(2018) 01 DEL CK 0038

Delhi High Court

Case No: 92 of 2017 and CM APPL 19737 of 2017

ABHIMANYU PORIA		APPELLANT
	Vs	
RAJBIR SINGH AND ORS		RESPONDENT

Date of Decision: Jan. 12, 2018

Acts Referred:

- Constitution of India, Article 32 - Remedies for enforcement of rights conferred by this Part
- Code of Criminal Procedure, 1973, Section 164, Section 156

Hon'ble Judges: Hima Kohli, Deepa Sharma

Bench: Division Bench

Advocate: Y.P. Narula, Neeraj Kumar Jha, Yash Prakash, Hrishikesh Jha, Abhay Narula, V.K. Garg, Jinendra Jain, Noopur Dubey, Aishwarya Laxmi, Chirag

Final Decision: Disposed

Judgement

1. In this appeal, the appellant/father has challenged an order dated 29.04.2017 passed by the learned Family Court, North, Rohini, Delhi, disposing of an application moved by him under Section 12 of the Guardians and Wards Act, 1890 (hereinafter referred to as ''the Act, 1890''), seeking the interim custody of his minor daughter, Baby Smridi Singh, aged 7 years and 9 months, as on date and arrayed as respondent No.3, who is presently in the custody of her maternal grandparents, respondents No.1 and 2 herein. By the impugned order, the learned Family Court has declined the relief of interim custody of the respondent No.3 to the appellant and instead, allowed the alternative prayer made in the application by granting him visitation rights in respect of the minor child, twice a month.

2. The factual matrix of the case needs to be delineated. On 01.07.2009, the appellant had got married to Priyanka, daughter of the respondents No.1 and 2,

who was a dentist by profession, as per the Hindu rites. The couple were initially residing in Sector 7, Rohini, Delhi, but subsequently, they had shifted to the residence of the respondents No.1 and 2 at Gurgaon. They were blessed with a daughter, respondent No.3/minor on 09.03.2010. After four years, the appellant''s wife expired on 22.04.2014 at Medanta Medicity Hospital, Gurgaon. It is the appellant''s version that his wife was suffering from epilepsy, which was the cause of her untimely death. Till early September, 2014, the appellant and his minor daughter continued to reside at Gurgaon, alongwith the respondents No.1 and 2. While residing in Gurgaon, the respondent No.3/minor daughter was admitted to G.D. Goenka Public School, Gurgaon. In the second week of September, 2014, the appellant and his daughter shifted to a rented premises in Delhi. After shifting to Delhi, the appellant had got respondent No.3 admitted in G.D. Goenka La Petite Play School, then in Shri Ram Global School, West Delhi and finally, in G.D. Goenka Public School, Delhi in the Kindergarten.

3. The appellant claims that during his daughter''s summer vacations, both of them had gone to visit his matrimonial uncle living in Jind City, Haryana on 25.06.2015. When he was about to leave for Delhi alongwith the respondent No.3, the respondent No.1 and his relatives and supporters had barged into his uncle''s house and had forcibly taken away the minor child.

4. The aforesaid narrative has however been denied by the respondents No.1 and 2, whose version is that after the demise of their daughter in April 2014, the respondent No.3, their minor granddaughter had continued residing with them for about 6-7 months and one day, in their absence, the appellant had taken her away on a false promise that he would return in the evening. However, he did not do so and instead, completely disconnected himself from his in-laws. After searching high and low for the appellant and the respondent No.3 for several months, the respondents No.1 and 2 got the information that he and the respondent No.3 were residing at one of his relative''s place in Jind. When the respondent No.1 alongwith some respectable persons arrived there on 27.06.2015, they were verbally abused and threatened by the appellant and his relatives. It was from there that the respondent No.1 took his granddaughter with him. As a fracas took place at the spot, the appellant called the police at 100 number and at his instance, a FIR was registered on the very same day under Sections 323, 452, 363, 506, 147 and 149 IPC. On 01.07.2015, the respondent No.3/minor child was produced by the respondents No.1 and 2 before the learned Judicial Magistrate, Jind who recorded her statement under Section 164 Cr.PC. Respondent No.3 stated before the Magistrate that she was living with her Nana Nani and wanted to live with them. A copy of the said statement, as recorded by the learned Judicial Magistrate at Jind has been filed by the respondents alongwith their reply.

