

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present:

Hon'ble Justice Soumen Sen

Hon'ble Justice Uday Kumar

FMA 1750 of 2018
CAN 6 of 2019 (Old No: CAN 2789 of 2019)
CAN 8 of 2023

Smt. Susmita Sarkar Mondal
Vs.
Sri Pratik Ram Mondal

For the Petitioner :Mr. Kartick Kumar Bhattacharya, Adv.
Mrs. Sudipta Roy, Adv.

For the respondent :Mrs. Shohini Chakrabarty, Adv.
Mr. Arijit Sarkar, Adv.

Hearing Concluded on : 13th February, 2023

Judgment on : 28th February, 2023

Soumen Sen, J. : The appeal is arising out of a judgment passed in an application filed by Pratik Ram Mondal for custody of the ward under Sections 7, 9, 17 and 25 of the Guardians and Wards Act, 1890 read with Sections 6 and 13 of the Hindu Minority and Guardianship Act, 1956. The application was filed for restoration of the custody of the minor son, Priyanshu, who alleged to have been illegally removed from the custody and guardianship of Pratik Ram by his wife Susmita on 4th March, 2017.

The said application was filed on 27th April, 2017 by Pratik praying, *inter alia*, for restoration of custody of the child.

Pratik is the father of the minor.

Briefly stated, Pratik Ram married Susmita Sarkar on 12th June, 2008 and in their wedlock a male child was born on 9th November, 2010.

The respondent is living in a joint family with parents, uncle, paternal uncle's wife, cousin brothers and other members in the ancestral residential complex. The child was growing up along with the elder members of the family. Pratik wanted his son to be reared up in the same manner and similar atmosphere in which he grew up in a joint family so that the child can enjoy the love, affection and comfort of the elders and other members of the family who are simple minded and led a simple life.

Pratik claimed that he was always attentive to his minor son. The child is dearer to all the family members and he was growing up in that congenial, peaceful and happy atmosphere being loved by all the family members of the applicant. Pratik is a senior high school teacher with M.A. degree in history. His brothers and family members are all well educated. Susmita was a primary school teacher who at the relevant time was working in a high school.

It is alleged that she was a woman of a complete different mental makeup with lack of kindness and softness and she was always quarrelsome

and used to behave rudely with all the family members of Pratik. She was suspicious. She had no sense of belonging towards the appellant's parents and his other relations. She refused to live in her matrimonial home with other family members and always wanted and created constant pressure upon the applicant to separate himself from the joint family and live with her separately elsewhere. She did not appreciate the warmth and care of the family members of Pratik towards the child and was suspecting such feeling to be a ruse and/or alibi to separate the child from her. She was causing impediment for a free and happy interaction of the child with the family members of Pratik. The respondent has alleged that she was unattentive to the family affairs and was not caring the child. She was wayward. She was obsessed with cell phones, face book, whatsapp and had very little time for the child. Pratik notwithstanding such aberrations tried to adjust with her and tried his best to convince her to change her behaviour and lead matrimonial life with joy and happiness as it is essential for proper upbringing of the child. Pratik besides his school hours, used to spend time with his son and looked after his education and pleasure, convenience and inconvenience, comfort and happiness. The appellant for reasons best known to her prevented the respondent from leading a happy conjugal life which amounts to mental cruelty. Due to her indifferent attitude the child was completely dependent on the respondent and the family members of the respondent who were following his pursuits, happiness, education, physical need, mental comfort, growth and enjoyment. The respondent alleged that

