Delhi High Court
Prabhati Mitra vs D.K. Mitra on 17 January, 1984
Equivalent citations: 25 (1984) DLT 186
Author: A B Robatgi
Bench: A B Rohatgi
JUDGMENT Avadh Behari Robatgi, J.

(1) This unfortunate matter arises out of matrimonial differences. A girl of 14 and a boy of 11 are living with their mother. Their is a contest between the parents as to which should have their care and custody. Each is attacking the other. The guardian judge has decided that the minors should be transferred to the father's control. From that order mother appeals to this court.

(2) The appellant, Smt. Prabhati Mitra, is the mother of the children. The respondent, Shri D.K. Mitra, is their father. Their marriage was dissolved by a decree of divorce passed by this court on 21.5.82. There are two children of the marriage. A daughter Sofia alias Bipasha, a girl 14 years of age. She was reading in 8th class in Lady Irwyn School. The other is a son. Raja alias Tanmoy, a boy 11 years of age. He was studying in 5th class in Frank Anthony School.

(3) Unfortunately the marriage of the parties came to grief. The mother left the house on 22.3.1980. On 25.7.1980 she made an application under section 25 of the Guardian and Wards Act for the custody of the two minor children. The father opposed. The application was dismissed for want of prosecution on 24.8.1982.

(4) On 24.5.1983 the mother went to the house of the father and met the children in his absence. They narrated their tale of woe to her. Moved by the story of their maltreatment and neglect, she brought them with her without obtaining any orders of the court. On 30th. May, 1983 she made an application to the Guardian Judge staling that when she went to see the children at the house of their father, they started weeping and insisted that she should take them with her as they were not happy in the father's house, She found it unbearably distressing to lew them behind. So the children accompanied her to her house. At present they are with the mother. She produced the children before the judge. They told the judge that they would like to live with the mother. The court allowed her custody of the children till an application is moved by the father.

(5) It appears that the father had gone out of India during those days. When he returned he did not find the children at home. He immediately made an application under section 151, Code of Civil Procedure statling that the children bad been removed from his custody forcibly and that it is not in the interest of the children to live with their mother. He sought the custody of the minors. By his order dated 21st July, 1983 the Guardian Judge decided this application in favor of the father. He made an order to the mother to hand over the custody of both the children to the father "forthwith".

(6) The learned judge held that "the mother took the law in her own hands and removed the children from the custody of the father in his absence and such a course adopted by the mother cannot have any legal sanction." He was of the view that "the custody of the children with the mother is absolutely illegal". From this order granting custody to the father, the mother appeals to

this court.

(7) It appears to me that the learned judge did not decide the case on merits. He mainly held that the wife had kidnapped the children from the legal custody of the father who was not unfit to retain their custody and therefore the children must be restored to the custody of the father. That is why at the end of his judgment he observed that it was open to the mother to claim custody and "she can apply afresh for obtaining custody of the children under the provisions of Guardians and Wards Act" or by reviving the earlier proceedings she had launched in 1980.

(8) In the very beginning when I started hearing the appeal I told counsel for both parties that I will decide the case on merits and they can adduce such evidence before me as they thought proper. The parties have given evidence by affidavits. I have heard arguments at length. Written arguments have also been submitted by both parties.

(9) In my opinion the learned judge erred in concluding that he should make a peremptory order for the children's return to the father. He should have heard the case on its merits. It is true that the parents ought to be discouraged from taking the law into their own hands. The courts must set their face against kidnapping. If a child is in the mother's care and the father takes it away against her will, the proper course usually will be to restore it to her forthwith in the absence of any evidence that this is likely to harm the child. But the courts are now more anxious to consider the case on its merits. The courts are becoming increasingly reluctant to make peremptory orders and are now much readier to consider the merits. This appears to be the view of Supreme Court in Dr. Mrs. Veena Kapoor v. Varender Kapoor, . The Punjab High Court had dismissed the mother's petition for habeas corpus on the narrow ground that the custody of the child with the father was not illegal. The Supreme Court remitted the case to the High Court to take evidence and to consider the questions as to whether it was in the interest of the minor that its custody should be handed over to the mother, after taking into consideration all the circumstances of the case. This new attitude to the question of custody suggests that I should investigate the merits of the rival claims of the parties and for this purpose I embarked on an inquiry after taking affidavit evidence.