5. Thereafter, the appellant filed W.P.(CRL) No.111/2015 before the Supreme Court

invoking Article 32 of the Constitution of India, for seeking the custody of his minor daughter. The said petition was however withdrawn by the appellant''s counsel on 27.07.2015, on the ground that the matter was being amicably settled between the parties with the help of their well-wishers. In February, 2016, the appellant filed a petition under Section 25 of the Act before the learned Family Court, Rohini, seeking the Petition No.1/2017. Accompanying the said petition was an interim application for the production of the respondent No.3/minor and for her interim custody, which has been disposed of by the impugned order by granting the appellant visitation rights in respect of his daughter, twice a month, but rejecting his request for grant of her interim custody.

6. Mr. Y.P. Narula, learned Senior Advocate appearing for the appellant has assailed the impugned order on the ground that the learned Family Court failed to appreciate the fact that the appellant being the father and natural guardian of the respondent No.3/minor child, is on a better footing to retain her custody; that the appellant is well established in the society and is physically and financially capable of maintaining the child, which can be seen from the fact that she was admitted by him in a prestigious school in Delhi; that the learned Family Court failed to appreciate the fact that the respondent No.3/minor child had been constantly tutored for two years by the respondents No.1 and 2 and other members of their family and in all that duration, the appellant was never permitted to see his daughter, which is why she had reacted the way she did before the Family Court on 22.04.2017; that the respondents had tried to file a frivolous complaint against the appellant, alleging inter alia that he had killed his wife and when a FIR was not registered by the police, they had filed a private complaint under Section 156(3) Cr.PC, which also came to be dismissed by the learned ACJM, Gurgaon, vide order dated 13.01.2017. It was thus contended on behalf of the appellant that all the above factors are a reflection on the conduct of the respondents No.1 and 2, which disentitles them from retaining the custody of the respondent No.3/minor child. Learned counsel had strenuously urged that the respondents No.1 and 2 are influential persons inasmuch as the brother of the respondent No.1 is a Member of Parliament and feeling threatened from them, the appellant was constrained to shift to Delhi alongwith his daughter, only for her benefit and welfare.

7. The aforesaid arguments were countered by Shri V.K. Garg, learned Senior Advocate appearing for the respondents, who disputed each and every allegation levelled by the appellant against the respondents No.1 and 2. He submitted that the respondent No.3/minor child has a deep and emotional attachment with her grandparents, having lived with them ever since her birth and even thereafter; that there is no question of the respondents No.1 and 2 tutoring the minor child against the appellant, which is clearly reflected from her statement recorded before the Judicial Magistrate at Jind on 01.07.2015, which was after she had remained in the custody of the appellant for over a period of six months. It was canvassed that it is

not in the best interest of the minor child to grant her interim custody to the appellant and the presiding Judge of the Family Court had personally interacted with the child and satisfied herself on this aspect before passing the impugned order. During her interaction, respondent No.3/minor child had stated before the learned Family Court Judge in no uncertain terms that she wanted to reside only with the respondents No.1 and 2 and her Mama Ji (matrimonial uncle). It was thus urged that the present appeal is liable to be dismissed as meritless and the impugned order upheld. In support of his submission that when dealing with custody cases, the Court must select a guardian of a minor by focusing only on the welfare and wellbeing of the child, the following decisions were cited by learned counsel for the respondents:-

(i) Rosy Jacob vs. Jacob A. Chakramakkal; (1973) 1 SCC 840

(ii) Nil Ratan Kundu and Anr. vs. Abhijit Kundu; (2008) 9 SCC 413

(iii) Smt. Anjali Kapoor vs. Rajiv Baijal; (2009) 7 SCC 322

8. We have heard the arguments advanced by both sides, carefully perused the impugned judgment, the pleadings and the documents filed, as also examined the judgments cited before us.

