Athar Hussain vs Syed Siraj Ahmed & Ors on 5 January, 2010

Equivalent citations: AIR 2010 SUPREME COURT 1417, 2010 (2) SCC 654, 2010 AIR SCW 597, 2010 CLC 199, (2010) 1 RECCIVR 696, 2010 (1) SCALE 95, (2010) 1 CLR 276 (SC), (2010) 1 JCR 202 (SC), (2010) 2 BOM CR 272, (2010) 3 KANT LJ 1, (2010) 1 UC 488, (2010) 2 MAD LW 149, (2010) 1 WLC(SC)CVL 153, (2010) 2 ALL WC 1229, (2010) 3 MAH LJ 525, (2010) 78 ALL LR 908, (2010) 3 RAJ LW 2297, (2010) 2 GUJ LR 1277, (2010) 2 MPLJ 503, (2010) 2 MAD LJ 967, (2010) 2 ICC 449, (2010) 1 HINDULR 164, (2010) 1 SCALE 95, (2010) 1 CURCC 135

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Bench: V.S.Sirpurkar, Tarun Chatterjee

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.11 OF 2010
(Arising out of SLP) No. 24148 of 2007)

Athar Hussain. -----Appellant

Versus

Syed Siraj Ahmed & Ors. ----Respondents

JUDGMENT

TARUN CHATTERJEE, J.

1. Leave granted.

2. This appeal is directed against the judgment and order dated 8th of October, 2007 passed by the High Court of Karnataka at Bangalore by which the High Court had set aside the order dated 11th of June, 2007 of the Family Court, Bangalore vacating its order of injunction dated 21st of April, 2007 passed against the appellant in G.W.C. No. 64 of 2007 preventing him from interfering with the custody of his children with the respondents.

3. The appellant is the father of the minor children in whose respect interim custody and guardianship have been sought for. The respondent No.1 is the maternal grandfather of the two minor children of the appellant and respondent Nos. 2, 3 and 4 are their maternal aunt and uncles.

4. The appellant married one Umme Asma, daughter of respondent No. 1, in accordance with Islamic rites and customs on 31st of March, 1993. Two children were born out of the wedlock, Athiya Ali, aged about 13 years and Aayan Ali , aged about 5 years. Their mother Umme Asma died on 16th of June, 2006. Subsequent to the death of Umme Asma, the mother of two minor children, the appellant again married to one Jawahar Sultana on 25th of March, 2007 who in the pending proceeding had filed an application before the Family Court for her impleadment in the same.

5. A proceeding was initiated on 21st of April, 2007 at the instance of the respondents under Sections 7, 9 and 17 of the Guardian and Wards Act, 1890 (hereinafter referred to as `the Act') in the Court of the Principal Family Judge, Bangalore which came to be registered as G.W.C.No.64 of 2007. In the aforesaid pending proceeding under the Act, an application was filed under Section 12 of the Act read with Order 39 Rule 1 and 2 of the Code of Civil Procedure (in short `the Code') in which interim protection was prayed for of the persons and properties of the minor children and also for an order of injunction restraining the appellant from interfering or disturbing the custody of two children till the disposal of the application filed under Sections 7, 9 and 17 of the Act. The case that was made out by the respondents in the affidavit accompanying their application for injunction filed under Section 12 of the Act read with Order 39 Rule 1 and 2 of the Code was a follows :-

