Tejaswini Gaud vs Shekhar Jagdish Prasad Tewari on 6 May, 2019

Equivalent citations: AIR 2019 SUPREME COURT 2318, AIRONLINE 2019 SC 256, (2019) 137 ALL LR 274, (2019) 203 ALLINDCAS 252, 2019 (2) ABR(CRI) 738, (2019) 2 HINDULR 772, 2019 (2) KLT SN 113 (SC), (2019) 2 UC 1110, (2019) 3 BOMCR(CRI) 247, (2019) 3 CRILR(RAJ) 705, (2019) 3 RAJ LW 2425, (2019) 3 RECCIVR 104, (2019) 4 ANDHLD 271, (2019) 4 CIVLJ 435, (2019) 7 SCALE 502, 2019 (7) SCC 42, 2019 CRILR(SC MAH GUJ) 705, AIR 2019 SC(CRI) 931

Author: R. Banumathi

Bench: R. Subhash Reddy, R. Banumathi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 838 OF 2019
(Arising out of SLP (Crl.) No. 1675 of 2019)

TEJASWINI GAUD AND ORS. ...Appell

VERSUS

SHEKHAR JAGDISH PRASAD TEWARI
AND OTHERS ...Responden

JUDGMENT

R. BANUMATHI, J.

Leave granted.

2. This appeal arises out of the judgment dated 06.02.2019 passed by the High Court of Bombay in Crl.W.P. No. 5214 of 2018 in and by which the High Court held that the first respondent- father of the child being the surviving parent and in the interest of welfare of the child, the custody of the child must be handed over to the first respondent-father and issued writ of habeas corpus directing the appellants to handover the custody of the minor child to respondent No.1-father of the child.

3. Brief facts of the case are that marriage of respondent No.1 was solemnized with Zelam on

28-05-2006. During the fifth month of her pregnancy i.e. in May 2017, Zelam was detected with breast cancer. Respondent No.1 and Zelam were blessed with a girl child named Shikha on 14-08-2017. While Zelam was undergoing treatment, child Shikha was with her father respondent No.1 till November, 2017. Unfortunately, on 29-11-2017, respondent No. 1 was suddenly hospitalised and he was diagnosed with Tuberculosis Meningitis and Pulmonary Tuberculosis. While he was undergoing treatment, appellant No.1-Tejaswini Gaud – one of the two sisters of Zelam and appellant No.4-Dr. Pradeep Gaud who is the husband of Tejaswini, took Zelam along with Shikha to their residence at Mahim, Mumbai for continuation of the treatment. Later, in June 2018, Zelam was shifted to her paternal home along with Shikha in Pune i.e. residence of appellant No.3-Samir Pardeshi, brother of Zelam. In July 2018, they were again shifted to the house of appellant No.1 in Mumbai. On 17-10-2018, Zelam succumbed to her illness. Child Shikha continued to be in the custody of the appellants in Pune at the residence of appellant No.3 till 17-11-2018. Respondent No.1-father was denied the custody of child and on 17-11-2018, he gave a complaint to Dattawadi Police Station, Pune. Thereafter, respondent No.1-father approached the High Court by filing a writ petition seeking custody of minor child Shikha. Respondent No.1-father is a post-graduate in Management and is working as a Principal Consultant with Wipro Limited.

4. The High Court held that respondent No.1-father, the only surviving parent of the child is entitled to the custody of the child and the child needs love, care and affection of the father. The High Court took into account that respondent No.1 was hospitalised for a serious ailment and in those circumstances, the appellants have looked after the child and in the interest and welfare of the child, it is just and proper that the custody of the child is handed over back to the first respondent. However, the High Court observed that the efforts put in by the appellants in taking care of the child has to be recognized and so the High Court granted appellants No.2 and 3 access to the child.