9. Before dealing with the facts of the present case, it is necessary to examine the legal position. The Act, of 1890 has consolidated the amended law relating to Guardian and Wards. Section 4 which is the definition clause, defines the term, "minor" as a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained majority; the term "guardian" has been defined as a person having the care of the person of a minor or of his property or of both, his person or property; the term "ward" has been defined as a minor for whose person or property or both, there is a guardian.

10. Chapter II of the Act, 1890 deals with appointment and declaration of guardians. Section 7 that falls in Chapter-II, empowers the court to make orders as to guardianship. The said provision is reproduced herein below for easy reference:

"7. Power of the Court to make orders as to guardianship.-

(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made-

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

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

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

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

11. Section 8 enumerates the persons, who are entitled to apply for an order for guardianship. Section 9 specifies as to which court would have the jurisdiction to entertain an application with respect to guardianship of the minor. Section 17 that deals with matters that the court must consider while appointing a guardian is of significance. The said provision is reproduced herein below:-

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

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

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

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

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

12. Yet another statute that pertains to majority and guardianship amongst Hindus, is the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as ''The Act, 1956''). Section 4 of the said enactment defines the term, "minor" as a person who has not completed the age of 18 years. "Guardian" has been defined as a person having the care of the person of the minor or his property or of both, his person and property and includes the natural guardian. "Natural guardian" means any of the guardians that have been enumerated in Section 6 of the Act and reads as below:-

"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 by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi)"

13. Section 8 of the Act, 1956 lays down the powers of the natural guardian. Section 13, which is of prime concern, stipulates that the welfare of a minor is of paramount consideration. The said provision is reproduced herein below for ready reference:-

"13. Welfare of minor to be paramount consideration- (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."

14. On a conspectus of the relevant provisions of the Act of 1890 and the Act of 1956 what clearly emerges is that the matter relating to the custody of a minor child is an overwhelming consideration that must weigh with the court when examining the "welfare of the minor" and the said term must be given effect to in its broadest sense. At the time of appointing or declaring any person as the guardian of a minor, it is not the rights of the parents or relatives that should concern the court. The paramount consideration is the welfare of the minor child. The aforesaid aspect has been consistently highlighted over the years in several judicial pronouncements of the Supreme Court and the High Courts including in the cases of Rosy Jacob (supra), L.Chandran vs. Mrs. Venkatalakshmi and Anr. reported as AIR 1981 AP 1, Smt. Surindar Kaur Sandhu vs. Harbax Singh Sandhu and Anr. reported as (1984) 3 SCR 422, Kamla Devi vs. State of Himachal Pradesh and Ors. reported as AIR 1987 HP 34, Mrs. Elizabeth Dinshaw vs. Arvand M. Dinshaw and Anr. reported as (1987) 1 SCR 175, Smt. Elokeshi Chakraborty vs. Sri Sunil Kumar Chakraborty reported as AIR 1991 Calcutta 176, Kirtikumar Maheshankar Joshi vs. Pradipkumar Karunashanker Joshi reported as AIR 1992 SC 1447, Bimla Devi vs. Subhas Chandra Yadav ''Nirala'' reported as AIR 1992 Patna 76; Sumedha Nagpal vs. State of Delhi & Ors. reported as (2000) 9 SCC 745, Nil Ratan Kundu (supra), Mausami Moitra Ganguli vs. Jayanti Ganguli reported as AIR 2008 SC 2262, Smt. Anjali Kapoor (supra), Gaurav Nagpal vs. Sumedha Nagpal reported as (2009) 1 SCC 42, Shyamrao Maroti Korwate vs. Deepak Kisanrao Tekam reported as (2010) 10 SCC 314 and Smt. Vibha vs. Sh. Rama Nand reported as 2013 X AD (DELHI) 399.