> 6. On the same day on which the respondents filed the applications for being appointed as guardians and for interim injunction against the appellant, i.e. on 21st of April, 2007, the Family Court disposed of the application under section 12 read with Order 39 Rule 1 and 2 of the CPC, and passed an ex parte interim order restraining the appellant from interfering with the custody of the two children of the appellant.
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> 7. Feeling aggrieved, the appellant filed an application against the order of the family court under Order 39 Rule 4 of the Code praying for vacation of interim order of injunction passed against him. In the Counter Affidavit accompanying the application filed on 28th of April, 2007 to vacate the interim order of injunction, he denied all averments made in the application filed by the respondents as incorrect and fabricated. It is not in dispute that the appellant is the father and natural guardian of the children. While respondent no.1 is aged about 72 years and is retired and hence is in no position to look after his children, respondent no.2 is living separately after his marriage; respondent nos. 3 and 4 are nearing the age of marriage and would go ahead with their own lives once married. Further respondent no.1 has another son whose wife divorced him on account of harassment for dowry and another daughter who was mentally retarded. These heavy responsibilities which already lie on the respondent make him unfit as a guardian of his children. The only motive of the respondents is to gain the property that the appellant had purchased in favour of Umme Asme.
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> 8. Pursuant to a telephonic request made by respondent no.3, he dropped his children at their place on 21st of April, 2007. When he went back to collect them on 22nd of April, 2007, he was informed that they would be back only at night.

On 23rd of April, 2007, he was told that the children had gone to Ooty and would return after a few days. Since the appellant had reasons to suspect the bonafide of the respondents, he lodged a complaint before the Inspector of Police, J.C. Nagar, Bangalore on 23rd of April, 2007. The respondents who were summoned to the police station gave an undertaking to the effect that the children would be back on 24th of April, 2007. It is alleged that though the respondents had procured the interim order of injunction on 21st of April, 2007 itself, they did not inform either the appellant or the Police authorities until 25th of April, 2007 on which day they produced the copy of the interim order to the appellant.

9. Appellant further alleged that his daughter had been missing classes as she was unduly retained by the respondents, who had no concern whatsoever with respect to the same.

10. The death certificate clearly showed leukemia as the sole cause of death of Umme Asma, contrary to the allegations of the respondents. He had deeply loved his wife and as a token of his love, had purchased a property in her name on which he constructed house entirely in accordance with her wishes. Contrary to what the respondents had alleged, all the expenses for the treatment of his wife and the education of the children were borne by the appellant. His relationship with his deceased wife and the children were indeed cordial. In order to secure education of high quality for his daughter, he got her admitted into a good school and had borne all related expenses, as proved from the receipts issued by the school authorities. He had also obtained an insurance policy in the name of his daughter.

11. It is for the vengeance of the appellant's refusal to marry respondent no.3 who wished to marry him after the death of her sister, that they had filed the application claiming custody and guardianship of the children. The photographs produced before the Court were taken when the appellant himself took the respondents on an excursion along with his family in his own car. The mark sheets produced by the respondents bore forged signatures of the appellant whereas the documents bearing his own signature were not produced.

12. In short, the appellant submitted that in view of suppression and concealment of material facts on part of the respondents, they were not entitled to the equitable relief of injunction. Moreover, he had a prima facie case and the balance of convenience stood in his favour. Irreparable injury would be caused to him as the father of the minor children who would not be safe in the hands of the respondents.

13. The family court by its order dated 11th of June, 2007 vacated the interim order of injunction granted on 21st of April 2007. The Court found that the respondents had neither prima facie case nor balance of convenience in their favour, nor vacating the ex parte interim order would cause irreparable injury to them. It was also the finding of the family court that the respondents did not approach the Court with clean hands. The Court found that in support of their contention that Umme Asma died due to the assault cast upon by the appellant, the respondents had not been able to produce any material evidence; nor was any case filed against the appellant. This appears in contrast to their contention that after the death of Umme Asma, her relatives had enquired about the marks on her face which occurred when the appellant had hit her. If this was the case, the

respondents would have initiated an enquiry much before, not when almost ten months had expired after the death of Umme Asma. This prolonged silence, according to the trial court, renders the version of the appellant probable that it is to wreck vengeance towards him who refused to marry the respondent no.3 that the entire proceedings had been launched. The death report produced by the appellant, on the other hand, supports the version of the appellant of bone cancer being the cause of his wife's death. The fact that he bore with all medical expenses is also supported by evidence. The appellant has also been able to produce the sale deed of the property which he claims to have purchased in his wife's name out of his love and affection for her.