5. The appellants contend that the writ of habeas corpus cannot be issued when efficacious alternative remedy is available to respondent No. 1 under Hindu Minority and Guardianship Act, 1956. It was submitted that the child was handed over to the appellants by the ailing mother of the child who has expressed her wish that they should take care of the child and therefore, it is not a fit case for issuance of writ of habeas corpus which is issued only in cases of illegal detention. It is also their contention that the question of custody of the minor child is to be decided not on consideration of the legal rights of the parties; but on the sole and predominant criterion of what would best serve the interest and welfare of the minor and, as such, the appellants who are taking care of the child since more than a year, they alone would be entitled to have the custody of the child in preference to respondent No.1-father of the child.

6. Learned counsel appearing for the appellants submitted that though the first respondent-father is a natural guardian of the minor child Shikha and has a preferential right to claim the custody of the minor child, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party, in this case, the father. It was further submitted that Section 6 of the Hindu Minority and Guardianship Act, 1956 cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child and the welfare of the minor child has to be the sole consideration. In support of his contention, the learned counsel for the appellants has placed reliance upon:-

(i) Dr. Veena Kapoor v. Varinder Kumar Kapoor (1981) 3 SCC 92;

Sarita Sharma v. Sushil Sharma (2000) 3 SCC 14;

G. Eva Mary Elezabath v. Jayaraj and Others 2005 SCC Online Mad 472 : AIR 2005 Mad 452;

L. Chandran v. Mrs. Venkatalakshmi & Another 1980 SCC Online AP 80 : AIR 1981 AP 1;

Ravi Kant Keshri & Another v. Krishna Kumar Gupta and Others 1992 SCC Online All 548 : AIR 1993 All 230;

Suriez v. M. Abdul Khader and Others 2017 SCC Online Kar 4935; Murari Lal Sharma and Another v. State of West Bengal and Others 2013 SCC Online 23045 : AIR 2013 Cal 213;

R. Suresh Kumar v. K.A. Kavathi and Others MANU/TN/8529/2006;

Athar Hussain v. Syed Siraj Ahmed and Others (2010) 2 SCC 654;

Nil Ratan Kundu and Another v. Abhijit Kundu (2008) 9 SCC 413; Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi (1992) 3 SCC 573;

Gaurav Nagpal v. Sumedha Nagpal (2009) 1 SCC 42; Baby Sarojam v. S. Vijayakrishnan Nair AIR 1992 Ker 277; Abhimanyu Poria v. Rajbir Singh and Others 2018 SCC Online Del 6661 : AIR 2018 Del 127;

A.V. Venkatakrishnaiah and Another v. S.A. Sathyakumar 1978 SCC Online Kar 241 : AIR 1978 Kar 220.

7. Per contra, the learned counsel appearing for the first respondent has submitted that in view of Section 6 of the Hindu Minority and Guardianship Act, 1956, father has the paramount right to the custody of the children and he cannot be deprived of the custody of the minor child unless it is shown that he is unfit to be her guardian. The learned counsel submitted that in view of his illness and the illness of the mother Zelam, mother and child happened to be in Mumbai and Pune and considering the welfare of the child, she had to be handed over to the first respondent. It was further submitted that father being a natural guardian as per the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956, the appellants have no legal right for the custody of the infant and the High Court rightly ordered the custody of the child to respondent No.1. In support of his contention, learned counsel for the respondents inter alia placed reliance upon number of judgments:-

(i) Gohar Begam v. Suggi @ Nazma Begam and Others AIR 1960 SC 93;

(ii) Smt. Manju Malini Sheshachalam D/o Mr. R.

Sheshachalam v. Vijay Thirugnanam S/o Thivugnanam & Others 2018 SCC Online Kar 621;

(iii) Amol Ramesh Pawar v. State of Maharashtra & Others 2014 SCC Online Bom 280;

(iv) Marggarate Maria Pulparampil Nee Feldman v. Dr. Chacko Pulparampil and Others AIR 1970 Ker 1 (FB);

(v) Thirumalai Kumaran v. Union Territory of Dadra and Nagar Haveli 2003 (2) Mh.L.J.;

(vi) Capt. Dushyant Somal v. Smt. Sushma Somal & Others (1981) 2 SCC 277;

(vii) Syed Saleemuddin v. Dr. Rukhsana and Others (2001) 5 SCC 247;

(viii) Nirmaljit Kaur (2) v. State of Punjab and Otherrs (2006) 9 SCC 364;

(ix) Surya Vadanan v. State of Tamil Nadu and Others (2015) 5 SCC 450;

(x) Ruchika Abbi & Anr. v. State (National Capital Territory of Delhi) and Another (2016) 16 SCC 764;

(xi) Kanika Goel v. State of Delhi through Station House Officer and Another (2018) 9 SCC 578.