15. In L. Chandran (supra), where the mother of the minor child had expired and she was left in the care and custody of the grandmother, on the father approaching the court for the custody of the child, the Division Bench of the Andhra Pradesh High Court had repelled the stand of the father that as the natural guardian of the child, he had unlimited rights to the custody of the minor child over and above the maternal grandparents, in the following words: -

"19. It may now be taken as universally settled that State would not use its power in its parens patriae jurisdiction, against the welfare of the children. Speaking positively it will use that jurisdiction only for the promotion and the welfare of the child. We are, therefore, clearly of the opinion that the first submission advanced on behalf of the petitioner cannot be accepted. But we insist that in rejecting this claim of the father for the custody of the minor child in this case, we do not intend in any way to undermine or impair the legitimate rights of the father to the custody of his minor child. Patria Potestas is too ancient an institution to be lightly interfered with. Normally, there is nothing which a father and a mother would not do for the promotion and protection of the interests of their child. The noble practice of self-sacrifice in the interests of the minor children is imbedded in the system of Hindu family. Babur, the great Moghul was reported to have voluntarily courted death in order to save his son Humayun from the creeping effects of a consuming disease. We therefore do not use the welfare of the child as antithetical to the custody of the father. We only reject the absolutist doctrine advanced by the petitioner. As Lord Mac Dermott observed in the aforesaid House of Lord''s decision in J. v. C. (supra). "While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other consideration, such rights and wishes recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute for the purposes of the investigation....."

We are, therefore, in this case only rejecting the absolute argument advanced by the father."

16. In Smt. Surinder Kaur Sandhu (supra), dealing with the Act of 1956, the Supreme Court had held that though Section 6 defines the father as a natural guardian of the minor child, but the said provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.

17. In Kamla Devi (supra), the Himachal Pradesh High Court had observed as follows:-

"13. As observed earlier, the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. 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 giving due weight to the circumstances such as a child?s ordinary comfort, contentment, intellectual, moral and physical development, his health,

education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court''s view of the best interests of the child whose welfare requires that he be in custody of one parent or the other."

(emphasis added)

18. In Mrs. Elizabeth Dinshaw (supra), the Supreme Court had observed that whenever the question arises before court pertaining to the custody of the minor child, the matter is to be decided not on the consideration of legal rights of the parties, but on the sole and predominant criterion of what would best serve the interest and welfare of the child. Therefore, the father''s fitness alone could not be treated as an overriding consideration for the welfare of the minor children.

19. In Smt. Elokeshi Chakraborty (supra), while examining the provisions of Sections 7, 12 and 25 of the Act, 1890, the Calcutta High Court had observed that even if the children are in the custody of one, who has no legal right thereto, but the welfare of the child is reasonably looked after in a manner in which it should, then the minor''s legal guardian cannot claim an order of return or recovery of custody merely on the strength of his legal right or financial soundness.

20. In Kirtikumar Maheshankar Joshi (supra) where again, the mother had died an unnatural death, the father was facing a charge under Section 498-A of the IPC and the children were staying with the maternal uncle when the father had sought their custody, deferring to the desire expressed by the children of staying with their maternal uncle and not with their father, the Supreme Court had rejected the said request after interacting with them.

21. In Bimla Devi (supra), the Patna High Court had highlighted the fact that the word ''welfare'' defined under the statute must be taken in its widest sense and the moral and ethical welfare of the child must also weigh with the court just as his physical well being.

22. In Nil Ratan Kundu (supra), where the mother of the minor had died an unnatural death and his father was charged under Section 498-A of Indian Penal Code (in short ''IPC''), the custody of the child was handed over to the appellants, his maternal grandparents. On being enlarged on bail, when the respondent, father of the minor filed an application under the Act, 1890 praying for his custody, the trial court allowed the said application. Aggrieved by the said order, the grandparents approached the High Court but their appeal was dismissed. The said order was challenged by them before the Supreme Court. After examining the legal position expounded in the English law, American law and analysing several judicial

pronouncements of Indian courts, where the principles relating to the grant of custody of the minor child had been applied by taking into account their necessity and well being as of paramount consideration, the Supreme Court had allowed the said appeal and dismissed the father''s application for seeking custody of his minor child.

