

Before Sudip Ahluwalia, J.

MUKTA AGARWAL—*Petitioner*

versus

VINEET GUPTA—*Respondent*

CR No.1929 of 2019

August 30, 2019

Guardians and wards Act, 1890—Ss.9 and 25—Custody of minor daughters—Minors to continue to be with their father—On personal interaction, the children affirmed their right to stay with their father—They further objected to the visitation rights with the mother as it was interfering with their activities—Girls were happy with their existing school, teachers and friends—They were old enough to form intelligent preference—No viable material on record to show that the father tutored them or treated them with cruelty—No reason to unnecessarily dislocate children from the custody of the father—Petition filed by mother seeking custody of daughters dismissed.

Held that, the considered opinion of the Court that at this juncture, interim custody of the minor children should not be granted to her.....During interaction with the minor children particularly on 17.8.2019, this Court could gather that they do not want to go into the custody of the Petitioner/mother at this stage and stated firmly that they want to live with their father. It may be argued that being of such tender age, the minor children could have been tutored by their father to make such representations before me in my Chamber, or are otherwise not matured enough to comprehend that where their ultimate welfare lies. But the elder daughter Sharanya Mohan went to the extent of telling me that she is not happy even with the existing arrangement of visitation rights in favour of the Petitioner/mother, by which, the girls remain with her in the weekends..... Both the minor children also stated that they are very happy with their Teachers and friends in the School, and do not wish to leave their company at this stage.

(Para 22)

Further held that, the above judgment is in full consonance with Section 17(3) of the Act of 1890, which provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference.

(Para 24)

Further held that, there is no justification at this stage to unnecessarily dislocate them from their father's custody, particularly considering that there is no verifiable material on record that the children at any time have been mistreated or subjected to any kind of cruelty or trauma by their father/Respondent, nor have they themselves suggested anything of this nature against their father during their interaction with me.

(Para 26)

S.D.Singh, Shweta Sinha, Vaibhav Goel and
Anu Garg, Advocates
for the Petitioner.

Alok K. Jain, Advocate
for the Respondent.

SUDIP AHLUWALIA, J.

(1) This Revisional Application is directed against the Order dated 25.2.2019 passed by the Ld. Additional Principal Judge, Family Court, Faridabad, whereby the Application moved by Ms. Mukta Agarwal-present Petitioner seeking grant of interim custody of her minor daughters namely Sharanya Mohan and Arunima had been disposed off.

(2) Vide the impugned Order, the Ld. Court below had virtually disallowed the Application of the Petitioner seeking the interim custody of her daughters, who are presently residing with their father/Respondent in the present case. The Ld. Court below nevertheless permitted the Petitioner/mother to pick up the minor girls from their present home in Noida on each Friday at 5.30 P.M. and take them to her own residence at Faridabad, and thereafter return their custody at Noida by 3 P.M. on Sunday, apart from directing the Respondent to make the minor daughters talk to the Petitioner on telephone on every Sunday, Tuesday and Thursday between 7.00 p.m. to 8.00 p.m. In addition, the Ld. Court below also granted liberty to both sides to seek variation and alteration of the aforesaid arrangement if any exigency of the situation so demanded. The relevant operative portion of the impugned order is contained in Para 25 of the same, while liberty to seek alteration/modification is in para 27, and those observations are set out below -

“25. Having regard to the peculiar facts and attending circumstances in this case, and to see the welfare and the

interest of the minor girls, at this stage of proceedings, I am unable to accept the application for interim custody preferred by the petitioner- mother. However, her concern, being mother of the minor girls, can not be totally ignored and overlooked. Hence, to my view, interest of justice shall be amply met if she is granted appropriate and suitable visitation rights of the children. Accordingly, it is ordered that on 1st and 3rd Friday of every month, the petitioner-Ms. Mukta Aggarwal shall pick the minor girls from their home at Noida at 5:30 p.m. and take them with her at Faridabad, and then the petitioner will drop the minor girls back to Noida latest by 3:00 p.m. on Sunday, i.e. after spending almost two days with the minor girls. The respondent shall also make the minor daughters talk to the petitioner on telephone on every Sunday, Tuesday and Thursday of the week between 7:00 p.m. to 8:00 p.m.