(10) This was not a case of kidnapping, as the Judge thought. The mother informed the Nizamuddin Police Station about the fact of removal of children on that very day i.e. 24.5.1983. She produced them before the judge. She brought their distressing condition to his notice. He allowed the mother to retain custody. But the course adopted by the learned judge means initially moving the children from father to mother, then from mother to father by his order, and possibly from father to mother if the wife did as advised by the judge. So the children will virtually become playthings in the parental warfare. Like a rolling stone they will have no stability of home.

(11) "THE controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents." (Rosy Jacob v. Jacob, ). It is well settled that "in the matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party." (Veena Kapoor v. Varender Kapoor (supra) ).

(12) This is the paramount consideration. Other considerations must be subordinate. The mere desire of a parent to have his child must be subordinate to the consideration of the welfare of the child and can be effective only if it coincides with the welfare of the child. Consequently, it cannot be correct to talk of the pre-eminent position of parents, or of their exclusive right to the custody of their children, when the future welfare of those children is being considered by the court. What does this paramountcy of welfare means ? In the words of Lord Macdermott in J. v. C. (1970) Ac 668, 710 :

"(THESEwords) must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they can note a process whereby, when all the relevant facts, relationships, claims and wishes of parents. risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the Child's welfare as that term has now to be understood. That is the first consideration because it is of the first importance and the paramount consideration because it rules upon or determines the course to be followed."

(13) The crux of the case is that father and the mother have now been divorced. They were married in 1968. Out of the wedlock these two children were born. Sofia was born on 22nd December, 1969. Raja was born on 23rd August, 1973. Later on their marital relations became estranged. The wife petitioned for divorce on the ground of her husband's cruelty under section 13(1)(ia) of the Hindu Marriage Act. The Additional District Judge dismissed the petition. On appeal Goswani J. allowed the appeal of the wife holding the husband to be guilty of cruelty. He granted a decree of divorce in favor of the present appellant against the respondent. The custody proceedings are the outcome of this divorce litigation. One important fact which has to be constantly borne in mind is that after divorce the father remarried on 15.9.1982. The mother remains unmarried. She says that she does not intend to remarry.

(14) Of the problems resulting from the dissolution of marriage none is more serious than that of trying to ensure the future well being of the children. The size of the problem has assumed such an enormous proportion that each year thousands of children are affected by the divorce of their parents. While it is a general principle of law that in proceedings relating to the custody and upbringing of a child, the child's welfare is the first and foremost consideration, it is often the case-and should be openly admitted-that in divorce proceedings the welfare of the children of the marriage is in direct conflict with the desire- and the legal right-of one or both of the parents divorced. The very institution of divorce proceedings bodes ill for the children of the marriage. When the marriage breaks down their custody becomes the subject of a court order.

(15) In the forefront of his arguments counsel for the father said that the mother is living in adultery with one Mr. Vashisht and she is therefore disentitled to the custody of the children by reason of her moral character. For this he relies on the observations of Goswami J. in Prabhati Mitra v. D.K. Mitra. 1982 Hindu Law Reporter 397, 407.. What was argued before Goswami J. was that the wife had some sort of relationship with Mr. Vashisht. The wife denied this. The husband objected to the visits of Mr. Vashisht to their house. As a result there were quarrels between the husband and wife. The learned judge observed "in these circumstances, I feel that the learned trial judge was right in

drawing the inference that the allegations of the respondent regarding the relationship of the petitioner and Mr. Vashisht were not without foundation or reckless and as such the said allegations cannot be termed as an act of cruelty". The learned judge was only concerned with the question whether the husband was cruel to the wife when he objected to the visits of Mr. Vashisht to the house. This point he decided in favor of the husband and held that on this count he was not cruel because his objection was not without foundation. I cannot read it as a positive finding of adultery against the wife. The wife alleged that Mr. Vashisht was like a brother to her. But she did not produce him in court. So it was held that the husband was not cruel to the wife when he objected to Vashisht's visits, whether frequent or spasmodic, and if as a result there were "unpleasant incidents" between the parties.