23. In Nil Ratan Kundu (supra), the Supreme Court had opined that in cases where a guardian has to be appointed for a minor child, it is not the "negative test" that the father is not "unfit" or disqualified to have the custody of his son or daughter which is relevant, but the "positive test" that the said custody would be in the welfare of the minor, which is material and it is on that basis and the court should exercise the power to grant or refuse the custody of the child in favour of the father, mother or any other guardian. The said decision highlighted the fact that children are not a ''property'' or a ''commodity'' and issues relating to their custody have to be handled with love, affection, sentiments and by applying a human touch to the problem.

24. In Mausami Moitra Ganguli (supra), the Supreme Court had reiterated the principles of law in relation to the custody of a minor child in the following words:-

"14. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

(emphasis added)

25. In the case of Smt. Anjali Kapoor (supra), the Supreme Court had observed that the principle on which the Court should decide the suitability of the guardian mainly depends on two factors: (i) the father''s fitness or otherwise to be the guardian, and (ii) the interest of the minors. Considering the welfare of the child in the captioned case, it was held that children are not mere chattel, nor are they mere play things in the hands of their parents. Declaring that absolute rights of the parents over the destinies and the lives of their children in the modern changed social conditions, had yielded to considerations of their welfare as human beings so that they may grow up in a normal balanced manner, to become useful members of the society, the Supreme Court had observed as below:-

"26. Ordinarily, under the Guardian and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute and the Courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the appellant grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the appellant to retain the custody of the child."

26. In Shyamrao Maroti Korwate (supra), the Supreme Court observed that in deciding the question as to whether a father, who is otherwise a natural guardian of a minor child, is fit or unfit to be appointed as such, the "welfare of the minor child" is of paramount consideration and such a question cannot be decided merely on the basis of the rights of the parties under the law.

27. In Smt. Vibha (supra), a Division Bench of the Delhi High Court had referred to the following considerations as were summarized by the Guardianship Court in that case for determining the welfare of a minor child:-

"6. After considering the submissions, the trial court took note of the decision of the Supreme Court in Shyamrao Maroti Korwate vs. Deepak Kisanrao Tekam, 2010 X AD (S.C.) 76 = 2010 (10) SCC 314 and summarized the legal position which the Guardianship Court had to take into consideration in the following manner:-

"17. From the judicial precedents, for determining the welfare of the minor child, it need to be addressed the following guiding ingredients which are in brief enumerated herein below:-

(i) Where the child will be more happy.

(ii) Who is in a better position to look after the physical and mental development of the minor.

(iii) Who can give more comfort.

(iv) In whose care the welfare of the minor is more secure.

(v) Who has the capacity to provide for a better education and round the clock look after the child.

(vi) Who would be available by the side of the child when in need.

(vii) Who would look after the emotional aspect, social setup, good education, career building and nurturing of the child as a good human being.

(viii) Where the child will have congenial atmosphere, healthy for his growth and overall development.

(ix) Where the child can be developed well, keeping in mind the ethos and as a better Indian citizen.

(x) Where he will develop as a proper human being having progressive attitude and not having constricted thoughts and outlook towards life."

28. In a recent decision in the case of Nithya Anand Raghavan vs. State of NCT of Delhi and Ors. reported as (2017) 8 SCC 454, where the appellant/mother had questioned a writ of habeas corpus issued by the High Court for production of the minor daughter, removed by her from the custody of the father/respondent from a foreign country and brought to India, a Three Judge Bench of the Supreme Court overturned the impugned judgment and reiterated the legal position that the Indian Courts are strictly governed by the provisions of the Act of 1890. It was emphasized that the overriding consideration must always be the interest and welfare of the minor child. A similar same view has been expressed by the Supreme Court in

Prateek Gupta vs. Shilpi Gupta and Ors. reported as 2017 (14) SCALE 121 in the following words:-

"34. It has been consistently held that there is no forum convenience in wardship jurisdiction and the peremptory mandate that underlines the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration."