26. xxxxxxxx

27. As sequel to the findings recorded above, this application for interim custody stands disposed of accordingly. However, it is made clear that this is purely an interim arrangement and the parties are left at liberty to move application for variation and alteration of the aforesaid arrangement, only if warranted and justified in changed situation, or in case consequences of the aforesaid arrangement ordered turn out to be such which necessitate alteration or modification therein, but for the welfare of the children. The parties to this lis are directed to comply with the order of grant of visitation rights to the petitioner and other directions passed herein meticulously, and they will fully cooperate with each other. It is also expected that they would not poison the ears of the minor children against the opposite side.”

(3) The aggrieved Petitioner has now challenged the impugned Order. It may be mentioned that at an earlier stage, the Respondent/husband had apparently challenged the maintainability of the Petitioner's original Petition u/s 25 of the Guardian and Wards Act *inter-alia* on the ground of defect of Territorial jurisdiction of the Ld. Court below. His application for rejection of the original Petition was however, dismissed by the Ld. Court below on 18.10.2018, after which, he filed CR No.8160 of 2018 in this Court, which was

thereafter withdrawn by him with liberty to take objection regarding Territorial jurisdiction. While granting him such liberty, a Coordinate Bench of this Court also directed the Ld. Court below to endeavour to dispose off the main Petition itself within a period of nine months. Such order of the Coordinate Bench was passed on 1.12.2018, and is set out below -

“After arguing the case at length and realising the difficulty in persuading the Court, learned counsel for the petitioner seeks permission of the court to withdraw the revision petition with liberty to take objections with regard to territorial jurisdiction which shall be decided by the Court, while adjudicating upon the main petition.

Dismissed as withdrawn with the aforementioned liberty.

However, keeping in view the fact that custody of two minor girls are in dispute, it is directed that the learned family court would make sincere attempt to dispose of the main petition itself within a period of nine months positively. The learned family court shall be at liberty to proceed with the matter irrespective of the fact that whether the parties cooperate or not.”

(4) It has since been informed by Ld. Counsel for parties that before completion of the stipulated period of nine months, the Ld. Court below had itself sought extension of time citing certain circumstances warranting such extension, and that thereafter time has been extended for a further period of six weeks by the Bench.

(5) Having thus been apprised about the aforesaid background of the separate litigation between the parties arising out of the original Guardianship Petition, it would be appropriate to now advert to the merits of the case as urged on behalf of both sides. The Petitioner/mother of the minor girls, apart from seeking their custody u/s 25 of the Guardian and Wards Act, had also sought their interim custody u/s 9 by contending *inter-alia* that she was married to the respondent on 28.11.2004, and from their wedlock the above named daughters were born. She alleged that the respondent had abandoned her and the daughters for about 2½ years from 24.8.2014 to 3.3.2017, and during that time he did not care for their maintenance and wellbeing, and she (petitioner) single handedly took care of them, be it their education, sustenance, comforts and upbringing, at her parental home at Faridabad. It was also pleaded that she is a highly qualified

woman, having passed MA in Mass Communication and M.Sc. in Sustainable Development, and further that she has been in Government Service for the last 13 years, and at present, is posted as Manager in National Fertilizers Limited, a Public Sector Undertaking. She pleaded that she had made every effort for reunion with the respondent for the welfare of the minor girls, and in pursuance thereto and giving another chance to her married life, in March 2017 she alongwith the minor girls shifted to Noida with the respondent. But, as alleged, her hopes got shattered since the respondent continued to treat her with cruelty, and on 16.2.2018 his sister disappeared with the minor girls from their house, and since then the petitioner-applicant has been deprived of the custody of her daughters, and on 27.2.2018 she was also ousted from the house at Noida. Consequently, she, being deserted and illtreated took shelter at her parental home at Faridabad. In order to substantiate her claim for interim custody, it was further pleaded that the minor girls at such tender age of about 7 years and 5 years need the care of their mother the most. Added to it, the petitioner is also supported by her parents, and her father is retired class-I Government Officer, who took all pains to provide upbringing and comforts to the minor girls at the time when the respondent had left them in the lurch. More so, as alleged, the respondent remains busy in his official assignments, and has a transferable job, and his parents, being of the age of 70 and 67 years respectively, are suffering from diabetes, erratic B.P. etc. Inter-alia, on these grounds claiming herself to be better suited person, the petitioner in her separately filed application had prayed for granting interim custody of the minor girls to her till disposal of this petition.