14. The undertaking given by the respondents before Police Authorities with respect to the complaint filed against them by the appellant also strengthens the version of the appellant that as a matter of course, the children stayed with the appellant and that it was the respondents who took them away without his sanction. It is pertinent to note that the respondents did not produce the temporary order of injunction at the time they were asked to file the said undertaking to the Police Authorities. The various receipts produced by the appellant as evincing the expenses he incurred for his wife and children were also considered. Thus it was found that the respondents had no prima facie case.

15. The Family Court found the balance of convenience also leaning in favour of the appellant, who is admittedly the natural guardian of the children. The photographs produced by both the parties were considered as indicating the bond the children shared with both. It was found that they were also happy in the company of their step mother. Though Athiya had stated that she was not willing to go with her father, the Family Court felt that it could be no consequence as she was not old enough to form a mature opinion and was susceptible to tutoring. The fact that the son went to the appellant when he saw him in the Court premises indicated that the children were close to the appellant. Accordingly, balance of convenience was found tilting in favour of the appellant.

16. Irreparable injury will be caused to the father if he is denied interim custody as he is the natural guardian of the children, the care and concern for whom he had established in various ways. Keeping in view the fact that welfare of the children is the paramount consideration, it was noted that the respondent nos. 2 and 3 would get married and start living separately while respondent no.1 is an aged person. Therefore, the appellant was more competent and fit than all to take care of the children. In order not to deprive the children of the love and affection of their maternal relatives, the appellant had agreed to leave the children at the respondents' place on every alternate Saturday and for five days at the beginning of the summer vacation which shows his magnanimity and generosity.

17. The contentions of the respondents were not supported by documentary evidence and, therefore, the Family Court was of the opinion that they had not approached the Court with clean hands. Hence, the equitable remedy of injunction could not be granted to them.

18. Therefore, by its order dated 11th of June, 2007, the Family Court vacated the ad-interim order of temporary injunction restraining the appellant from interfering with the custody of the children with the respondents.

19. Aggrieved by this order, the respondents filed a Writ Petition which came to be numbered as W.P. No. 9177 of 2007 before the High Court of Karnataka at Bangalore. Before the High Court, the respondents contended that the parties would be governed by Mohammaden Law which dictates that in the absence of the mother, maternal grand parents shall be the guardian of minor children. It was further contended that the second marriage of the appellant disentitles him to the custody of children. Further, when the children are capable of forming their opinion, they should be allowed to exercise their option with respect to which of the parties they would go with. The well being of the children which is the paramount consideration in matters of custody was not taken into account by the Family Court whose order is liable to be set aside on this count alone.

20. The appellant, in response to these submissions, contended that the High Court could not interfere with the findings of the Family Court unless serious infirmity is proven. The decisions cited by the respondents were distinguished on the ground that these decisions concerned findings that were recorded after a full fledged trial and not an order passed as an ad-interim relief granting custody to one of the parties.

21. On consideration of these arguments, the High Court by its order dated 8th of October 2007 had set aside the order of the Family Court by which it had vacated the interim order of injunction and passed the following directions:

> a. The impugned order is quashed.
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> b. The respondent father will have visiting rights and shall visit his two children on every Sunday between 9 a.m. and 5 p.m. The father is permitted to take out the children to any place of his and children's choice and shall bring back the children to petitioner's house. This arrangement shall continue pending disposal of the proceedings before the learned Family Judge.

c. Having regard to the sensitive issue involved i.e. as to the guardianship of the minor children, the learned Family Judge is directed to conclude the proceedings within six months from the date of receipt of the copy of this order.

d. Any observation made during the course of this order is only for the purpose of considering as to where the children should stay during the pendency of the proceedings. It shall not be treated as a finding on the merits of the case. The learned Family Judge shall not be swayed by any of the observations made during the course of this order.

22. The High Court in its impugned judgment had held that while appointing the guardian or deciding the matter of custody of the minor children during the pendency of guardianship proceedings, the first and foremost consideration for the Court is the welfare of the children. The factors that must be kept in mind while determining the question of guardianship will apply with equal force to the question of interim custody. It was observed that the Family Court should have delved a little deeper into the matter and ascertained where the interest of the children lay, instead of recording abstract findings on questions of prima facie case, balance of convenience and

irreparable injury.