without any just cause or excuse in order to perpetrate mental cruelty and torture, the appellant left the matrimonial home at Balurghat on 4th March, 2017 while the respondent was in the school and thereafter started residing intermittently with her parents' house and at Malda with the child. On 17th March, 2017, the appellant filed a complaint against the respondent his parents and his brother vide GR Case No. 299 of 2017 under Sections 498(A)/323/406/34 of the Indian Penal Code with false accusation. Pratick and his family members were however enlarged on bail. It is claimed by Pratik that he and his family members made several attempts to restore the relationship. In fact, on several occasions he and his family members went to his parents-in-law's house to bring them back but the appellant and her family members insulted them and hurled abusive language and threatened them with dire consequences in the event they make any attempt to restore the relationship and take custody of the child. They refused to hand over the child and illegally detained and kept the child in their custody. Pratik was unable to meet his beloved son since 5th March, 2017. Pratik alleged that the appellant is a cruel, quarrelsome, despotic, unkindful, hard-hearted and suspicious woman. There is no suitable congenial atmosphere in the house of the appellant where the child can grow properly with adequate need, care and protection and with love, joy and happiness. It is alleged that there is no facility and suitable atmosphere for education, mental care, medical facility and all round development of the minor in the house of the appellant and the said place was not suitable for proper upbringing and development of

Priyanshu. The minor was studying in Class-KG in the academic year 2016-17 at Techno India Group Public School, however, the appellant removed the child from the said school without the consent and knowledge of Pratik disregarding the future of the minor. The appellant was moving in and out from places and was changing her school as well as the school of the child which caused enormous loss and injury to the welfare and education of the minor. It was alleged that the wife was trying to get her transfer from her present school to any other school at Malda with an intention to keep and confine the child at her place which, if allowed, would cause serious injury to the child. The child was five years old and the respondent being the father is his natural guardian. The respondent is incapable of providing a congenial, comfortable and happy home to the minor. The respondent is not a fit and proper person to look after the child by keeping him in her custody as she is suffering from personality disorder.

The said proceeding was contested by the appellant.

In her written objection, she has denied all the allegations. She has alleged that she left the matrimonial house as there was a tremendous pressure for dowry, in fact, she was compelled to leave the matrimonial home on 2nd March, 2017 as she was mercilessly beaten up by her husband and in-laws. She was treated by the government hospital on 4th March, 2017 for the injuries suffered on her forehead on 2nd March, 2017.

It was stated that when she had returned after treatment to her matrimonial home, she was driven out by her husband and the family members from her matrimonial home after perpetrating torture and cruelty on 4th March, 2017 and for that she had to take shelter in her father's house with the child. In view of such torture she lodged a complaint against her husband, father-in-law, mother-in-law and brother-in-law.

It was stated that the mother is inseparable from the child and the mother has a very important role to play for the proper growth of the child.

Before the learned Trial Court, Pratik, Priti Ram, Pranay adduced evidence in support of restoration of custody of the child.

On behalf of the appellant, only Susmita, the appellant herein adduced evidence.

Pratik in his evidence has reiterated the statement made by him in the petition and affidavit-in-chief. We have, at the beginning, summarized the contention of Pratik culled out from the petition and the affidavit-in-chief and hence to avoid prolixity not repeated.

Priti and Pranay are the father and uncle of the respondent/applicant. Priti in his evidence has stated that the child was very dear to all the family members and the minor was brought up in a homely atmosphere with proper care, protection, love and affection. All his brothers used to reside in the same ancestral complex and maintain cordial relationship with each other.

They still possess the character of the joint family. Pratik used to spend time with the child after he returned from school. The child used to play with his father and Pritam, his younger son. Pritam used to clean the posterior of the child after stool, release of bowels, feed him and would take the child for shower. Susmita would refuse to attend to such needs. Pritam was idol to the child. Susmita always used to create pressure upon the applicant to stay in a rented house with an intention to break the joint character of the family. Since Pratik did not agree with the proposal in order to teach a lesson, she left the house with the minor child without even informing them. Pratik is ideal and competent to act as guardian of Priyanshu. The grandparents are in great distress as they are unable to communicate with their grandson. The grandson was very much attached to his grandparents and other family members. In view of the prime location of the matrimonial house, it was suitable for education and skill development and it would help the minor to grow up in a healthy atmosphere. In his cross-examination, he has denied that he assaulted the appellant during her stay at the matrimonial home.