8. We have carefully considered the rival contentions and perused the impugned judgment and various judgments relied upon by the parties.

9. The question falling for consideration is whether in the writ of habeas corpus filed by respondent No.1 seeking custody of the minor child from the appellants, the High Court was right in ordering that the custody of minor child be handed over to respondent No.1-father. Further question falling for consideration is whether handing over of the custody of the child to respondent No.1-father is not conducive to the interest and welfare of the minor child.

10. Section 6 of the Hindu Minority and Guardianship Act, 1956 enacts as to who can be said to be a natural guardian. As per Section 6 of the Act, natural guardian 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) is the father, in the case of a boy or an unmarried girl and after him, the mother. Father continues to be a natural guardian, unless he has ceased to be a Hindu or renounced the world. Section 13 of the Act deals with the welfare of a minor. Section 13 stipulates that in the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration. Section 13(2) stipulates that no person shall be entitled to the guardianship by virtue of the provisions of the Act if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

11. Maintainability of the writ of habeas corpus:- The learned counsel for the appellants submitted that the law is well- settled that in deciding the question of custody of minor, the welfare of the minor is of paramount importance and that the custody of the minor child by the appellants cannot be said to be illegal or improper detention so as to entertain the habeas corpus which is an extraordinary remedy and the High Court erred in ordering the custody of the minor child be handed over to the first respondent-father. Placing reliance on Veena Kapoor1 and Sarita Sharma2 and few other cases, the learned counsel for the appellants contended that the welfare of children requires a full and thorough inquiry and therefore, the High Court should instead of allowing the habeas corpus petition, should have directed the respondent to initiate appropriate proceedings in the civil court. The learned counsel further contended that though the father being a natural guardian has a preferential right to the custody of the minor child, keeping in view the welfare of the child and the facts and circumstances of the case, custody of the child by the appellants cannot be said to be illegal or improper detention so as to justify invoking extra-ordinary remedy by filing of the habeas corpus petition.

12. Countering this contention, the learned counsel for respondent No.1 submitted that in the given facts of the case, the 1 Dr. Veena Kapoor v. Varinder Kumar Kapoor (1981) 3 SCC 92 2 Sarita Sharma v. Sushil Sharma (2000) 3 SCC 14 High Court has the extraordinary power to exercise the jurisdiction under Article 226 of the Constitution of India and the High Court was right in allowing the habeas corpus petition. The learned counsel has placed reliance on Gohar Begum3 and. Manju Malini Sheshachalam4. Contention of respondent No.1 is that as per Section 6 of the Hindu Minority and Guardianship Act, respondent No.1, being the father, is the natural guardian and the appellants have no authority to retain the custody of the child and the refusal to hand over the custody amounts to illegal detention of the child and therefore, the writ of habeas corpus was the proper remedy available to him to seek redressal.

13. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal 3 Gohar Begum v. Suggi @ Nazma Begam and others AIR 1960 SC 93 4 Smt. Manju Malini Sheshachalam D/o Mr. R. Sheshachalam v. Vijay Thirugnanam S/o Thivugnanam & Others 2018 SCC Online Kar 621 law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

14. In Gohar Begum3 where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued. In Gohar Begum3, the Supreme Court dealt with a petition for habeas corpus for recovery of an illegitimate female child. Gohar alleged that Kaniz Begum, Gohar's mother's sister was allegedly detaining Gohar's infant female child illegally. The Supreme Court took note of the position under the Mohammedan Law that the mother of an illegitimate female child is entitled to its custody and refusal to restore the custody of the child to the mother would result in illegal custody of the child. The Supreme Court held that Kaniz having no legal right to the custody of the child and her refusal to make over the child to the mother resulted in

an illegal detention of the child within the meaning of Section 491 Cr.P.C. of the old Code. The Supreme Court held that the fact that Gohar had a right under the Guardians and Wards Act is no justification for denying her right under Section 491 Cr.P.C. The Supreme Court observed that Gohar Begum, being the natural guardian, is entitled to maintain the writ petition and held as under:-