23. The terms on which the appellant and his deceased wife were, the manner in which the respondents obtained the custody of the children are questions that should be determined during the course of trial.

24. Though when the children's father is not unfit otherwise he shall be the natural guardian, a child cannot be forced to stay with his/her father. According to the High Court, merely because the father has love and affection for his children and is not otherwise shown unfit to take care of the children, it cannot be necessarily concluded that welfare of the children will be taken care of once their custody is given to him. The girl had expressed a marked reluctance to stay with her father. The High Court was of the opinion that the children had developed long standing affection towards their maternal grandfather, aunt and uncles. It will take a while before they develop the same towards their step mother. The sex of the minor girl who would soon face the difficulties of attaining adolescence is an important consideration, though not a conclusive one. She will benefit from the guidance of her maternal aunt, if custody is given to the respondents, which the appellant will be in no position to provide. Further, there is a special bonding between the children and it is desirable that they stay together with their maternal grandfather, uncles and aunt.

25. In case of custody of the minor children, the Family Law, i.e. the Mohammedan Law would apply in place of the Act. Considering the provisions under Section 353 of the Mohammedan Law, the High Court had held that the preferential rights regarding the custody of the minor children rests with the maternal grandparents. After making a doubtful proposition that in case of a conflict between personal law and welfare of the children the former shall prevail, the High Court held that in the case at hand there is no such conflict.

26. For the reasons aforementioned, the High Court by its impugned order set aside the order of the Family Court, Bangalore which vacated the interim order of injunction issued against the appellant.

27. It is this order of the High Court, which is challenged before us by way of special leave petition which on grant of leave has been heard by us in the presence of the learned counsel appearing on behalf of the parties.

28. It was the contention of the appellant before us that the Act will apply to the present case because there is a conflict between the preferential guardian in Mohammedan Law and the Act. It was pointed out that while deciding the custody of the minor children, the welfare of the children had to be taken into consideration and that it was guaranteed by the Act. They have placed their reliance on the case of Rafiq v. Bashiran and ors, [AIR 1963 Rajasthan 239]. The Rajasthan High Court in the cited case held that where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act the latter shall prevail over the former.

29. Relying on the case of B.N.Ganguly v. C.H.Sarkar, [AIR 1961 MP 173] it was contended by the learned counsel for the appellant that there is a presumption that parents will be able to exercise good care in the welfare of their children.

30. It was argued by the learned counsel on behalf of respondents that the impugned order warrants no interference. Before passing the impugned order, the learned Judge had spent over one hour with the children to ascertain their preferences. The children have been living with the respondents since their mother's death in June, 2006 as the High Court had stayed the order of the Family Court vacating the injunction order. While the respondents had been complying with the visitation rights granted to the appellant, the children were not happy with the treatment meted out to them during the time they spent with their father and stepmother. In contrast, respondent no. 3, contrary to the apprehensions expressed by the appellant has stated on record that she had no intention to marry and would devote her life towards the welfare of the children. Respondents further asserted that the cases of Rafiq v. Bashir (supra) and B.N. Ganguly (supra) are not applicable to the facts of this case.

31. We have heard the learned counsel for both the parties and examined the impugned order of the High Court and also the orders passed by the Family Court. After considering the materials on record and the impugned order, we are of the view that at this stage the respondents should be given interim custody of the minor children till the disposal of the proceedings filed under Sections 7, 9 and 17 of the Act. Reasons are as follows:

32. Section 12 of the Act empowers courts to "make such order for the temporary custody and protection of the person or property of the minor as it thinks proper." In matters of custody, as well settled by judicial precedents, welfare of the children is the sole and single yardstick by which the Court shall assess the comparative merit of the parties contesting for custody. Therefore, while deciding the question of interim custody, we must be guided by the welfare of the children since Section 12 empowers the Court to make any order as it deems proper.