Pranay in his evidence has stated that the child was reading in a renowned school at Balurghat but Susmita illegally removed the child without his consent and knowledge. All the family members are residing in the ancestral house. All of them are maintaining cordial and sweet relationship. Although there are separate buildings in the ancestral residential complex but they are still maintaining the characteristic of a joint family. The atmosphere in the ancestral house is congenial for the child for

his proper growth and development. In his cross-examination, he had stated that Susmita had gone to her father's house without giving any information. The family members of Pratik had no discord with Susmita at any point of time during her stay in the matrimonial house. He has stated that he persuaded his wife to come back but of no avail because of the intervention of the relatives of his wife. The wife was also adamant not to return. He has reiterated that he requested his wife time and again to come back to the matrimonial home to resume the conjugal life.

Susmita in her chief has produced a complaint lodged with the Kumarganj P.S. on 17th March, 2017 and the discharge certificate from the hospital on 4th March, 2017 which was marked as "X" and "Y" for identification due to lack of production of the original certificate. She also produced a few photographs to show alleged injury suffered at the matrimonial house that were collectively marked as Exhibit-Z for identification as those photographs were not supported by any documentary proof to vindicate the assault perpetrated on her by her husband or in-laws. In her cross-examination, she has stated that save and except for the occurrence on 4th March, 2017, she did not lodge any complaint against her husband or in-laws during her stay in the matrimonial home. She admitted that they were living in a joint family and in the ancestral residential complex along with the elder brother of her father-in-law and his family members. She also admitted that after the child was removed from Techno India, he was admitted to Saraswati Vidya Mandir at Balurghat as the said school was

near to her place of teaching at that point of time. She had a residential flat at Balurghat. At the time of her deposition, she was staying with her parents at Balurghat. She admitted that when she left her matrimonial home with the son, her husband was in his place of teaching and the child was taken away without informing Techno India or Pratik or any of the family members of Pratik. She also admitted that on occasions, the child used to request her to take him to his father's house. During cross-examination, she was put a specific question:-

“Did you oblige your son by taking him to his father's house on his request?

She did not give any answer.

The observation of the court is relevant: “This witness remains silent for a long time on this question.” (emphasis supplied)

She also admitted to have made an application before the appropriate authority for her transfer from her present school at Balurghat to a school in Malda District and this fact was never intimated to her husband. She denied to have created any pressure upon her husband to leave his parents and live separately with her at Malda. At the time of deposition, the child was pursuing his studies at Patiram Monteswari Academy. This fact was not shared with Pratik or his family members. In answer to the question whether she wants “to lead conjugal life with her husband in order to upkeep the welfare of your son”? She answered:

“I obviously want to look forward to upkeep and welfare of my son and I want to look for it, but it is difficult for me to answer whether I can lead conjugal life with my husband for that purpose.” (emphasis supplied)

She also candidly admitted in her cross that her child was comfortable at the matrimonial home in the following words:

“It is a fact that sometimes my brother in law (younger) and cousin brothers of my husband and cousins of my father in law used to provide amusement and mental recreation, to my son during the course of my leading conjugal life with my husband in my matrimonial house and sometimes they used to play with my said son for mental recreation of my son and amusement of my son.” (emphasis supplied)

On the issue relating to the sufferance of the child due to separation, she has stated:

“I do not think and appreciate that my son has been suffering from mental stress/agonny/disappointment because of want of presence of my husband or husband’s brother or other family members of my husband beside my son at my father’s house.

(Volunteers: With the passage of time of there was any mental agony suffered by my son on that score because that problem has been overcome.”)

She denied that she was not tortured at her matrimonial residence.

