in the

divorce petition instituted by the husband/father, she has been sued only in her individual capacity and not through any next friend.

122. It is the further case of the learned counsel for the wife/mother that she was subjected to ill-treatment. On the contra, husband/father has

claimed that he was ill-treated and subjected to cruelty and hence, filed a petition for divorce. Attributing psychiatric dis-order, C.M.P. No. 2717

of 2014, has been filed by the husband/father and his mother. After posing a series of questions, the learned Judicial Magistrate has arrived at a

categorical finding that except for a short duration of treatment, there is absolutely no material on record to substantiate the allegation of mental

disorder or psychiatric problem.

123. The Hon''ble Apex Court in State of Kerala Vs. Putthumana Illath Jathavedan Namboodiri, , held that under Section 397 of the Criminal

Procedure Code, the High Court, in its revisional jurisdiction, can call for and examine any proceedings, for the purpose of satisfying itself, as to

the correctness, legality or propriety of any finding, sentence or order, but the revisional power cannot be equated with the power of the appellate

jurisdiction. Ordinarily, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same,

when the evidence has already been appreciated by the Magistrate as well as Sessions Judge, in an appeal. Reference can be made to a decision

of

124. The Delhi High Court in Jeet Pal Vs. State, , held that revisional jurisdiction of the High Court under Section 401 Cr.P.C., is different from

the appellate jurisdiction. The High Court does not normally reappreciate the evidence and go into the question of credibility of witnesses, unless

the appreciation of evidence, and the finding of the Courts below is vitiated by an error of law of procedure, misreading of the evidence or is

perverse.

125. In Abdul Rajak Mazumder Vs. Noor Khatun Begum, , the Court held that while the appellate Court can re-appreciate the evidence on

record so as to arrive at a different view, the revisional Court cannot proceed to that extent. Except from examining the legality, propriety and

correctness of the decision on a broad view, the revisional Court cannot assume the power of an appellate Court.

126. Though the above decisions have been rendered in cases, relating to an offence, the principles underlined can be made applicable, while

exercising the revisional jurisdiction of the High Court, under Sections 397 r/w. 401 Cr.P.C., when the High Court is called upon to examine the

correctness, legality or propriety of any order, passed by an inferior criminal Court. If only there are illegalities or any irregularities, committed by

the inferior criminal Court and if the same has resulted in injustice, revisional jurisdiction can be exercised, to redress the grievance of the aggrieved

person.

127. In the case on hand, for taking anti-depressants for a short period, when there was differences between the spouses, without a previous or

subsequent medical history or record, the state of mind of the wife/mother, to defend litigations, is questioned, on the ground that she is not

mentally sound to prosecute. After giving his careful consideration to the questions and answers, evidence produced by the husband/father, the

learned Judicial Magistrate, Ambattur, has arrived at a categorical finding that except for the short duration of treatment, there is absolutely no

medical record, to substantiate the contention of the husband/father.

128. Finding of the learned Judicial Magistrate, on the aspect of medical soundness, to prosecute the petition in C.M.P. No. 2717 of 2014, cannot

at any stretch of imagination be said to be perverse or erroneous. The contention of the learned counsel for the husband/father that there were

special counseling in the Family Court and that the same ought to have been considered in the proceedings pending before the criminal Court,

cannot be countenanced, for the reason that nothing prevented the husband/father from producing any supporting medical evidence before the

learned Judicial Magistrate.

129. Though the wife/mother has given a complaint, dated 19.10.2013, to the All Women Police Station, Avadi, alleging physical assault on her

and husband/father has contended that an enquiry was conducted by the Police, in which, she did not produce any medical evidence to prove her

mental state of affairs, it is not known, as to why, the husband/father has lodged a complaint on 19.10.2013, against the wife/mother, her brother

and her father, to the Hon''ble Chief Minister''s Cell, when in normal circumstances, a complaint would be lodged only with the jurisdictional police.

130. It is the case of the husband/father that wife/mother has not produced any document to the Police, supporting her contention that she was

assaulted. On the contra, the wife/mother has contended that if the in-laws were beaten, then why they should go to Government General Hospital,

Chennai, for treatment, when there was some hospital, near to the matrimonial home.

131. At this juncture, it is also to be noted that when the husband/mother has stated that the neighbours, who intervened on that date of the alleged

incident, were hurt, husband/father has not chosen to furnish any names of neighbours, nor neighbours have chosen to lodge any complaint. After

perusal of the documents filed and the submissions advanced, by both parties, this Court is of the considered view that before the Family Court as

well as the Judicial Magistrate Court, the parties appear to have magnified the alleged incident. However, that is the matter for evidence before the

Family Court, Chennai, while deciding the prayer for divorce on the grounds of cruelty.

132. The learned Judicial Magistrate, Ambattur, has exercised his due care and caution, while evaluating the mental soundness of the wife/mother.