> "7. On these undisputed facts the position in law is perfectly clear. Under the Mohammedan law which applies to this case, the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of Section 491. This position is clearly recognised in the English cases concerning writs of habeas corpus for the production of infants.
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> In Queen v. Clarke (1857) 7 EL & BL 186: 119, ER 1217 Lord Campbell, C.J., said at p. 193:
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> "But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty." The courts in our country have consistently taken the same view. For this purpose the Indian cases hereinafter cited may be referred to. The terms of Section 491 would clearly be applicable to the case and the appellant entitled to the order she asked.
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> 8. We therefore think that the learned Judges of the High Court were clearly wrong in their view that the child Anjum was not being illegally or improperly detained. The learned Judges have not given any reason in support of their view and we are clear in our mind that view is unsustainable in law. .....
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> 10. We further see no reason why the appellant should have been asked to proceed under the Guardian and Wards Act for recovering the custody of the child. She had of course the right to do so. But she had also a clear right to an order for the custody of the child under Section 491 of the Code. The fact that she had a right under the Guardians and Wards Act is no justification for denying her the right under Section 491. That is well established as will appear from the cases hereinafter cited." (Underlining added)

15. In Veena Kapoor1, the issue of custody of child was between the natural guardians who were not living together. Veena, the mother of the child, filed the habeas corpus petition seeking custody of the child from her husband alleging that her husband was having illegal custody of the one and a half year old child. The Supreme Court directed the District Judge concerned to take down evidence, adduced by the parties, and send a report to the Supreme Court on the question whether considering the interest of the minor child, its mother should be given its custody.

16. In Rajiv Bhatia5, the habeas corpus petition was filed by Priyanka, mother of the girl, alleging that her daughter was in illegal custody of Rajiv, her husband's elder brother. Rajiv relied on an adoption deed. Priyanka took the plea that it was a fraudulent document. The Supreme Court held that the High Court was not entitled to examine the legality of the deed of adoption and then come to the conclusion one way or the other with regard to the custody of the child.

17. In Manju Malini4 where the mother filed a habeas corpus petition seeking custody of her minor child Tanishka from her sister and brother-in-law who refused to hand over the child to the mother, the Karnataka High Court held as under:-

> "24. The moment respondents 1 and 2 refused to handover the custody of minor Tanishka to the petitioner the natural and legal guardian, the 5 Rajiv Bhatia v. Govt. of NCT of Delhi and others (1999) 8 SCC 525 continuation of her custody with them becomes illegal detention. Such intentional act on the part of respondent Nos.1 and 2 even amounts to the offence of kidnapping punishable under S.361 of IPC. Therefore there is no merit in the contention that the writ petition is not maintainable and respondent Nos.1 and 2 are in legal custody of baby Tanishka."

18. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

19. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

20. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent- father is a natural guardian of the

minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India.

21. Custody of the child – removed from foreign countries and brought to India:- In a number of judgments, the Supreme Court considered the conduct of a summary or elaborate enquiry on the question of custody by the court in the country to which the child has been removed. In number of decisions, the Supreme Court dealt with habeas corpus petition filed either before it under Article 32 of the Constitution of India or the correctness of the order passed by the High Court in exercise of jurisdiction under Article 226 of the Constitution of India on the question of custody of the child who had been removed from the foreign countries and brought to India and the question of repatriation of the minor children to the country from where he/she may have been removed by a parent or other person. In number of cases, the Supreme Court has taken the view that the High Court may invoke the extraordinary jurisdiction to determine the validity of the detention. However, the Court has taken view that the order of the foreign court must yield to the welfare of the child. After referring to various judgments, in Ruchi Majoo6, it was held as under:-

> "58. Proceedings in the nature of habeas corpus are summary in nature, where the legality of the detention of the alleged detenu is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction. A High Court may, therefore, invoke its extraordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the Court views the rival claims, if any, to such custody.
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> 59. The Court may also direct repatriation of the minor child to the country from where he/she may have been removed by a parent or other person; as was directed by this Court in Ravi Chandran (2010) 1 SCC 174 and Shilpa Aggarwal (2010) 1 SCC 591 cases or refuse to do so as was the position in Sarita Sharma case (2000) 3 SCC 14. What is important is that so long as the alleged detenu is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ court's jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detenu is within its territorial jurisdiction."