Mr. Kartick Chandra Bhattacharya, the learned Counsel for the appellant has submitted that the minor is of 11 years and is living with his mother since birth. For the last five years the child is staying with the mother in Malda Town. The minor has been looked after well by the mother

and her family members. The appellant is an MA in English and was a part-time lecturer in English at Balurghat and at present she is working in a school in Malda. The appellant's father (maternal grandfather) of the child was an Assistant Head Teacher of a reputed high school at Kumarganj and mother (maternal grandmother) was a head mistress of a girl's high school at Balupara in Kumarganj block, Balurghat. The maternal grand-parents stay at Kumarganj in their ancestral house and they off and on comes to Malda to stay with her daughter. The academic qualification of the appellant and the maternal grand-parents of the child is conducive for the child and the separation of the child from his mother at this stage would badly affect the mental and psychological condition, education, academic brilliance and future of the child.

It is submitted that by the time the child return from school at 3.10 p.m. the appellant is back. Moreover, the elder sister of the appellant stays near to the house of the appellant and was also looked after the child. It is submitted that in her matrimonial home there is nobody to look after the child except the grand-parents. The brother of the respondent resided in a separate family and his wife is a working lady. In her absence in day time her female child is looked after by the aged parents of the respondent. The respondent is a school teacher of a secondary school. He is a MA in history. The father of the respondent is about 76 years of age. He passed BA examination and was working as a clerk in a high school. The grandmother

of the child is also an aged person passed Madhyamik examination and was an employee of Anganwari.

A criminal case is pending against the respondent and his family members in which a charge sheet has been filed by the investigating officer. The appellant has also filed a suit for divorce being MAT suit no. 8 of 2020 in which she alleged that the respondent is in an intimate relationship with one of his female colleague. The respondent since 2017 did not pay any single farthing for the maintenance and the educational expenses of the minor.

The learned Counsel has submitted that the welfare of the minor is of paramount consideration. On a comparative view of the matter one would surely be inclined that the son can be better looked after while living with her mother. Moreover it is not only the physical care and educational facilities of the child which would be the sole criteria for determining his welfare but other facilities are also required to be looked into in deciding the welfare of the child. The court is required to take into consideration the factors relating to the psychological and mental growth of a growing child. It is submitted that wishes of the child are of relevant consideration and the remarriage of the mother cannot be taken as a ground for not granting custody of the child to the mother. This submission was made in view of the allegation made by the respondent that the appellant is in relationship with one Pinak Pani Chowdhury disclosed by the appellant in written objection filed by her in the matrimonial suit.

Mr. Bhattacharya has relied upon the following decisions in support of his submission:

1. Smt. Mohini v. Virender Kumar reported at AIR 1977 SC 1359,
2. Smt. Doli Banerjee v. Shri Prabir Banerjee reported in 1996 WBLR (Cal) 220.
3. Lekha v. P. Anil Kumar reported in 2006(13) SCC 555.

Mr. Bhattacharya has also relied upon the decision of the Hon'ble Supreme Court in K.M. Vinaya v. B.R. Srinivas reported at 2015(16) SCC 405 and submits that the Apex court time and again has reiterated that interest and welfare of the child is of paramount consideration and in the aforesaid decision a direction was passed for joint custody of the child so that the child could grow up with both parents.

Per contra, Ms. Sohini Chakraborty, learned Counsel appearing on behalf of the respondent has submitted that the custody of the child was wrongly denied as the appellant had surreptitiously and clandestinely removed the child from the custody of the respondent for which the respondent-father has to file an application for custody of the ward on 27th April, 2017 before the learned District & Sessions Judge, Dakshin Dinajpur at Balurghat.

It is submitted that even after the order permitting custody was allowed in view of the pendency of the appeal and the interim orders the

respondent could not get the said custody and the child is still with his mother.

It is submitted that the academic excellence of the child has gone down drastically. He was alone most of the time. He also could not interact and communicate with her maternal grand-parents who reside at a far away place from the present residence of the appellant and it is a fact that due to old age they hardly could visit their daughter and spent time with the grand-child.