29. Reverting to the case in hand, it is noteworthy that by the impugned order, the learned Judge, Family Court has only disposed of the application moved by the appellant under Section 12 of the Act, 1890 for seeking interim custody of the respondent No.3. The main petition has yet to be adjudicated by the Family Court. In his interim application, as a first relief, the appellant had prayed for the custody of the respondent No.3 and in the alternative, he sought visitation rights in respect of his minor daughter at regular intervals.

30. A perusal of the impugned judgment reveals that the respondents No.1 and 2 were directed to produce the respondent No.3 in the Court on 22.4.2017, which they did. The Family Court first called the respondent No.3 to the chamber for interaction, followed by the appellant, then the respondent No.2/maternal grandmother of the respondent No.3 and Shri Bhalender Singh, maternal uncle of the respondent No.3 and lastly, the respective counsels of the parties. The interaction recorded separately in respect of each of the aforesaid parties, was kept in a sealed cover. After hearing the counsels for the parties, the respondent No.3 was called back in the chamber by the learned Family Court Judge, who again interacted with her. On the insistence of the respondent No.3, her maternal uncle, Shri Bhalender Singh was recalled by the learned Family Court and the interaction that took place with them was also recorded separately and placed in a sealed cover.

31. At the time of pronouncing the impugned order, one week down the line, on 29.4.2017, the aforesaid sealed covers were opened by the learned Family Court to refresh its memory. We can do no better than to reproduce below, the relevant observations made in respect of the said interaction that have been reproduced in extenso in para 15 of the impugned judgment:-

"15. The said sealed cover is opened today to refresh the memory of the court. On 22.04.2017, while recording the interaction of the court with the child, the parties and their respective counsels, the court has observed as under:-

The child appeared in the chamber of the undersigned, smiling in a jovial manner. Preliminary queries regarding her name and school, brought about pleasant replies. The child is very talkative and of her own, she informed the court about her recent birthday, the gifts that were given to her and what was not given to her by her maternal uncle, whom she affectionately calls Bhalu Mama. She informed the court about her school friends and that due to her examinations, this time, her birthday was celebrated at home with her friends of locality. On query by the court, the child told that she is not afraid of anything and that there is no ?Bhoot? in this world, and that her Nani has told her that Bhoot means Gujra Hua Time.

The child appeared to be a very happy child, with a very pleasant disposition. However, when the child was asked as to for how long, she has not met her father, she started trembling and her discomfort and agitation was writ large on her face. Her opening comment was that he used to beat her. Thereafter, she stated that she did not wish to meet her father, nor did she wish to live with him or even see his face. She was explained that she need not be scared or afraid of anyone, but she continued crying. After she was consoled by the court and informed that her Nani, and her father alongwith Vakeel uncles were being called inside, she insisted that her maternal uncle Bhalu Mama be also called.

The child did not even give a glance to her father, but rather sat next to the undersigned on a chair and insisted that her Bhalu Mama sit next to her, as she felt secure with him. Repeated efforts of the court, to have the child even say a word to her father or wish him, brought about only tears, with her whole body shaking and her hands trembling. Since, on seeing her father, her sobbing and tears were uncontrollable, the Naib Court was asked to take the child to the other room for a while, alongwith her maternal uncle, with whom she was comfortable.

The child was given snacks by the court staff, which she took happily, as informed by the child herself.

After the child went out, the petitioner and the respondents made allegations against each other, and both the counsels, after restraining their respective clients, made further submissions on the application, citing certain judgments, which shall be referred to at the time of passing of the order on the application.

When the parties as well as their counsels had concluded their submissions, they left the chamber, the child was again called in the chamber. She came happily to the chamber of the undersigned and said Thank You, for the chips and chocolates given

to her by the court staff. She was again comforted by the court and was told she need not be afraid of anyone.