Merely because, the husband/father has filed a petition for medical expert to evaluate the soundness of the wife/mother, that cannot be granted, for

mere asking. According to wife/mother, she was ill-treated and subsequently, not permitted to see the child. Per contra, it is the case of the

husband/father that he was ill-treated and subjected to cruelty. In any event, taking anti-depressants, for a short duration, cannot be a dis-

qualification, to prosecute any litigation, in which, wife/mother is a party and have the custody of the child.

133. In Chapter IV of the Domestic Violence Act, the procedure for obtaining orders/reliefs, is set out. Section 12 deals with filing of an

application by the aggrieved person to the magistrate. Section 13 deals with the service of notice to the Protection Officer or any other person, as

directed by the Magistrate. Section 14 speaks about counseling of the aggrieved person or the respondent, either singly or jointly, with any

member of the service provider, who has registered himself under sub-Section (1) of Section 10 . If the Magistrate has issued any such direction,

after counseling, he shall fix the date of hearing of the case, not exceeding two months.

134. The prayer sought for in C.M.P. No. 2717 of 2014 in D.V. No. 7 of 2014, by the husband/father and mother-in-law, is to provide

assistance of Medical and Welfare Experts and evaluate and assess the wife/mother. Reading of Section 15 of the Act, only indicates that the

Magistrate may secure the services of any person, viz., (i) related to aggrieved person, (ii) not related to the aggrieved person, (iii) including a

person engaged in promoting family welfare. Provision only confers discretion on the learned Judicial Magistrate to secure the services of any of

the above mentioned persons, if he thinks fit. Irrespective of the disputes, sought to be adjudicated in a case, pertaining to Domestic Violence Act,

a learned Judicial Magistrate, can secure the services of any of the above mentioned persons and that would not clothe any right to the

husband/father, to seek for assistance of medical and welfare experts to the wife/mother, for evaluation, for mere asking and that too, on the basis

of taking anti-depressants for a short duration. The contention that the Magistrate is not a medical expert and therefore, he cannot evaluate the

soundness of mind, cannot be accepted. He has posed several questions in the presence of the parties and their learned counsel. The answers

given by the wife/mother are quite clear and cogent. The learned Judicial Magistrate, Ambattur, has the discretion to seek for any services, if he

thinks fit. When a witness answers the questions in a clear cogent manner, it cannot be contended that she is mentally ill and that she has to be

evaluated by a medical expert. On the facts and circumstances of this case, such a contention cannot be accepted. Merely because, the learned

Judicial Magistrate, Ambattur, has the discretion to secure the services of any of the above persons, including for promoting family welfare, medical

expert cannot be claimed as a matter of right.

135. In Union of India (UOI) Vs. Kuldeep Singh, , the Hon''ble Supreme Court while testing the correctness of the judgment rendered under the

Narcotic Drugs and Psychotropic Substances Act, 1985, and the discretion to be exercised by the High Court, explained the principles governing

the mode of exercise of the discretionary power for public functionaries as follows:

20. When anything is left to any person, judge or Magistrate to be done according to his discretion, the law intends it must be done with sound

discretion, and according to law. In its ordinary meaning, the word ""discretion"" signifies unrestrained exercise of choice or will; freedom to act

according to one''s own judgment; unrestrained exercise of will; the liberty or power of acting without control other than one''s own judgment. But,

when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according

to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right

and wrong; and therefore, whoever hath power to act at discretion, is bound by the rule of reason and law.

21. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a

person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate

judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and

substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons.

22. The word ""discretion"" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from

folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies

vigilant circumspection and care; therefore, where the legislature concedes discretion it also imposes a heavy responsibility. ""The discretion of a

judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper and passion. In

the best it is often times caprice; in the worst it is every vice, folly, and passion to which human nature is liable,"" said Lord Camden, L.C.J., in

Hindson and Kersey reported in (1680) 8 HOW St Tr 57.

23. If a certain latitude or liberty is accorded by a statute or rules to a judge as distinguished from a ministerial or administrative official, in

adjudicating on matters brought before him, it is judicial discretion. It limits and regulates the exercise of discretion, and prevents it from being

wholly absolute, capricious, or exempt from review.

136. The contention of the husband/father that only a District and Family Court can entertain a petition for custody, under the Guardian and Wards

Act or the Hindu Minority and Guardianship Act and that therefore, the learned Judicial Magistrate, Ambattur, has exceeded in his jurisdiction,

cannot be accepted, for the reason that under Section 21 of the Domestic Violence Act, 20015, the learned Judicial Magistrate, Ambattur, is

empowered to decide the question of interim custody. The Court dealing with interim custody has to consider the paramount welfare of the minor

child and in the light of the statutory provisions, there is nothing wrong in considering the statutory provisions applicable to the custody of a child

and applying the judgments, apposite to the facts of the case. If the contentions of the husband/father are to be accepted, then the provision under

Section 21 of the Domestic Violence Act, would be nugatory. If the learned Judicial Magistrate, Ambattur, has to relegate the parties to the

District Court or the Family Court, as the case may be, then the very purpose of incorporating such a provision would be defeated. It depends

upon the facts and circumstances of each case.