Ms. Chakraborty has drawn our attention to the evidence of the grand-father of the child and uncle of the respondent to show that the child was taken due care by the family members of the respondent and was more comfortable at his father's place. It is submitted that the maternal grand-parents did not give any evidence to show that they used to come off and on to take care of the child. It is submitted that in absence of such evidence it cannot be held that the welfare of the child is secured at the appellant's place.

On the basis of the aforesaid pleadings and evidence, the learned Trial Judge decided the issue in favour of the applicant-father. During the pendency of the proceeding, the learned Trial Judge interacted with the minor child. The relevant observations in this regard are:-

“This is pertinent to note that before the completion of the testimony of the parties, the minor child of the contesting parties of this Act VIII Case,

'Priyanshu Ram Mondal' was given a hearing by this court in his chamber of this court on 01-12-2017 where without hesitation, on being produced by the O.P. of this case, the said minor son of the contesting parties explicitly answered to this court that "he loves his parents but he prefers to stay at the residence of his father with his mother in well and good condition." (emphasis supplied)

"This intention of the minor child was circulated by the court to the contesting parties of this case i.e. the contesting parents of the said minor male child, in the open court."

We have also interacted with the child and in the informal discussion that we had with the child, the minor has very candidly stated that most of the time he was living alone in his present house at Malda, since her mother was busy in her school and he missed his friends and his grandparents. He appears to be extremely lonely and unhappy. He wanted to go back to his father's place at Balurghat along with her mother. He was very candid in reiterating the same views that he had explicitly stated before the learned Trial Judge. We have also shared the views of the child in the course of hearing and we wanted the parents to reconcile. In order to resolve the dispute amicably, we referred the dispute to mediation. However, the mediation has failed. We have also tried to convince the parents that joint parenting is necessary for the well-being of the child. In fact, the parties at one stage were willing to dissolve their marriage by mutual consent which we have recorded in our order dated 16th January, 2023, but the wife is not willing to part with the child and withdraw the proceeding u/s. 498A of the IPC. Moreover, it is now clear that the wife is not interested for restitution of

conjugal rights. A rational and moderate stand by the wife with regard to the pending criminal proceedings could have saved the marriage and the future of the child as the mental turmoil of a child of a broken marriage is easily predictable and can have a disastrous effect. The court should not allow such bitterness between parents to affect the child and leave a bad taste in his mouth.

The custody of a minor is a very delicate issue.

The statutes governing the custody of a minor principally are The Guardians and Wards Act, 1890 and The Hindu Minority and Guardianship Act, 1956. These two statutes are relevant for the present purposes.

The Guardians and Wards Act, 1890, was the first statute that primarily enacted to consolidate the various Acts then in force keeping in view the personal law of diverse communities in India. Section 7 gives power to the Court that if it is satisfied that it is for the welfare of a minor that an order should be made, it may make an order appointing a guardian of his person or property, or both, or declaring a person to be such a guardian. Section 8 lays down that no order under Section 7 will be made except on the application of the person desirous of being, or claiming to be, the guardian of the minor or any relative or friend of the minor or the Collector of the district in which the minor ordinarily resides or in which he has property or the Collector having authority with respect to the class to which the minor belongs. Section 17 enjoins upon the court to have due regard to the

personal law of the minor and specially take note of the circumstances which point towards the welfare of the minor in either appointing a guardian or declaring a guardian. If the minor is old enough to form an intelligent preference, the court may be justified to consider that preference also in coming to the final conclusion.

The Hindu Minority and Guardianship Act, 1956 was enacted as a law complementary to the Guardians and Wards Act, 1890. This defines a 'minor' to be a person who has not completed the age of eighteen years. 'Natural guardian', according to this Act, means any of the guardians mentioned in Section 6. Section 6 says that the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in the joint family property) are - (a) in the case of a boy or an unmarried girl, the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Section 13 of the Act lays down that in the appointment or declaration of any person as guardian of Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

A bare reading of the provisions of the two Acts referred to above with the statement of object and reasons make it clear that the welfare of the minor is the predominant considerations and the legal rights of the persons

claiming to be the guardians or claiming to be entitled to the custody would play a very insignificant role in the determination by the court.