During the course of submissions made by the petitioner, he had mentioned that child''s Nani and maternal uncle Sh. Bhalender Singh had threatened and intimidated the child with injections and she is terrified of them. On general questioning, the child stated that she is not afraid of anyone and adores her Nani and Bhalu Mama, who was earlier living in US. She even joked that he eats too much and looks like a Bhalu. On a question, as to whether anyone has scared or scolded her, when she did not study, she very happily stated that no one scolds her but rather she scolds her Bhalu Mama. She fondly spoke about both her Mamis Ms. Savita and Ms. Sakshi and her second maternal uncle (Koka Mama). She also informed that she goes to G.D. Goenka School, Gurgaon and it is her Nani, who gets her ready for school. She gets gifts from her maternal uncles.

She was asked that if she would like to wish and say Hello to her father, but she again started crying and sobbing, stating that she did not wish to speak to him. Again on being consoled, the petitioner as well as her maternal uncle were called in on her demand, but she held the hand of the undersigned and her maternal uncle, and while trembling, she stated Good Afternoon to the petitioner in a very low tone. The petitioner responded to her but thereafter did not put any question to the child, but merely told her that "Tipu Didi and other relatives had come to meet her outside and she should not be afraid of her maternal uncles and that her Papa is here:

The petitioner was advised to interact with the child and ask her certain questions regarding her school and friends etc., so that the child may feel comfortable with him, but no questions were forthcoming from the petitioner. On the other hand, the child went to her maternal uncle and hugged him tightly, and despite being repeatedly asked to tell her father about herself, she refused. On the asking of the court, the child told that her best friend is ''Stuti''.

It is quite apparent that the child is not comfortable in the company of her father and was rather petrified of him. All of them were told to leave and the child was so scared that she even did not look at the petitioner while leaving. However, before leaving, she looked back at the court and said Bye."

32. In the impugned order, the learned Family Court has rightly observed that when considering the issue of interim custody, all that the court is required to assess is as to whether the child''s welfare being of paramount importance and concern, would

be better taken care of by the father as a natural guardian or by the respondents No.1 and 2, the maternal grandparents, who were already having her custody or whether the physical, mental or emotional state of the respondent No.3 demanded that her interim custody be handed over to the appellant/father. After a lengthy interaction that it had with the respondent No.3 on 22.4.2017, the learned Family Court opined that it was not in her welfare to handover her custody to the appellant/father as the child was being well taken care of by her maternal grandparents and her maternal uncle. The adverse reaction of the respondent No.3 to the appellant''s presence during the interaction was also taken note of. The Family Court observed that the respondent No.3 was visibly shaking, trembling and petrified in the presence of the appellant and that she kept on crying continuously, was inconsolable and became incoherent.

33. Given the attendant facts and circumstances and the totality of the situation, the scales had tilted in favour of the respondents No.1 and 2 and the Family Court was of the firm opinion that granting interim custody of the respondent No.3 to the appellant/father, would have uprooted the child from a happy and conducive environment and it was likely to have a serious negative impact on her growth and development. Consequently, the prayer for temporary custody of the minor child was declined. Holding that it was necessary for the respondent No.3 to get acquainted with the appellant for both of them to establish a healthy and positive relationship, as an interim measure, the appellant has been granted visitation rights to meet the minor child twice a month, on the first and third Saturdays. The meeting scheduled for the first Saturday of every month has been directed to be held in the children''s room attached to the Family Court and the second meeting directed to be held in Gurgaon, where the minor/respondent No.3 is residing with the respondents No.1 and 2, at a mutually convenient place.

34. In the light of the facts and circumstances of the case and the decisions cited hereinabove, we have no hesitation in holding that merely because the appellant is the father and natural guardian of the minor, respondent No.3 or that he is financially sound, will not be a consideration for granting her interim custody to him. The overriding consideration when deciding an application either under Section 12 or Section 25 of the Act of 1890, is the physical, mental and emotional well being of the minor; no more, no less.

35. On the scale of finances, merely because the appellant is financially sound, cannot be the guiding factor for the Court to handover the custody of the minor, respondent No.3 to him. In any event, the respondents No.1 and 2 are better placed than the appellant when it comes to financial soundness. Even if the situation was converse, it would not have made much difference. Therefore, the said criteria alone cannot weigh with the court when deciding a matter of custody of the minor respondent No.3. Further, the fact that the appellant and the respondents No.1 and

2 have a serious dispute with each other and they have filed criminal cases against each other, will also not be relevant for this court as those are extraneous factors, when it comes to assessing the overriding interest and welfare of the child.