(6) The Respondent opposed the Petitioner's Claim by contending that her Application was in fact a counter blast to his divorce petition already filed against her on the grounds of adultery and cruelty, at Gautam Budh Nagar. He reproduced the parts of some of the telephonic conversation allegedly between the petitioner and another person to plead that the petitioner being a characterless woman was not suited to keep custody of the minor girls. It was averred that the petitioner used to spend time with her paramour depriving the children of motherly love and affection at the time when it was most needed. It was also pleaded that on 24.8.2014, the petitioner took away both the minor girls forcibly and against the wishes of the respondent and his parents, and thereafter he made numerous efforts to patch-up for the welfare of the children, but the petitioner remained as obstinate as ever, and threatened the respondent and his parents to implicate them in false criminal cases. He further pleaded that on 27.2.2018, the petitioner left

her matrimonial home with bag and baggage, and abandoned the minor girls at Noida with an oblique motive to lead unchaste life with her paramour.

(7) The Respondent's further contention was that being a keen academician and in a settled Government job, he had been taking good and proper care of the minor girls with the assistance of his mother, who is a retired teacher, and his father, who is a retired Central Government servant, and on account of their painstaking efforts, the girls had been doing fairly well in their studies and extra-curricular activities. As pleaded, both the minor girls were enrolled in the Stroke Art Institute, one of the best Drawing and Painting Schools of Noida during the summer vacations in year 2018, and they were learning 'Kathak dance' under one of the best classical Danseuse in the Krishna Kala Dance School at Noida. The daughter named Sharanya was learning Tennis in one of the best Academies at Noida. Besides, the respondent had been personally teaching the minor girls, besides providing other comforts and entertainment to them. It was averred that the minor girls had also been taken to various places of religious, cultural and educational importance by him.

(8) After having heard both sides and considering the various case laws cited by them, the Ld. Court below passed the impugned Order, in which, note was also taken of the allegations made by the Respondent against moral conduct of the Petitioner by alleging that she was in an adulterous relationship with one Amit Garg and such adultery, apart from physical/mental cruelty was the main ground in his Divorce Petition, while he had also filed a separate criminal complaint against the said Amit Garg in the Court of Ld. Addl. Chief Judicial Magistrate at Noida.

(9) The Ld. Court below has observed in the impugned order that the truth of the allegations and counter allegations made by the parties against each other cannot be verified at this stage. It was however, of the opinion that the Petitioner had failed to lead "any, much less clinching, material to show that the welfare of the minor daughters is at peril and calls for an interference. The trauma that the children are likely to experience in the event of change of such custody pending proceedings before the court, will have to be borne in mind. Here I am conscious of the emphasis laid by the learned counsel for the petitioner that the lap of a mother is the natural cradle where the safety and welfare of the children can be assured and there is no substitute for the same, but still I feel that at this stage of the proceedings, it would

not be appropriate for me to uproot the children from their place and school at Noida. More so, the question of jurisdiction of this court to decide the custody issue of the children is still open, to be decided after the evidence is led by both the sides.”