In a fairly recent decision of the Hon'ble Supreme Court in ***Rajeswari Chandrasekar Ganesh v. State of Tamil Nadu & Ors.***, reported at **2022 SCC Online SC 885: MANU/SC/0890/2022** decided on 14th July, 2022 the Apex Court in deciding a petition seeking right of habeas corpus in a matter relating to custody of a child discussed the principles relating to custody of a child in great details by referring to a large catena of Indian and Foreign decisions. In the said decisions the Apex court observed that while considering the competing claims of guardianship, the test would be to see what would best serve the welfare and interest of the child. It was observed that in all circumstances welfare of the minor child would prevail over the legal rights of the parties in the custody battle.

The principles of law relating to the custody of a child that are relevant for the present purpose and discussed lucidly in the said judgment are stated in paragraphs 83 to 89 of the reports which reads:

“83. In the case of Anjali Kapoor v. Rajiv Baijal, (2009) 7 SCC 322, where the custody of a minor child was being claimed by the father being the natural parent from the maternal grandmother, the mother having died in child birth, it was held that taking proper care and attention in upbringing of the child is an important factor for granting custody of child, and on facts, the child having been brought up by the grandmother since her infancy and having developed emotional bonding the custody of the child was allowed to be retained by the maternal

grandmother. While considering the competing rights of natural guardianships vis-a-vis the welfare of the child, the test for consideration by the Court was held to be; what would best serve the welfare and interest of the child. Referring to the earlier decisions in *Sumedha Nagpal v. State of Delhi*, (2000) 9 SCC 745; *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840; *Elizabeth Dinshaw v. Arvand M. Dinshaw*, (supra) and *Muthuswami Chettiar v. K.M. Chinna Muthuswami Moopanar*, AIR 1935 Mad 195, it was also held that the welfare of child prevails over the legal rights of the parties while deciding the custody of minor child. The observations made in the judgment in this regard are as follows :

“14. The question for our consideration is, whether in the present scenario would it be proper to direct the appellant to hand over the custody of the minor child Anagh to the respondent.

15. Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. (See *Sumedha Nagpal vs. State of Delhi*.” (2000) 9 SCC 745 (SCC p. 747, paras 2 & 5).

84. In *Rosy Jacob v. Jacob A. Chakramakkal* (supra), 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.”

85. This Court considering the welfare of the child also stated that : (SCC p. 855, para 15) “15...The children are not mere chattels: nor are they mere playthings 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...."

86. In *Elizabeth Dinshaw (supra)*, this Court has observed that whenever a question arises before a court pertaining to the custody of the minor child, the matter 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 child.

87. The question as to how the court would determine what is best in the interest of the child was considered in *Re: McGrath (Infants)*, [1893] 1 Ch. 143 C.A., and it was observed by Lindley L.J., as follows :

"...The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

88. The issue as to the welfare of the child again arose in *re "O" (An Infant)*, [1965] 1 Ch. 23 C.A., where Harman L.J., stated as follow:

"It is not, I think, really in dispute that in all cases the paramount consideration is the welfare of the child; but that, of course, does not mean you add up shillings and pence, or situation or prospects, or even religion. What you look at is the whole background of the child's life, and the first consideration you have to take into account when you are looking at his welfare is : who are his parents and are they ready to do their duty?"