(16) The first and foremost consideration is the welfare of the minor. The rights and wishes of parents must be assessed and weighed in their bearing on the. welfare ofthe child in conjunction with all other factors relative to that issue. The mother's custody is preferred not because she has a paramount claim against other relations but because of the care and supervision that a mother who is not out at work can give to young children is a very important factor. The court may see the child privately and ascertain the wishes of a child if it is grown up. I talked to the children in my chamber twice-once on September 7, 1983 and a second time on October 13, 1983. They showed me their school record, their progress record and fee books. Both of them are studying in a good public school. They told me clearly and unambiguously that they were not willing to go to their father under any circumstances because they had been ill treated by their step mother. They complained of maltreatment by the stepmother and neglect by the father. They told me that they were given raw potatoes and onion to eat. They were not sent to school in clean and properly pressed school dress. They said that their stepmother in Calcutta threatened to drown them into sea if they did not leave her house.

(17) At this stage I must mention that the learned trial judge also had a private interview with the children. His impression was, however, different. He was of the view that the children had been "tutored" and "coaxed" to speak against their father so much so that they were not willing to talk to him. The children told the judge that their father will beat them for going away with their mother in his absence, To this the judge said :

"To my mind this apprehension in the "minds of the children has been created by continuous poisoning from the side of the mother."

From my talk with the children I did not have the impression that they had been tutored. They talked to me freely. As normal children, they seemed to me very happy with their mother. This was the dominant impression they left on my mind.

(18) It was said that the Father is employed in Trade Fair Authority on a decent salary, that he can give better education to the children, that they can be respectably brought up if custody is given to him. The fact that one claiment to the custody is in a position to give the child a better start in life than another does not give him a prior claim. It is the happiness of the child, not its material prospects, with which the court is concerned, and any other rule would automatically put a poor

parent at a disadvantage. Obviously, however, a party's financial position cannot be ignored entirely, e.g. if he is so poor that he cannot provide home for his children, this in itself might be enough to refuse him actual custody. But again the quality of the home life that the child will have must not be measured in purely material terms : the amount of time and energy that a parent can devote to its care and upbringing is of considerable importance. This may mean that a mother who can spend the whole of her time with her children will necessarily have an advantage over the father who will be out at work all day, whatever alternative arrangements he can make to have them looked after. (See Re. K 1977 (1) All E.R. 647). Here the position is complicated by the fact that the father has remarried. Giving custody to the father will amount to giving custody to the stepmother. From the stepmother the children had maltreatment. From the father neglect. This was the experience of the past. The affidavits filed on behalf of-the mother and the children's report to me in private show that this was the state of things. It will be harsh to the children to repeat the old experiment. In the fact and circumstances of this case the husband is disentitled to the custody of the children. He has remarried. The new partner he has taken will care more for the children whom they bring into this world. Human nature is the same the world over.

(19) There is an affidavit by the stepmother as to her willingness and intention to look after the children and be a mother to them. I do not think a stepmother, however anxious to do her best for the children, can take the place of the mother. The mother is more likely to give the attention to the children that they need at this formative stage than a stepmother who, however anxious to perform her duties, will naturally be more interested to the needs of a child who is her own child. The order of the judge gives the custody to the father. So the mother is deprived of the care and control of the children. The children, too, are deprived of their mother's care. They will have the opportunity of a stepmother to care, but that is not always the same thing. Above all the children are not prepared to live with the stepmother.

(20) In Gohar Begum v. Suggi, the Supreme Court applied the welfare principle and held that the mother, a muslim woman, and a singing girl by profession, was entitled to the custody of her minor illegitimate daughter of 6 years which was in the custody of her mother's sister. No matter who her father is, the Supreme Court said, the mother is entitled to the custody of the illegitimate daughter. The interest of the child will be better served if she is in the custody of the mother rather than her mother's sister, the court said.