36. The predominant focus of the Court in the present case is solely on the "well being" of the respondent No.3, which term must be given its widest amplitude. The Court must remain mindful of the fact that the respondent No.3 should as best as is possible, remain in a harmonious and peaceful environment that is conducive to her upbringing and growth. From a perusal of the interaction of the Family Court with the child, it is revealed that she has a great deal of affection for the respondent No.2/maternal grandmother and Shri Bhalender Singh, maternal uncle, apart from other maternal uncles, their wives and children. As of now, the child appears to be blossoming in the secure presence of her grandparents and her extended family and all of whom have joined hands to give the comfort and solace that a motherless girl child would need at this tender age. To our mind, the emotional and psychological quotient would far outweigh the monetary quotient when it comes to balancing the interest of a minor child. A safe, secure and harmonious environment at home and the presence of a loving and caring family are of preeminent consideration for a child of that age for her healthy and well balanced growth which we find that the respondents No.1 and 2 have been able to provide.

37. In the above facts and circumstances, there is no reason for this Court to interfere in the impugned order whereunder, the request for interim custody made by the appellant/father in respect of the minor, respondent No.3, has been declined. We are in agreement with the observations made by the learned Family Court that till the respondent No.3 gets familiar with her father, the appellant and the latter is able to establish a rapport, with her, good enough to build a confidence level for her to be willing to stay for a longer durations with him, she ought not to removed from the custody of the respondents No.1 and 2/maternal grandparents.

38. We may note here that during the course of arguments, Mr. Narula, learned Senior Advocate appearing for the appellant/father had stated during the visitation rights granted under the impugned order, that the appellant was never left alone with the respondent No.3 in the children''s room attached to the Family Court, for him to be able to bond with her and that the maternal uncles of the respondent No.3 are always hovering around them, which was creating an impediment in the meeting. Learend counsel had also stated that the appellant is very apprehensive of meeting with the child in Gurgaon, due to the immense influence that the respondents No.1 and 2 wield in the area.

39. To allay the aforesaid apprehension, we had suggested that the visitation rights in respect of the respondent No.3, granted to the appellant under the impugned order, twice a month, should initially be arranged in the children''s room attached to

the concerned Family Court itself. Further, in view of the grievance expressed that the maternal uncles of the respondent No.3 were constantly interfering during the visitation rights, we had suggested that the Family Court can direct a Counsellor to remain present in the children''s room in that duration. However, the said suggestions did not find favour with the appellant.

40. Now that the impugned order presently declining the interim custody of the respondent No.3 to the appellant has been upheld, we are of the opinion that for any further progress to be made in forging a filial bond between the appellant and the respondent No.3, the father and daughter ought to be left alone during the periods of visitation. With this intent and purpose, we modify the impugned order dated 29.4.2017, limited to the extent that during the pendency of the main petition, the respondents No.1 and 2 shall bring the minor respondent No.3 on the first and third Saturdays of every month to the children''s room attached to the concerned Family Court and a Counsellor attached to the said Court shall remain present during the meeting between the appellant and the respondent No.3. The meeting hours, as fixed in the impugned order is for 1 1/2 hours, i.e., from 11.30 AM to 1.00 PM. If the Counsellor reports to the Family Court that the respondent No.3 is comfortable with the appellant then the meeting hours on one Saturday of every month may be extended by the learned Family Court to two hours, i.e., from 11.00 AM to 1.00 PM.

41. It is clarified that the order passed hereinabove is purely interim in nature and in case of any change in the circumstances, either party is at liberty to approach the Family Court with sufficient material for modification/alteration of the visitation rights.

42. The opinion expressed hereinabove is only in the context of the fact situation noted in the interim order passed by the Family Court and shall not influence the said Court at the time of finally deciding the main petition filed by the appellant under Section 25 of the Act of 1890.

43. The present appeal is disposed of on the above terms, while leaving the parties to bear their own expenses.