89. The question as to what would be the dominating factors while examining the welfare of a child was considered in *Walker v. Walker & Harrison*, 1981 New Ze Recent Law 257 and it was observed that while

the material considerations have their place, they are secondary matters. More important are stability and security, loving and understanding care and guidance, and warm and compassionate relationships which are essential for the development of the child's character, personality and talents. It was stated as follows :

"Welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and 18 compassionate relationships that are essential for the full development of the child's own character, personality and talents." (emphasis supplied)

In a matter of the child custody the court is exercising *parens patriae* jurisdiction. The Court is required to give due weight to the ordinary comfort of the child, contentment, intellectual, moral and physical development, health, education and general maintenance, and the favourable surroundings. The Court is not bound either by statutes nor by strict rules of evidence nor procedure or precedent. In deciding the issue of custody, the paramount consideration should be the welfare and well-being of the child. [See: ***Nil Ratan Kundu v Abhijit Kundu*** reported in **2020 (12) SCC 248** at **paragraph 17**].

It is well settled that while deciding the matters of custody of a child the welfare of the child is primary and paramount. If the welfare of the child so demands, then technical objections cannot come in the way. The Courts

are expected to decide the issue of custody on a paramount consideration which is in the best interest of the child.

It is the duty of the Court to ensure that the child is required to be kept away from negative influences and stressful atmosphere. In a catena of decisions it has been held that in dealing with a matter concerning a minor, the court has a special responsibility and it is the duty of the court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the court has to be guided by the only consideration of the welfare of the minor. [See: ***Sheoli Hati v Somnath Das***, reported in **2019 (7) SCC 490**].

In ***Gaurav Nagpal v Sumedha Nagpal***, reported in **2009(1) SCC 42** at paragraph 28, the Hon'ble Supreme Court has lucidly explained the word "welfare" in the following words:

*"50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently 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."*

*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.” (emphasis supplied)*

During the pendency of this matter, the appellant filed an application on 4th January, 2023 for modification of the order dated 20th December, 2018. In the said application, the following prayers were made:

“(i) The Opposite party may be allowed in every weekend at a fixed time at the present resident of the petitioner instead and/or in place “one week the father shall go during the weekend to fetch the child and to drop him back, whereas in the following week the mother shall have to do the same job” as per the order dated 20.12.2018;

(ii) Allow your petitioner to shift and/or change the school of her minor child from Sister Nibedita Public School to the Techno Global School, Malda in the coming Sessions;”

The contention of the wife that the child was duly taken care of at her present residence is completely belied by the candid statements of the child that sometimes during few weekends, the maternal grand-parents used to come to give company to him but due to distance and old-age, such visit was infrequent. The opposite party during his cross-examination has admitted

that when the male child was suffering from physical ailments, she did not inform the father about such illness and physical discomfort. She being all alone it would be difficult for her to provide proper medical treatment to the son and it would not be proper to keep the child completely unattended during the absence of her mother. The child should not be turned into a virtual recluse as it would likely to cause physical and psychological disorder for the child. He should have a happy upbringing and it is the responsibility of both the parents to provide the child good care and healthy atmosphere so that he can blossom and develop as a good human qualities and good behaviour. Good and proper parenting is essential for the healthy development of the child. The evidence on behalf of the applicant-father would overwhelmingly show that in his house the child had all the facilities which would enable him to grow as a proper human being. When the joint family for various reasons are now on decline and fragmented and dwindling, it needs to be appreciated that the grandparents and the uncle of the child are living together in a joint mess and had showered lots of love and affection upon the child. The child has also admitted in his brief interaction that he was extremely happy at his father's place at Balurghat. The child did not complain of any rude behaviour of his father. The appellant could not establish even prima facie that applicant-father or his family members was unsympathetic, insensitive or irresponsible towards his son or the respondent lacked any quality of a father. Creation of any unwanted situations in order to separate the child from the father should not be

condoned or encouraged just because the applicant is the mother of the child. There are numerous instances where the father was able to fill up the void created by the absence of the mother. We could not find any justification for removing the child from Techno India to a comparatively lesser known school at Balurghat and then to flee away from Balurghat to Malda and admit the child in a school which is admittedly not at par with Techno India. These frequent change of place and school are bound to affect the child adversely. This is not in the best interest of the child. The conduct and behaviour of the respondent does not inspire the confidence of the Court that the child would receive adequate comfort, care, love and affection at his present place of stay. The frequent change of school along with lack of caring and empathy at the present place persuaded us to affirm the order under challenge with some modifications.