(10) This Court has heard Ld. Counsel for both sides in detail, and also considered the citations relied upon by them. In addition, the Court has interacted with the two minor girls on more than one occasion. They appeared before me in my Chamber on 28.5.2019, which was just before closing of the Court for Summer Vacation, when a decision had to be taken regarding their custody for such vacation period as their School was otherwise to remain closed. Subsequently, the children again appeared in Court on 17.8.2019 when hearing in the Revisional Application was virtually at the concluding stage. This Court after interaction with the children took their views and preferences qua their own custody, a course which somehow had not been resorted to by the Ld. Court below, which in its impugned order on the contrary was of the opinion that in the given facts and circumstances, direct interaction with the children would not have been appropriate. The relevant observations in this regard are contained in Para 15 of the impugned order, which are set out as below -

“15. Adverting to this case, the minor girls are staying away from the mother for the past one year. In view of the hostility between the spouses and to see the tender age of the minor daughters and their fragile minds and attending circumstances of the case, interviewing of the minor girls would not be appropriate exercise at this stage, as they may not be able to give their positive view points and form a definite preference as to with whom they want to stay.”

(11) Having analyzed the impugned order, this Court has identified the following major reasons, which appear to have swayed its decision regarding retention of interim custody with the Respondent/father, in preference to granting the same to the Petitioner/mother -

(i) That some extent, the Court was cognizant of the contention that it might not have Territorial jurisdiction to entertain the main Petition itself considering the Respondent's contention that the minor children are 'ordinarily' residing with him at Noida i.e. Beyond the Court's jurisdiction. Of course, this contention regarding

defect of jurisdiction in itself was not the major reason for declining the Petitioner's prayer;

(ii) The Ld. Court below in Para 22 of the impugned order has referred to a Delhi High Court's decision in '**Ruchika Bindra** versus **Harvinder Singh**', after which, it appears to have taken the view that awarding interim custody to the Petitioner/mother in a way would also amount to granting the final relief of children's custody in her favour, which is against the canons of ordinary jurisprudence ;

(iii) The Ld. Court below also appears to have been concerned with the nature of allegations made against the Petitioner/mother regarding her moral character and of being involved in adultery with one Amit Garg, although of course, the truth or otherwise of such allegations is a matter of trial. But in adopting the usual course in dealing with applications for any interim relief, the Ld. Court below appears to have considered the allegations against the Petitioner as "prima facie" reason enough to infer that mental/psychological development of the minor girls might be compromised if they were to be placed under their mother's custody;

(iv) Further, the Ld. Court below was of the view that dislocation of the minor children from their present school during the middle of an Academic Session cannot be in the interest of their overall welfare; and,

(v) The Ld. Court below, without endeavouring to directly interact with the minor children, was nevertheless also of the view that their dislocation from their present place (i.e. Father's house in Noida) could cause some Trauma to them.

(12) Ld. Counsel for Petitioner during the course of his arguments has submitted that none of the above mentioned five reasons is tenable for the purpose of refusing interim custody to his client. It has been asserted first of all that it is judicially recognized that in a custody matter, the place of residence of either of the parents, and especially that of the mother itself confers Territorial jurisdiction upon the concerned Court to entertain a Custody Petition (See : **Lakshmi Bhat** versus **C.H.Venkata Krishna, Mat. A. No.192 of 2010**, dated 25.3.2010; **V.Vasu** versus **Muralidharan, Mat. A. No.137 of 2008** dated 13.1.2009; **S. Prabhu** versus **Rajani R., M.A. No.177 of**

2006 dated 25.1.2007 (*Kerala*); *Amit Kashyap* versus *Pooja CR No.6683 of 2016 (O&M)* dated 19.12.2016; *Chiranjeev Singh Saini* versus *Baljit Kaur Saggoo CR No.3288 of 2017* dated 16.8.2017 and *Sarbjit* versus *Piara Lal and Ors.*¹ dated 1.4.2005 (*Punjab & Haryana*).

(13) It has also been stressed that in custody matters, the paramount consideration before the Court is ensuring the welfare of the minor child (ren) and not the legal rights of the contesting parties, and that in such circumstances, even interim custody, so long as it would be to the benefit of the child, cannot be refused merely on account of the legal nicety that the final relief claimed in a proceeding should not be granted at an interim stage. (*J. Finny Jefferson* versus *S.Ponsiro Bella CRP (PD) (MD) No.383 of 2009* dated 25.8.2009 (*Madras*); *Vinod Kumar* versus *Smt. Riya CR No.8360 of 2015* dated 9.12.2015; *Preet Ranjan Kaur* versus *Harjit Singh & another Amended Crl. W.No.978 of 2012* dated 16.11.2012 (*Punjab & Haryana*) and *Pavithra K.* versus *Vamshi Krishna G. Writ Petition No.52861 of 2017* dated 11.1.2018 (*Karnataka*).