(21) In Saraswatibai Ved v. Shripad Ved, Air 1941 Bombay 103 Beaumont Cj said:

"however the paramount consideration is the interest of the child, rather than the rights of the parents. Human nature is much the same all the world ever, and in my opinion if the mother is a suitable person to take charge of the child, it is quite impossible to find an "adequate subsitute for her for the custody of a child of tender years."

He further observed:

"The modern view of the judges in England is that it is impossible, in the case of a young child, to find any adequate substitute for the love and care of the natural mother.--- The mother's position is

regarded as of much more importance in modern times than it was in former days, when a wife was regarded as little more than the chattel of her husband."

Wadia J. said:

"c of the minor has married again. That in itself may not be a ground for depriving him of the custody of bids minor child. But the court has got to consider all the circumstances of the case, and taking human nature as the same here as elsewhere, a stepmother cannot be expected to be very much interested in the welfare of a minor stepson, nor likely to give him the attention, love and sympathy which the child naturally reqauires."

(22) The courts in this country took this view in 1941. Now we have advanced much further. The position of women in society is much improved today. The modern trend is well represented by the Supreme Court decision in Gohar Begum where the mother, a singing girl, was held to be entitled to the custody of her illegitimate daughter. Regardless of the question who the father is, the court held that mother is preferable to any other near relation.

(23) In Balram Mandal v. Rajani Mandalain, the boy was illtreated by the stepmother. The court said that if the boy is kept under the guardianship of the father, for all practical purposes, the stepmother will have full control over the boy. The court held that the natural mother was a better guardian than the stepmother.

(24) In Munnibai v. Dhanush, the father after divorce had remarried. The court held that there was probability of the minor child being neglected by the stepmother. It was held that the mother was entitled to the custody of the child as she had stated that she had no intention to marry again. The claim of the natural mother was preferred to the claim of the father in the matter of custody.

(25) The marriage of the parties has been dissolved by a decree of divorce. This is the most important factor in this case. After divorce the question of custody, control and maintenance of the minor children of the marriage has now arisen. Section 26 of the Hindu Marriage Act provides for the custody of the children:

"26.In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and . education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made."

(26) The wife ought to have petitioned under this section. This is the proper provision applicable to a broken home. All orders relating to "custody, maintenance, and education" of minor children are to be made "from time to time" and may be varied, suspended or discharged. They all automatically

come to an end on the child's 18th birthday when he attains majority.

(27) The court can make provision "in the decree" and "after the decree", and from "time to time". The legislature has given full elasticity in the exercise of the court's power and it would be unwise to restrict this elasticity. So flexible are the powers of the judge. In effect the legislature is saying: "In such cases trust the judge." This flexibility is its greatest advantage. In ordinary circumstances no final order is ever made. "From time to time" it can be varied, suspended or superseded.

(28) The mother and father are fighting about the custody of the minor children. The court has to make such provisions-now that the decree of divorce has been passed-"as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible." If parents are divorced, arrangements have to be made about the children's upbringing. With whom are the children to live ? Who is to be empowered to take major decisions about their upbringing, for example, about their education ? If the children have their home with one parent, what arrangements are to be made to allow the other to preserve the relationship with them by visits, holidays and so on ? Who is to provide financially for the children ? These difficult questions arise.

(29) Where custody is contested between the parties, as here, other difficulties arise. Each of them is anxious to have custody, but it is open to question whether the contest always indicates that the parties are moved solely or even primarily by the desire to safeguard the children's interests. Passions are aroused in divorce and judgments distorted. One party may contest other's claim to custody from spiteful or selfish motives. The children are then in danger of becoming pawns in the struggle of wills. This case vividly illustrates it. In circumstances of this kind, the judge in deciding custody is in the end forced back to the test of welfare of the children. He strives to make the best arrangement which he can devise for the children in the new situation created by the dissolution of the marriage. The law is now infinitely more complex, largely because the welfare of the children has become a major concern of public policy transcending the "rights" of individual parents. This means more than that the courts will not enforce parental rights if to do so would not serve the children's interest. The legislature has given wide powers to the court to look after the welfare of the children. This indeed is one of the most difficult problems in family law.