33. We are mindful of the fact that, as far as the matter of guardianship is concerned, the prima facie case lies in favour of the father as under Section 19 of the GWC Act, unless the father is not fit to be a guardian, the Court has no jurisdiction to appoint another guardian. It is also true that the respondents, despite the voluminous allegations leveled against the appellant have not been able to prove that he is not fit to take care of the minor children, nor has the Family Court or the High Court found him so. However, the question of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better. In the case of Rosy Jacob v. Jacob A. Chakramakkal, [(1973) 3 S.C.R. 918], keeping in mind the distinction between right to be appointed as a Guardian and the right to claim custody of the minor child, this Court held so in the following oft-quoted words:

> "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."

34. In the case of Mt. Siddiqunnisa Bibi v. Nizamuddin Khan and Ors., [AIR 1932 All 215], which was a case concerning the right to custody under Mohammaden Law, the Court held:

> "A question has been raised before us whether the right under the Mahomedan law of the female relation of a minor girl under the age of puberty to the custody of the person of the girl is identical with the guardianship of the person of the minor or whether it is something different and distinct. The right to the custody of such a minor vested in her female relations, is absolute and is subject to several conditions including the absence of residing at a distance from the father's place of residence and want of taking proper care of the child. It is also clear that the supervision of the child by the father continues in spite of the fact that she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father."

35. Thus the question of guardianship can be independent of and distinct from that of custody in facts and circumstances of each case.

36. Keeping in mind the paramount consideration of welfare of the children, we are not inclined to disturb their custody which currently rests with their maternal relatives as the scope of this order is limited to determining with which of the contesting parties the minors should stay till the disposal of the application for guardianship.

37. The appellant placed reliance on the case of R.V. Srinath Prasad v. Nandamuri Jayakrishna [AIR 2001 SC 1056]. This Court had observed in this decision that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children. In that decision, while granting interim custody to the father as against the maternal grandparents, this Court held:

> "The Division Bench appears to have lost sight of the factual position that the time of death of their mother the children were left in custody of their paternal grand parents with whom their father is staying and the attempt of the respondent no.1 was to alter that position before the application filed by them is considered by the Family Court. For this purpose it was very relevant to consider whether leaving the minor children in custody of their father till the Family Court decides the matter would be so detrimental to the interest of the minors that their custody should be changed forthwith. The observations that the father is facing a criminal case, that he mostly resides in USA and that it is alleged that he is having an affair with another lady are, in our view, not sufficient to come to the conclusion that custody of the minors should be changed immediately."

What is important for us to note from these observations is that the Court shall determine whether, in proceedings relating to interim custody, there are sufficient and compelling reasons to persuade the Court to change the custody of the minor children with immediate effect.

38. Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in the case of Mausami Moitra Ganguli v. Jayant Ganguli, [AIR 2008 SC 2262]. This Court held:

> "We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression on him."

39. After taking note of the marked reluctance on part of the boy to live with his mother, the Court further observed:

> "Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained."

40. The children have been in the lawful custody of the respondents from October, 2007. In the case of Gaurav Nagpal v. Sumedha Nagpal, [(2009) 1 SCC 42], it was argued before this Court by the father of the minor child that the child had been in his custody for a long time and that a sudden change in custody would traumatize the child. This Court did not find favour with this argument. This Court observed that the father of the minor child who retained the custody of the child with him by flouting Court orders, even leading to institution of contempt proceedings against him, could not be allowed to take advantage of his own wrong. The case before us stands on a different footing. The custody of the minor children with the respondents is lawful and has the sanction of the order of the High Court granting interim custody of the children in their favour. Hence, the consideration that the custody of the children should not undergo an immediate change prevails. The question with whom they remained during the period from the death of their mother till the institution of present proceedings is a matter of dispute between the parties and we are not in a position to reach a conclusion on the same without going into the merits of the matter. At any rate, the children are happy and are presumably taken care of with love and affection by the respondents, judging from the reluctance on part of the girl child to go with her father. She might attain puberty at any time. As the High Court has rightly observed, it may not be in the interests of the children to separate them from each other. Hence, at this juncture, we are not inclined to disturb the status quo, as we are only concerned with the question of interim custody at this stage.