22. After referring to various judgments and considering the principles for issuance of writ of habeas corpus concerning the minor child brought to India in violation of the order of the foreign court, in Nithya Anand7, it was held as under:-

> 6 Ruchi Majoo v. Sanjeev Majoo (2011) 6 SCC 479 7 Nithya Anand Raghavan v. State (NCT of Delhi) (2017) 8 SCC 454 "46. The High Court while dealing with the petition

> for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised."

23. In Sarita Sharma2, the tussle over the custody of two minor children was between their separated mother and father. The Family Court of USA while passing the decree of divorce gave custody rights to the father. When the mother flew to India with the children, the father approached the High Court by filing a habeas corpus petition. The High Court directed the mother to handover the custody to the father. The Supreme Court in appeal observed that the High Court should instead of allowing the habeas corpus petition should have directed the parties to initiate appropriate proceedings wherein a thorough enquiry into the interest of children could be made.

24. In the recent decision in Lahari Sakhamuri8, this court referred to all the judgments regarding the custody of the minor children when the parents are non-residents (NRI). We have referred to the above judgments relating to custody of the child removed from foreign country and brought to India for the sake of completion and to point out that there is a significant difference in so far the children removed from foreign countries and brought into India.

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

26. After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, 8 Lahari Sakhamuri v. Sobhan Kodali 2019 (5) SCALE 97 education, intellectual development and favourable surroundings, in Nil Ratan Kundu9, it was held as under:-

> "49. In Goverdhan Lal v. Gajendra Kumar, AIR 2002 Raj 148 the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters

concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

50. Again, in M.K. Hari Govindan v. A.R. Rajaram, AIR 2003 Mad 315 the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

51. In Kamla Devi v. State of H.P. AIR 1987 HP 34 the Court observed:

"13. ... 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."

9 Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

27. Reliance was placed upon Gaurav Nagpal10, where the Supreme Court held as under:-

> "32. In McGrath, (1893) 1 Ch 143, Lindley, L.J. observed: (Ch p. 148) 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) .....
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> 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 10 Gaurav Nagpal v. Sumedha Nagpal (2009) 1 SCC 42 on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mausami Moitra Ganguli case (2008) 7 SCC 673, 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.
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> 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.

28. Contending that however legitimate the claims of the parties are, they are subject to the interest and welfare of the child, in Rosy Jacob11, this Court has observed that:-

> "7. .... the principle on which the court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors." .....
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> "15. .... 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 their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned Single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us to 11 Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840 have erred in reversing him on grounds which we are unable to appreciate."

29. The learned counsel for the appellants has placed reliance upon G. Eva Mary Elezabath12 where the custody of the minor child aged one month who had been abandoned by father in church premises immediately on death of his wife was in question. The custody of the child was accordingly handed over to the petitioner thereon who took care of the child for two and half years by the Pastor of the Church. The father snatched the child after two and a half years from the custody of the petitioner. The father of the child who has abandoned the child though a natural guardian therefore was declined the custody.

30. In Kirtikumar Maheshankar Joshi13, the father of the children was facing charge under Section 498-A IPC and the children expressed their willingness to remain with their maternal uncle who was looking after them very well and the children expressed their desire not to go with their father. The Supreme Court found the children intelligent enough to understand their well-being and in the circumstances of the case, handed over the custody to the maternal uncle instead of their father.

31. In the case at hand, the father is the only natural guardian 12 G. Eva Mary Elezabath v. Jayaraj and Others 2005 SCC Online Mad 472 13 Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi (1992) 3 SCC 573 alive and has neither abandoned nor neglected the child. Only due to the peculiar circumstances of the case, the child was taken care of by the appellants. Therefore, the cases cited by the appellants are distinguishable on facts and cannot be applied to deny the custody of the child to the father.