(14) Regarding observations of Ld. Court below that allegations of adultery made against the Petitioner, although as yet unproven, nevertheless constitute sufficient “prima facie material” to infer that putting the minor children in her custody could have adverse effect on their overall welfare, mental and psychological development, it has been emphasized that such allegations of adultery are irrelevant and the evidence to prove the same as sought to be led by the Respondent is itself inadmissible, having been gathered by illegal tapping/hacking of the Petitioner's Phone Calls and electronic communications. (*Rayala M. Bhuvaneswari* versus *Nagaphanender Rayala*²; *Vishal Kaushik* versus *Family Court and Another CWP No.14726 of 2013 decided by Rajasthan High Court on 26.5.2015*; *Mary Vanitha* versus *Babu Royan* (1991) 2 MLJ 231; *J. Finny Jefferson* versus *S. Ponsiro Bella CRP (PD) (MD) No.383 of 2009* dated 25.8.2009 (*Madras*); *Vinod Kumar* versus *Smt. Riya CR No.8360 of 2015* Dated 9.12.2015 (*Punjab & Haryana*); *Prabhati Mitra* versus *D.K.Mitra*³ and *Rosy Jacob* versus *Jacob A. Chakramakkal*⁴.

¹ (2005) 140 PLR 692

² AIR 2008 AP 98

³ 25 (1984) DLT 186 (Delhi)

⁴ 1973 AIR 2090 (SC).

(15) The Petitioner's side has further gone on to contend that even in a case where allegations of adultery against the mother are otherwise established such as by way of conviction of the person with whom she was in adulterous relationship for the offence of adultery u/s 497 IPC still that would not be a disqualification against the mother for grant of custody of her minor daughters (***Rama Shanker*** versus ***Smt. Rama Beti Alias Sharda***⁵).

(16) Regarding the apprehension of the children's Academic Pursuits being compromised on account of their dislocation from their present School during the middle of Academic Session, the Petitioner alongwith her subsequent affidavit filed on 17.8.2019 has placed copy of a Certificate dated 18.5.2019 (Annexure A-I) issued by the Principal, Delhi Public School, Sector 11-D, Faridabad, in which it has been mentioned -

“This is to certify that Arunima for class-I and Sharanya for class- III have cleared the admission tests and now they are eligible for admission in this School.”

(17) In this regard, the submission of the Petitioner in her affidavit is that the proposed Delhi Public School, Faridabad carries the same CBSE Curriculum Syllabus, which is followed by the present School of the minor children, and as such there would be no change and hurdle for her two minor daughters in pursuing their studies for Classes-I and III respectively in Faridabad. The Petitioner has further mentioned in her affidavit -

“4. That I further undertake that I will make all other arrangements for the studies of my minor daughters and for their overall development in the best interest of the minors, at a level that will be even better in comparison to what is being provided by the Respondent to the minor daughters. I also undertake that I can get my minor daughters admitted in any alternative school in Faridabad other than DPS, if it is found necessary subsequently. Faridabad is a well-regarded centre of education in the Delhi NCR region and has many high quality schools.”

(18) In this manner, it has been urged on behalf of the Petitioner that the first four reasons as noted in earlier Para 11, which influenced the Ld. Court below in refusing her prayer for interim custody of the

⁵ 1979 WLN UC 219

minor children are all without any actual substance. Thereafter, it has also been contended on her behalf that a mother is the best person to look after the minor daughters in comparison to any one else including father and welfare of the minor daughters would be better served/promoted with the mother, who is recognized to be entitled to have custody of the minor daughters till they attain puberty and thereafter even during the period of adolescents between the age of 14 and 18 years. (*Rosy Jacob* versus *Jacob A. Chakramakkal*⁶; *Vivek Singh* versus *Romani Singh Civil Appeal No.3962 of 2016 (SC)*; *Prabhati Mitra* versus *D.K.Mitra*⁷; *Vinod Kumar* versus *Smt. Riya CR No.8360 of 2015 Dated 9.12.2015 (Punjab & Haryana)*; and *J. Finny Jerfferson* versus *S. Ponsiro Bella CRP (PD) (MD) No.383 of 2009* dated 25.8.2009 (Madras).