41. The learned counsel for the appellant has placed reliance on the case of Rafiq v. Smt. Bashiran and Another [supra]. In this case, the High Court had set aside the order of the Civil Judge granting the custody of the child to her mother's paternal aunt, while the father was not proven to be unfit. Quoting from Tyabji's Mahomedan Law, Third Edition, Section 236 (p. 275) the Court observed:

"The following persons have a preferential right over the father to the custody of (sic)minor girl before she attains the age of puberty.

1. Mother's mother

2. Father's mother

3. Mother's grandmother howsoever high

4. Father's grandmother howsoever high

5. Full sister

6. Uterine sister

7. Daughter of full sister, howsoever low.

8. Dauther of uterine sister, howsoever low.

9. Full maternal aunt, howsoever high.

10.Uterine maternal aunt, howsoever high.

11.Full paternal aunt, howsoever high.

42. However, the High Court of Rajasthan held that in the light of Section 19 which bars the Court from appointing a guardian when the father of the minor is alive and not unfit, the Court could not appoint any maternal relative as a guardian, even though the personal law of the minor might give preferential custody in her favour.

43. As is evident, the aforementioned decision concerned appointment of a guardian. No doubt, unless the father is proven to be unfit, the application for guardianship filed by another person cannot be entertained. However, we have already seen that the question of custody was distinct from that of guardianship. As far as matters of custody are concerned, the Court is not bound by the bar envisaged under Section 19 of the Act. In our opinion, as far as the question of custody is concerned, in the light of the aforementioned decisions, the personal law governing the minor girl dictates her maternal relatives, especially her maternal aunt, shall be given preference. To the extent that we are concerned with the question of interim custody, we see no reason to override this rule of Mohammedan Law and, hence, a prima facie case is found in favour of the respondents.

44. Further, the balance of convenience lies in favour of granting custody to the maternal grandfather, aunt and uncle. A plethora of decisions of this Court endorse

the proposition that in matters of custody of children, their welfare shall be the focal point. Once we shift the focus from the rights of the contesting relatives to the welfare of the minor children, the considerations in determining the question of balance of convenience also differ. We take note of the fact that respondent no.3, on record, has stated that she has no intention to get married and her plea that she had resigned from her job as a technical writer to take care of the children remains uncontroverted. We are, hence, convinced that the respondents will be in a position to provide sufficient love and care for the children until the disposal of the guardianship application. The second marriage of the appellant, though a factor that cannot disentitle him to the custody of the children, yet is an important factor to be taken into account. It may not be appropriate on our part to place the children in a predicament where they have to adjust with their step-mother, with whom admittedly they had not spent much time as the marriage took place only in March, 2007, when the ultimate outcome of the guardianship proceedings is still uncertain. The learned counsel for the appellant placed reliance on the case of Bal Krishna Pandey v. Sanjeev Bajpayee [AIR 2004 UTR 1] wherein the maternal grandfather of the minor contested with the father of the minor for custody of a girl aged about 12 years. The Uttranchal High court in that case gave the custody of minor to the father rejecting the contention of grandfather (appellant) that the father (respondent) after his remarriage will not be in a position to give fair treatment to the minor. However, in that case, the second wife of the father had been medically proven as unable to conceive. Hence, the question of a possible conflict between her affection for the children whose custody was in dispute and the children she might bear from the father did not arise. In the case before us, the situation is not the same and the possibility of such conflict does have a bearing upon the welfare of the children.

45. As this is a matter of interim custody till the final disposal of the application GWC No. 64 of 2007, we are of the opinion that the interests of the children will be duly served if their current residence is not disturbed and a sudden separation from their maternal relatives does not come on their way. Irreparable injury will be caused to the children if they, against their will, are uprooted from their present settings.

46. The learned counsel for the appellant placed strong reliance in the case of Hassan Bhatt v. Ghulam Mohamad Bhat [AIR 1961 J & K 5] which held that the words "subject to the provisions of this section" in sub-section 1 of Section 17 of the Act clearly indicates that the consideration of the welfare of the minor should be the paramount factor and cannot be subordinated to the personal law of the minor. The view expressed by the High Court is clearly correct. As far as the question of interim custody is concerned, we are of the view that there is no conflict between the welfare of the children and the course of action suggested by the personal law to which they are subject.