All the judgments relied upon by the appellant, in fact, supports our conclusion. To avoid any repetition we may say that the child has admitted his loneliness at the present residence. After he returned from his school there was none in the house to look after him. The maternal grand-parents visit the house infrequently. The child did not get the warmth and caring of his maternal grand-parents due to their unavailability. The submission that the grand-parents frequently visit their daughter at Malda and used to look after the child are not borne out from the affidavit in chief and other evidence of the appellant. There is also lack of evidence to show that the sister of the appellant stays nearby and had taken due care of the child in absence of her

mother. The educational qualifications of the grand-parents would not be a factor in deciding the overall development of the child. They are literate and had taken care of the child. The evidence shows that all the family members of the father are intimately connected with the child. At his father's place he has a sister to play with and spend time. It cannot be said that the educational qualification of the respondent or his parents, brother and uncle are not suitable for an overall growth and development of the child. That the happiness of the child lies in staying with his grand-parents and the other family members of the respondent is adequately reflected in interaction the child had with the learned trial Judge as well as with us. The child is intelligent and matured enough to decide his custody. He is capable of forming an intelligent preference regarding his custody. The child also expressed his strong desire to live at his father's place with both the parents.

The father's fitness to be the guardian, the love and affection of the grandparents for the minor, the environment and atmosphere at father's place, the education and favourable surroundings at the said place and above all physical and mental comfort the child is likely to receive at father's place and the desire of the child has persuaded us to give custody of the minor to the father and affirm the order under appeal with modification.

Although the guardianship and custody of the minor will be with the respondent it is fair that the applicant- mother has occasion to meet her only child as the requirement of the mother is equally needed for a healthy growth

of the child we make a direction that during the summer, Puja festival and winter vacation of the school the appellant will be entitled to take the son from the respondent's home or from the office of the DLSA at Balurghat as the parties may mutually agree for a period not extending over 10 days and return the child thereafter at a place to be mutually decided. In all, the appellant mother will be entitled to keep custody of the minor for a period not exceeding one month in a year. If there is any obstruction and resistance offered by the respondent- father in the appellant-mother taking the minor son with her it will be open to the appellant-mother to approach the District Court, having jurisdiction over the place where the minor son resides, for deputing an Officer of the court to take the minor into custody and make over such custody to the appellant-mother. Likewise, the respondent-father shall be entitled to take the minor child back from the custody of the mother-appellant at the end of the period as fixed by this order. In case the appellant-mother obstructs or otherwise creates difficulties in the way it shall be likewise open to the respondent father to move the district court concerned to depute an Officer to see that the minor's custody is secured by her.

In addition to aforesaid, the appellant-mother shall be entitled to interact with the child over mobile phone, landline, Zoom, Google Meet or Skype that may be convenient during the weekends at a mutually agreed time and she will also have the visitation right twice in a month during the

weekends on a fortnightly basis upon prior intimation to the respondent-father at a place and time to be mutually decided by the parties.

In view of the aforesaid order, we would request the Principal of Techno India Group Public School at Balurghat to readmit the minor in the appropriate class at the earliest so that the academic year of the minor is not affected. The appellant-mother shall make available all documents including the transfer certificate in facilitating such admission.

The appellant is directed to hand over the custody of the child to the respondent within one week from date in the office of DLSA, Balurghat upon prior intimation to be Secretary DLSA, Dakshin Dinajpur and the respondent- father.

We sincerely hope and trust that the parents shall ensure that the welfare of the child and his growth and development is taken care of with all seriousness and they shall not conduct themselves in any manner prejudicial to the interest of the child.

With the aforesaid modification the appeal and the connected applications are disposed of.

A copy of this order shall be immediately forwarded to Secretary DLSA, Dakshin Dinajpur for information and doing the needful.

However, there shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)