(19) The decision of Kerala High Court in *Mathew Varghese* versus *Rosamma Varghese*⁸ has also been cited to contend that where father of the minor children abandons them, or fails to perform his duties as father, he stands to be disqualified from their custody, and, in any case, relying on Supreme Court's decision in *Rosy Jacob's* case (supra) it has been argued that even where a father is affectionate and no disqualification in case of a daughter, he still would not have an indefeasible right to her custody and even in such situation the daughter's mother would be the preferred custodian.

(20) To further support her contention, the Petitioner in her affidavit dated 17.8.2019 has also informed that in the interregnum, she had been granted promotion by her employer 'National Fertilizer Limited', and was transferred to Bathinda for joining her promotional post as a Senior Manager. She however, declined acceptance of the promotion offered to her as that would have entailed her physical movement to Bathinda, which could have had the effect of displacing her from her present residence in Faridabad, where she lives with her parents and other family members, who otherwise being cultured and gentle people can look after the minor children even when she has to attend her office in Noida where she is presently posted. In fine, contention of the Petitioner in this regard is that she has thus gone out of her way in seeking to secure the welfare of her minor daughters by ensuring that they would not be left unattended in her house even if

⁶ 1973 AIR 2090 (SC)

⁷ 25 (1984) DLT 186 (Delhi)

⁸ 2003 131 TAXMAN 646 Ker

she has to attend to her normal duties in the office. In this manner, the Petitioner has sought to emphasize that the minor children would be better looked after in her parental house during her absence while on official duty, by her own parents and other family members, who according to her, are in a much better position to look after them in comparison to the Respondent's parents, who are aged and not in a very good health, and his family member(s), such as his divorced sister, who it is sought to be made out, could actually cause damage to the children's development considering her own antecedents. The Petitioner in Para 14 (iii) of her Rejoinder filed in the Ld. Court below had asserted that the Respondent's said sister and other family members had all along been misbehaving and subjected her husband to physical and mental torture by various means, and had "forced" him to agree to dissolution of his marriage by a Decree of the concerned Court, after which, the said divorced husband of the Respondent's sister has re-married.

(21) Such reference to private life of Respondent's sister in the opinion of this Court however, is rather uncalled for. The assertion that the Respondent's sister's husband, who according to the Petitioner, is now remarried to some one else had been "forced into" seeking dissolution of his marriage with the Respondent's sister is apparently an allegation in the nature of 'biting off more than the accuser could chew'. An assertion that a party to a Petition for dissolution of marriage by mutual consent was "forced into" agreeing for such dissolution would only tend to cast aspersions on the conduct/competence of the particular Court, which had granted the Decree for such dissolution, to the effect that it had failed to satisfy itself that the Petition for dissolution of marriage had not been filed by both the spouses voluntarily or with their free consent. In the opinion of this Court, such unnecessary assertion in the Petitioner's Rejoinder certainly does not strengthen her case for interim custody, but has the effect of suggesting that her attitude towards her husband and his family members is hostile and malicious, and placing the minor children in her custody could have the undesirable effect of exposing them to malicious/vindictive talk against their father's family members.

(22) This Court has considered all the above submissions made on behalf of Petitioner, as also applicability of the case laws cited from her side to the facts and circumstances of the present case. It is however, the considered opinion of the Court that at this juncture, interim custody of the minor children should not be granted to her.