47. At this juncture, we may mention the following factors to which the learned counsel for the appellant invites our attention. In the present case, respondent no. 1

is an old person aged about 72 years and respondent no. 2 is already married, living with his wife and children. Respondent no. 3 and 4 are unmarried and are of marriageable age. Respondent no. 3, the maternal aunt of the children, will go to live with her husband after marriage. Respondent No. 4 after his marriage may or may not live with his father. There is nothing on record to show that the appellant mistreated the deceased mother of minor children. We cannot express our views on the correctness of these averments. These are the matters that must be gone into when the Family Court disposes of the application for guardianship filed by the Respondents, and not at this stage.

48. According to the appellant, from the fact that the respondents raised the issue of death of his wife 10 months after her death and one month after he refused the marriage offer of Respondent No. 3, it must be inferred that the respondents have raised this issue merely to obtain the custody of children and that the respondents did not come to court with clean hands. As far as the question of denying the respondents the interim custody of children on the ground that they had not approached the Court with clean hands, we are constrained to say that we are not in a position to conclusively infer the same. The alleged refusal on part of the appellant to marry respondent no.3 which is said to have led the respondents to file the application for guardianship, is again question of fact which is yet to be proved. In Nil Ratan Kundu and Anr. Vs. Abhijit Kundu, [(2008) 9 SCC 413] this Court had enumerated certain principles while determining the custody of a minor child. This Court under Paragraph 56 observed:

"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. Thus the strict parameters governing an interim injunction do not have full play in matters of custody."

49. The learned counsel for the appellant again relied on a decision of B.N.Ganguly (supra) in which case the High Court of Madhya Pradesh had held that there is a presumption in law that parents will be able to exercise good care in the welfare of their children if they do not happen to be unsuitable as guardians. The facts of that case are quite different from the one at hand. The contesting guardians in that case where contesting on the basis of an alleged adoption, against the parents of the child. Both the parents had joined in making the application and nothing had been said against their habits or way of living. The case stands altogether on a different footing.

50. The High court had relied heavily on the preference made by Athiya Ali who then was 10 to 11 years old. In the opinion of High Court, she was capable of making intelligent preference. It may be true that 11 years is a tender age and her preference cannot be conclusive. The contention of the appellant in this respect is also supported by the decision in Bal Krishna Pandey's case (supra). But as we are not dealing with the question of guardianship, but only with the issue of interim custody, we see no reason why the preference of the elder child shall be overlooked. It may be noted that the

Family Court had considered fact that the younger child had instinctively approached his father while he met him in the Court premises while vacating the interim order of injunction. The second child who is just 4 years old cannot form an intelligent opinion as to who would be the right person to look after him and, hence, we must give weight to the preference that Athiya had expressed.

51. We find it fit, however, to modify the visitation rights granted to the appellant. He shall be allowed to visit the children on Saturdays as well between 9 am and 5 pm.

52. The order of the High court is modified to the extent indicated above, and the order of the Family Court dated 11th of June, 2007 vacating its injunction order is set aside. The Family Court is hereby directed to dispose of the case relating to the guardianship of the two children after adducing evidence by both the parties (both oral and documentary) at an early date, preferably within six months from the date of supply of a copy of this order to it.

53. We, however, make it clear that the observations made in the order of the High Court as well as by this Court, if there be any, shall not be taken to be final while deciding the original application filed under Sections 7, 9 and 17 of the Act and the Family Court shall be at liberty to proceed with the disposal of the said proceeding independently of any of the observations made by this Court in this judgment.

54. The appeal is thus dismissed. There will be no order as to costs.

55. In view of the above judgment, the application for impleadment becomes infructuous and is dismissed as such.

.....J. [Tarun Chatterjee] New Delhi; .....J. January 05, 2010. [V.S.Sirpurkar]