137. It is not uncommon in our society that a pregnant woman, who goes to her parental house for delivery, stays there for sometime, as it is

natural that she would prefer to stay with her mother and family members. In the case on hand, the husband/father, has contended that even after

delivery, she has refused to return to the matrimonial home and only on his best efforts, she returned on 12.08.2012. Though the husband/father

has contended that he had taken steps for her return, along with the child, he has not furnished any details, as to what steps, he has taken to see the

child from 02.01.2012, the date on which, the minor girl child, Sanjana was born, whereas, the wife/mother has approached this Court, by way of

filing Habeas Corpus Petition, thereafter, a petition before the Family Court and lastly before the learned Judicial Magistrate, for custody. There is

a sequence of events.

138. As already observed that even taking it for granted that the wife/mother had taken some anti-depressants for a short duration, that would not

be a ground to arrive at a conclusion that she was mentally unsound, either to prosecute any litigation or to bring up the child. In Ram Narain Gupta

Vs. Rameshwari Gupta, , the Hon''ble Supreme Court observed that, ""The context in which the ideas of un-soundness of mind and mental disorder

occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of mental disorder"". The said principle can be

applicable, insofar as the assessment of mental unsoundness is concerned.

139. Though the husband/father has contended that the wife/mother had changed her residence to evade legal liability and to file the domestic

violence case, within the jurisdiction of the learned Judicial Magistrate, Ambattur, it is her contention that shifting of residence to Ambattur, is for

the convenience of her parents and herself.

140. From the material on record, it could be deduced that earlier, the parties were residing at Ayyappakkam, Chennai-77 and the marriage was

solemnized at P.T.R. Chettiar Thirumana Mandapam. According to the wife/mother, the spouses lastly resided at the abovesaid address. In O.P.

No. 3837 of 2013, filed by the husband/father, before the Additional Family Court, Chennai, for divorce, he has given Waltax Road address.

When the husband is stated to have changed his residential address from the place, where the spouses lastly resided, his contention that the

wife/mother has changed her residential address to Ambattur, for legal liability, cannot be countenanced.

141. Both the parties seemed to have changed their address to suit their convenience and merely because, wife/mother has changed her residential

address, which according to her, for the convenience of her parents, the same cannot be found fault with. Legal liability cannot be avoided, merely

because, address is changed.

142. Merely because the father is the natural guardian, he is not entitled to have priority over the mother of the child in the matter of custody.

Paramount welfare of the child alone is the consideration and the Court has to consider all the factors, such as, the economic status, character of

the person, claiming custody and guardianship, love and affection shown by the parties in the betterment of the child, the age of the child, etc.

Considering the paramount welfare of the child, Sanjana, below the age of five years, custody should be with the wife/mother.

143. In the light of the above discussion and decisions, the Criminal Revision Petitions are dismissed. Consequently, the petitioners are directed to

give custody of minor child, Sanjana, to the wife/mother, within a period of 15 days, from today, in the family Court.

144. After the pronouncement of these orders, learned counsel for the respondent/mother/wife submitted that her client has no objection for the

husband/father to have visitation rights of minor Sanjana, on Saturdays and Sundays (both days inclusive) between 8.00 am and 7.00 pm, to take

her to the father''s residence or to any other place of his choice. Husband/father shall return the custody of the child at 7.00 pm., duly. Submission

is placed on record. Father/husband shall take the child from the residence of mother, who shall not raise any objections. Parties shall honour the

commitment made before this Court. Orders of this Court are directed to be implemented in letter and spirit.

145. Finally, on the facts and circumstances of this case, in the best interest of the child, this Court deems it fit to remind the parents of the child, a

paragraph of the judgment in Sumedha Nagpal"s case (cited supra), as follows:

6. Before parting with the case, we cannot but express our deep anxiety over the matter. No decision by any court can restore the broken home

or give a child the care and protection of both dutiful parents. No court welcomes such problems or feels at ease in deciding them. But a decision

there must be, and it cannot be one repugnant to normal concepts of family and marriage. The basic unit of society is the family and that marriage

creates the most important relation in life, which influences morality and civilization of people, than any other institution. During infancy and

impressionable age, the care and warmth of both the parents are I required for the welfare of the child and we do hope that in this case the

Petitioner 1 and Respondent No. 2, the parents, would realize what their responsibility should be and set right their broken home for the sake of

their child.