32. The child Shikha went into the custody of the appellants in strange and unfortunate situation. Appellants No.1 and 2 are the sisters of deceased Zelam. Appellant No.4 is the husband of appellant No.1. All three of them reside at Mahim, Mumbai. Appellant No.3 is the married brother of Zelam who resides in Pune. During the fifth month of her pregnancy, Zelam was diagnosed with stage 3/4 breast cancer. Zelam gave birth to child Shikha on 14-08-2017. On 29-11-2017, respondent No.1 collapsed with convulsions due to illness. Upon his collapse, he was rushed to hospital where he was diagnosed with Tuberculosis Meningitis and Pulmonary Tuberculosis. He was kept on ventilator for nearly eight days, during which period, appellants took care of Zelam and the child. The first respondent had to undergo treatment in different hospitals for a prolonged period. From 29-11-2017 to June 2018, Zelam and Shikha stayed at the residence of appellant's in Mumbai. During this period, Zelam underwent masectomy surgery. Zelam later relapsed into cancer and decided to get treatment from a doctor in Pune and therefore, shifted to appellant No.3's house at Pune with Shikha and Zelam passed away on 17-10-2018. After recovering from his illness, the respondent visited Pune to seek custody of the child. But when they refused to hand over the custody, the father was constrained to file the writ petition seeking custody of the child. The child Shikha thus went to the custody of the appellants in unavoidable conditions. Only the circumstances involving his health prevented the father from taking care of the child. Under Section 6 of the Act, the father is the natural guardian and he is entitled to the custody of the child and the appellants have no legal right to the custody of the child. In determining the question as to who should be given custody of a minor child, the paramount consideration is the `welfare of the child' and not rights of the parents under a statute for the time being in force.

33. As observed in Rosy Jacob11 earlier, the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well-being of the guardian, child's ordinary comfort, contentment, health, education etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.

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

35. The appellants submit that handing over of the child to the first respondent would adversely affect her and that the custody can be handed over after a few years. The child is only 1½ years old and the child was with the father for about four months after her birth. If no custody is granted to the first respondent, the court would be depriving both the child and the father of each other's love and affection to which they are entitled. As the child is in tender age i.e. 1½ years, her choice cannot be ascertained at this stage. With the passage of time, she might develop more bonding with the appellants and after some time, she may be reluctant to go to her father in which case, the first respondent might be completely deprived of her child's love and affection. Keeping in view the welfare of the child and the right of the father to have her custody and after consideration of all the facts and circumstances of the case, we find that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent.

36. Taking away the child from the custody of the appellants and handing over the custody of the child to the first respondent might cause some problem initially; but, in our view, that will be neutralized with the passage of time. However, till the child is settled down in the atmosphere of the first respondent-father's house, the appellants No.2 and 3 shall have access to the child initially for a period of three months for the entire day i.e. 08.00 AM to 06.00 PM at the residence of the first respondent. The first respondent shall ensure the comfort of appellants No.2 and 3 during such time of their stay in his house. After three months, the appellants No.2 and 3 shall visit the child at the first respondent's house from 10.00 AM to 04.00 PM on Saturdays and Sundays. After the child completes four years, the appellants No.2 and 3 are permitted to take the child on every Saturday and Sunday from the residence of the father from 11.00 AM to 05.00 PM and shall hand over the custody of the child back to the first respondent-father before 05.00 PM. For any further modification of the visitation rights, either parties are at liberty to approach the High Court.

37. The impugned judgment of the High Court dated 06.02.2019 in Crl.W.P. No. 5214 of 2018 is affirmed subject to the above directions and observations. The appellants shall hand over the custody of the child to the first respondent-father on 10.05.2019 at 10.00 AM at the residence of the first respondent. Keeping in view the interest of the child, both parties shall co-operate with each other in complying with the directions of the Court. This appeal is accordingly disposed of.

.....J. [R. BANUMATHI] .....J. [R. SUBHASH REDDY] New Delhi;

May 06, 2019