(30) In the broadest sense, custody meant the sum total of the rights which a parent could exercise over his child. These rights continue until the child attains the age of 18. Over the years the father's primacy was reduced in three ways. First the Court in exercise of their paternal jurisdiction might interfere to deprive the father of some or all of his rights. This is the theory of Guardian and Wards Act 1890. Secondly, section 26 of the Hindu Marriage Act, 1955 has made the mother's rights equal to those of the father. Thirdly, the courts have attached increasing importance to the welfare of the child rather than the rights of the parents. The paramount consideration in case of disputes between the father and the mother is the welfare of the child. Section 26 says that provision has to be made consistently with the wishes of the minors wherever possible. This shows that the court may disregard the rights of a parent if it finds that by having regard to their wishes it will be promoting the welfare of the children. The parent's rights can be suspended and superseded where it is shown that to do so will be in the interest of the minor. This is the key-note of the law relating to the

exercise of parental rights and gowers, as it has developed over the centuries culminating in the Hindu Marriage Act, 1955. Earlier cases indicate that effect will always be given to father's legal rights unless he had forfeited them by moral or cruel conduct or was seeking to enforce them capriciously or arbitrarily. The parental rights are on the decline. The welfare theory is on the ascendant.

(31) In this age of equality of sexes the effect of legislation and judge-made law is to whittle down the father's rights and also to give the mother positive rights to custody which in earlier days the law did not accord to her. In the cascade of legislation passed in the fifties of this century e.g. The Hindu Marriage Act 1955, the Hinnu Minority and Guardianship Act 1956, the Mindu Adoptions and Maintenance Act 1956, the legislature has touched upon the subject of welfare and protection of children from many angles. The new Guardianship Act of 1956 is in addition to and not in derogation of the Guardians and Wards Act 1893. The father's pre-eminent position as the patria potestas or head of the family who demanded unquestioned obedience to his commands simply does not obtain today. It is the children's interest which predominates. The legislation, old and new, is characterised by the golden thread which runs through it, which is that the welfare of the child is considered first, last and all the time.

(32) The "welfare principle" is the proper test to be applied in cases of disputes between the parents and is now universally accepted as applicable in all courts dealing with this issue, whether it is matrimonial jurisdiction or guardianship jurisdiction. The welfare of a child is not to be measured by money alone, nor by physical comfort only. It must beread in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the court must do what under the circumstances a wise parent acting for the true interest of the child would or ought to do.

(33) The conduct of the parents in relation to the child is obviously relevant in determining what is in his best interest. The parents' conduct towards each other may also be relevant if it reveals personality, or behavior problems which might adversely affect the child. But is matrimonial mis-conduct and responsibility for the breakdown of the parents' marriage "as district from conduct towards the child" to be taken into account in deciding custody issues? There has been a remarkable change of judicial policy on this issue in England. It was for long a settled rule of the divorce court that a mother who had been guilty of adultery should be deprived of care and control. It then came to be recognised that an adulterous mother could nevertheless be a good mother. (Willoughby v. Willoughby 1951 Probate J 84). Singleton L.J. said : "I have yet to learn that the fact that a woman commits adultery prevents her in all circumstances from being a good mother" (p. 192). In some cases even the conduct of the parent was a relevant factor. If one of the spouses was an innocent party it was thought that he was entitled to the custody. But even this is no longer accepted as a universal principle. It all depends on the facts of a particular case. Any attempt to formulate general pronoucements applicable in all cases will be likely to create more difficulties than it solves. What the court has to deal with is the lives of human beings and these cannot be regulated by formulae.

(34) Take the present case. The husband was held to have treated his wife with cruelty. He was the breaker of the home. His cruel conduct sounded the death knell of the marriage. No one can possibly

be proud of that.