This is so because as already noted, there is a direction upon the Ld. Court below by a Coordinate Bench of this Court to finally dispose off the main Application for custody within a fixed time framed, while the original time for that purpose mentioned in the earlier order dated 1.12.2018 ends tomorrow itself. The extended time of six weeks granted could thereafter the proceedings for about another 1½ month. During interaction with the minor children particularly on 17.8.2019, this Court could gather that they do not want to go into the custody of the Petitioner/mother at this stage and stated firmly that they want to live with their father. It may be argued that being of such tender age, the minor children could have been tutored by their father to make such representations before me in my Chamber, or are otherwise not matured enough to comprehend that where their ultimate welfare lies. But the elder daughter Sharanya Mohan went to the extent of telling me that she is not happy even with the existing arrangement of visitation rights in favour of the Petitioner/mother, by which, the girls remain with her in the weekends. The minor daughter explained that she had been selected for playing some part in a Function to be organized in her School on the occasion of “Janmashtami” this year. For that purpose, she was required to participate in the rehearsal on the weekends, but it was not possible because she had to go to the Petitioner's house in view of the direction contained in the impugned order, as a result of which, the minor child had ultimately to be excluded from participation in the concerned Function. Both the minor children also stated that they are very happy with their Teachers and friends in the School, and do not wish to leave their company at this stage.

(23) In *Nil Ratan Kundu and another* versus *Abhijit Kundu*⁹, it was noted by the Supreme Court *inter-alia* -

“71. In the instant case, on overall considerations we are convinced that the Courts below were not right or justified in granting custody of minor Antariksh to Abhijit-respondent herein without applying relevant and well-settled principle of welfare of the child as paramount consideration. The trial Court ought to have ascertained the wishes of Antariksh as to with whom he wanted to stay.

72. We have called Antariksh in our chamber. To us, he appeared to be quite intelligent. When we asked him

⁹ (2008) 9 SCC 413

whether he wanted to go to his father and to stay with him, he unequivocally refused to go with him or to stay with him. He also stated that he was very happy with his maternal grand-parents and would like to continue to stay with them. We are, therefore, of the considered view that it would not be proper on the facts and in the circumstances to give custody of Antariksh to his father, the respondent herein.

73. For the foregoing reasons, the appeal deserves to be allowed and is accordingly allowed. The application filed by the respondent Abhijit for custody of his son, Antariksh, is ordered to be dismissed. In view of the facts and circumstances of the case, however, there shall be no order as to costs.”

(24) The above judgment is in full consonance with Section 17(3) of the Act of 1890, which provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference. In this particular decision, the concerned minor child who was aged six years was found to be quite intelligent by Hon'ble Judges of the Court, who interacted with him in Chambers, and on his refusal to go and stay with his father and in view of his preference for his grand parents, the father's request for having his custody was rejected.

(25) In *Gaytri Bajaj* versus *Jiten Bhalla*¹⁰, it was observed by the Supreme Court inter-alia -

“14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasised is that while all other factors are

¹⁰ (2012) 12 SCC 471

undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court. (Emphasis added)

15.....

16. Taking into account all the aforesaid facts, we dismiss these appeals, affirm the impugned orders passed by the High Court of Delhi and deny any visitation rights to the petitioner and further direct that the children would continue to remain in the custody of their father until they attain the age of majority.”

(26) In view of the observations recorded in the preceding Para Nos.21 to 25, this Court is again therefore, of the opinion that when a final disposal of the main Guardianship Petition of the Petitioner appears to be not very far away in point of time on account of direction of a Coordinate Bench upon the Ld. Court below, and unambiguous desire of the minor children themselves is to remain in their father's custody and continue to study in their present School, there is no justification at this stage to unnecessarily dislocate them from their father's custody, particularly considering that there is no verifiable material on record that the children at any time have been mistreated or subjected to any kind of cruelty or trauma by their father/Respondent, nor have they themselves suggested anything of this nature against their father during their interaction with me.

(27) For the above reasons, the present Revisional Application is dismissed. The Trial Court in disposing off the pending Guardianship Petition finally as directed by the Coordinate Bench of this Court is however, requested to also interact with the minor children before taking a final decision, a course which it had not adopted earlier before deciding the Petition for interim custody.

Payel Mehta