(35) On the facts of this case it appears to me that the mother is entitled to the custody of the children. The daughter Sophia is a young girl of 14 years. The mother can be relied upon to give that wise counsel and sure guidance that are so necessary to a young girl growing up and maturing through adolescence into a womanhood. As regards the son it will not be in their interest if brother and sister are separated. They have grown up together. The substitute care which the father can provide cannot outweigh the risks of separating these two children from their mother. Their interests will suffer if they are brought up in the home we of the stepmother. On the facts welfare of the children-this girl of 14 and a boy of 11-admits of no other solution.

(36) In practice, as the cases show, the mother now has a built-in-advantage in disputes over the care and control of young children since it will normally be difficult for a father to provide adequate material care for them. In any case the courts have been heavily influenced by the view that a mother's care is necessary for the child's proper psychological development. Hence a mother is likely to be given care and control because she is thought "not as a matter of law, but in the ordinary course of nature the right person to have charge of young children." (Re : K (minors), 1977 I All E, 647, 655 per Sir John Pennycuick ; Rosy Jacob v. Jacob, and Raj Rani v. Subhash Chander, 23 (1983) Delhi Law Times 240 (DB).

(37) Much capital was sought to be made of the observations of Goswami J. in relation to the wife's character and conduct, that is visits of Vashist to the matrimonial home and the husband's protests with regard thereto. It was said that the wife is disqualified from claiming custody of the children on this ground. According to this view if the husband is morally blameless in relation to the breakup of marriage he ought to be given the custody. I do not agree, If the father, however innocent he may be, cannot provide the necessary physical and emotional environment, nothing can derogate from the court's duty to provide the solution which is for the child's welfare. The child's welfare has become the only factor to be taken into account and everything else is subordinate to it. In the end the judge has this single decision to made, namely, what is best for the welfare of the child ?

(38) Applying these principles it appears to me that there is no reason at all why the mother ought not to have the custody, care and control of the children. They are devoted to her and she is attached to them. The husband has remarried. The new partner he has taken will have her own children. The father had one child from the second marriage. But unfortunately he has died. Remarriage is a factor which has to be taken into account. If on that ground the husband is disqualified the natural mother must be given the custody. In many cases this must inevitably happen when a home is broken. To grant custody to the father would only lead to further unhappiness. The guardian judge has failed to give enough weight to the loving relationship between the mother and the children who are now grown up. Nor has he given due weight to the second marriage of the husband. The judge seems to me to have repeated one of the myths that the court has been trying to explode for many years. In the judgment he says:

"The mother has not absolved herself of the charge of adultery against her and rather thought not fit to contest the charge. Such conduct disentitles her from claiming the custody of the children."

He thought that the observations of Goswami, J. "reflect upon the way of life which the mother is leading at the moment and if the children are allowed to be in her company it may have adverse affect on their moral as well as physical growth." I cannot accept this view. Goswami, J. has not found that the mother is living in adultery. He was concerned only with the question of cruelty. He found that the husband was not cruel when Vashist visited his house and he protested. To say that this is a finding of adultery against the wife will be doing the grossest injustice to her. V/e live in a tolerant society. Adultery has to be put in issue and proved like a quasi-criminal offence. So the basis of the judge's order giving custody to the father was, in my view, unsound. He made a wrong decision. Founding himself on a narrow conception of moral welfare, he gave too little weight to the factors favorable and too much weight to the factors adverse to the mother's claim that she should retain care and control of the children. It is the duty of the appellate court to set aside the decision if it is satisfied that it is wrong. On the view I take the Judge's error was in the balancing exercise. Every case of custody involves a balancing exercise. It involves choices and risks.

(39) The relations between the parties are embittered. They are fighting in court, as I saw each of them, with inflamed passions. They are on the worst of terms. A state of acute hostility prevails between them. This sharpness of conflict between parents has made my task difficult. Even though the divorce proceedings have ended, the bitterness and mutual recrimination continue. There were allegations, counter-allegations, and mutual suspicions. The wife complained that the husband is following her everywhere to see that she is thrown out of employment by the employer and out of the house where she is living by the landlord. She showed me letters which, according to her, he had written under anonymous names to her employers and others describing her as a call girl and a smuggler. The husband denied this. I have not gone into the truth of these allegations, because that was not the scope of the proceedings. But what I have found is that there are unending accusations of one against the other even now that they are divorced, (40) I have borne in mind throughout the children's welfare is the first and paramount consideration. I am convinced that it is in the children's interest to stay with their mother. To take them away from her would not only be wrong from their point of view, it would also, in my judgment, be a grave injustice to the mother. As I see, these proceedings are in fact a continuation of divorce proceedings which took place before Goswami J. I have, therefore, to keep in mind the characters and personalities of the claimants, before and after divorce, their rights and wrongs, their conduct and behavior, their quarrels, shoutings and unkindnesses.

(41) Under section 26 the court is enjoined to make a provision for the minor children "consistently with their wishes wherever possible". I have met these two children twice in my chamber and talked to them in private. Although the court cannot allow a young person of 14 to decide entirely for herself, the fact that she did at the moment have a very positive view cannot be ignored as a most important factor in the case. I cannot ignore the close relationship of the mother and the daughter. It appears to me that she is a caring and a loving mother. The children have attained the age of the discretion. One is 14 and the other is 11. They can make an intelligent preference. The girl will soon be on her own.

(42) Custody means physical possession. It means a bundle of rights or to be more exact a bundle of powers which continue until the child attains the age of 18 years. But as Lord Denning has pointed

out :

"custordy is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is, It starts with a right of control and ends with little more than advice."

( Hewer v. Bryant, 1970 (1) Q.B. 357, 369).

(43) One other thing remains to be said. The wife is educated. She is a teacher. She was employed in a women's organisation. She produced her salary certificate. She earns from tuitions also. She can look after the education of the children. The husband's case is that the education of the children has suffered. They were removed from their previous schools, it is true. The girl was removed from Lady Irwin School and the boy from Frank Anthony Public School. I was at pains to ascertain whether they are being sent to a good school now. I found that they are reading in a good public school. I saw their progress report and their fee book. The mother has put them in a good school with whatever means she has. But she was not willing to disclose the name of the school in open court because she feared that the husband will remove them from the school. This will add to her difficulties, she said. She has asked me not to disclose the name of the school in my judgment.

(44) The question is whether the court is bound to disclose the name of the school to the father. He is very much insistent. In my opinion, I am not bound to disclose it to him in view of embittered relations between the parties and the vilification campaign which he is carrying on against his previous wife, as was alleged by the appellant. The inherent jurisdiction of the court is derived from the crown's prerogative power as parens patriae. The theory is that court is the guardian of all the infants in the realm. This invests the proceedings with a somewhat unusual character. Inasmuch as there is a justiciable issue between the parties the court is normally exercising a judicial function, but as its first duty is to protect the child irrespective of parents' wishes, its jurisdiction is also administrative. The House of Lords concluded in Official Solicitor v.K ((1965) Appeal Cases 201) that this entitled it to depart from the normal rules of evidence if this is necessary in the child's interest. It has always been accepted that the judge is entitled to see the child and each of the parents in private. In Official Solicitor v. K (supra) it was held that the judge may receive a confidential report from the child's guardian ad litem without disclosing it to the parties if he considers that disclosure would be detrimental to the child.

(45) Where the paramount purpose is the welfare of the minor, the procedure and rules of evidence should serve and certainly not thwart that purpose. The judge can hold proceedings in camera. He can see the children privately in his room when dealing with these cases. He can see each parent separately. This is left co judge's discretion. In the last resort the welfare of the child must dominate. Everything else is subordinate. This is the essence of the matter. (See Scott v. Scott, (1913) Ac 417, 437). No one disputes that this practice is free from objection or that these interviews are confidential. (In re A" at p. 235). As has been said :

"A principle of judicial enquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of principle of this sort does not serve the

ends of justice, it must be dismissed otherwise it would become the master instead of the servant of justice."

(In re K p. 238 per Lord Devlin).

(46) This is an unusual step, no doubt. But this is necessitated by the exceptional circumstances of this case where I have found that the parties even after divorce have taken to the path of unending accusations and recriminations.

(47) PARENTS' pre and post-divorce behavior has induced me to take this unusual step. Apart from this it must be remembered that the wardship jurisdiction of the court is not ousted or abrogated. The wardship litigation is very different from other litigation. It is not an ordinary lis. In the words of Lord Cross :

"clearly a wardship case differs altogether from ordinary litigation. In an ordinary action the court has before it two parties, each of whom asserts that he has a legal right to a decision in his favor. The function of the judge is to act as umpire at the fight and to decide which side has won. In a wardship case the court is asked to take the child into its care and to decide how and with whom it is best for the child to be brought up. The role of the parties is to simply put before the judge for his consideration their suggestions with regards to the ward's upbringing."

( 83 (1967) Lqr p. 200, 207).

(48) It is right at this stage to say that in order to be satisfied myself whether the children were reading in some school I asked the Registrar to verify the fact from the school named by the children in my private interview with them. He has informed me that the children are actually reading in a public school, as deposed by the mother in her affidavit. The daughter is in 8th class and the boy is in 5th class.

(49) To summarise: I rest my judgment on the broad ground that the mother is entitled to the custody of the children ; and there is nothing in her conduct, her character, or her present position to induce any court to take away her children from her. I do not want to take the risk of sending the children back to the father who has remarried. That will produce a rankling sense of injustice and depression in them which will not only hinder their development, but can easily prejudice their whole future. My choice is for the mother.

(50) The welfare test is the ultimate criterion. It is the governing consideration. Between 1890 and 1955 the whole social attitude towards parents and children had changed and the law has continued to develop and will develop by reflecting the changing times, trends and tendencies. Gone are the days of the pater familias. Gone are the days of the absolute right of the father to the custody of his child. The change in the climate of social conditions has taken place gradually and its influence on the courts has been quite perceptible. The tide began to turn against the power and authority of the father. Under the impact of changing social conditions and the weight of opinion the Hindu Marriage Act was passed in 1955. Section 26 is directed to equalise the legal rights or claims of the

parents, and seeks to achieve an equality between the sexes in relation to custody of minors. This is a statutory provision which is almost refreshing in its clarity. The section means what it says-no more and no less : if on a consideration of all the circumstances the judge considers that the paramount welfare of the minor demands a particular arrangement as being the proper one he shall make that arrangement. The stepmother has lodged an affidavit that she will act as the mother of the children. I think she cannot take the place of the mother. The mother has layers of love for her children. She can wipe the tear of every eye.

(51) The judge is required to give sympathetic consideration to the wishes of the minor if he is of an age fit enough to express an opinion. The court has the duty to consider the application on its merits before it. It must take into account all the merits and demerits of the alternative proposals as they seem likely to bear upon the child's welfare. In the end it must adopt the course most calculated to promote the welfare of the child. There is nothing permanent about the order relating to custody; it can be varied at any time.

(52) The more modern approach to the question of custody is represented by Gohar Begum's case. The modern feeling in these matters is that ties of affection ought not to be disregarded. Ved v. Ved be Beaumont Cj illustrates it. The equality of parents is much more pronounced in the Hindu Marriage Act. The authorities are not always consistent and the way along which they have moved towards a broader discretion had many twists and turns. No useful purpose will be served by a copious citation of authority. The Hindu Guardianship Act, 1956 has also put the rights of the mother on an equality with those 'of the father in relation to the custody of minors, and the tide has run more strongly against the father as the cases show.

(53) A child's future happiness and sense of security are always important factors. On the whole facts of this easel have come to the conclusion that the children should remain with the mother and the change of custody will prove detrimental to their interests. I am also of opinion that the aspersion cast on the character of the mother is without any substance. She has not forfeited her right to custody in any manner.

(54) For these reasons the order of the Guardian Judge dated 21.7.1983 is set aside. The appeal is allowed. The custody of the children will remain with their mother, until further orders. The parties are left to bear their own costs.