

HIGH COURT OF TRIPURA

Bench: JUSTICE T. AMARNATH GOUD

Date of Decision: 12 October 2023

Crl. Petn. No. 22 of 2023

1. Shri Rakesh Chandra Saha, son of Shri Jadab Chandra Saha.
2. Shri Jadab Chandra Saha, son of late Raimohan Saha.
3. Smti. Mukul Saha, wife of Shri Jadab Chandra Saha.

.....Petitioners**V E R S U S**

Smti. Puja Dey Saha, wife of Shri Rakesh Saha

..... Respondent.**Sections, Acts, Rules, and Articles:**

Section-13B of the Hindu Marriage Act 1955 (HMA)

Section-498A of IPC

Section 21 of the Protection of Women from Domestic Violence Act, 2005 (DV Act)

Guardians and Wards Act, 1890

Section 6 of the Hindu Minority and Guardianship Act, 1956

Subject: Child custody dispute between parents, with a challenge to the custody order dated 01.09.2023 passed by the learned Additional Sessions Judge. Appellants seek redress against the order, claiming it lacks proper reasoning and may not consider the welfare of the minor child. The conduct and income of the respondent are brought into question, and the provisions of the Hindu Minority and Guardianship Act are discussed. Appellants contend that the appellate court's decision appears arbitrary and that there is prima facie evidence suggesting the respondent may not be a suitable custodian.

Headnotes:

Child Custody Dispute under DV Act - Challenge to custody order - Appellants seeking redress against an order dated 01.09.2023 passed by the learned Additional Sessions Judge - Dispute arose after respondent left matrimonial house and eloped, later filing a case against appellants under DV Act - Trial Judge initially granted temporary custody to the respondent - Appellate court reversed the order without sufficient reason - Appellants contend that the appellate court failed to consider the welfare of the minor child - Argument presented that respondent's conduct and lack of income make her an inappropriate custodian - Appellate court's decision appears arbitrary and lacks proper reasoning - Prima facie evidence suggests respondent may not be a suitable custodian - Provisions of Hindu Minority and Guardianship Act also brought into question - Appellants seek redress for the order, claiming it to be a nullity in the eye of the law. [Para 1-22]

Child Custody – Welfare of the Child – Custody dispute between parents – Court's paramount consideration is the welfare and interest of the child, not the rights of the parents under the statute – The child's psychology and well-being must not be hampered – Custody arrangements should be made to ensure the child's access to both parents. [Para 23-33]

Visitation and Contact Rights – Even if custody is given to one parent, the other parent should have sufficient visitation and contact rights – Courts should define the nature, manner, and specifics of visitation rights – Efforts should be made to give maximum visitation rights to the non-custodial parent – Contact rights should include methods like phone calls, email, and video calls. [Para 32-33]

Best Interest of the Child – In deciding child custody matters, the primary consideration is the child's welfare – Technical objections should not hinder decisions – Courts must weigh all circumstances carefully – Children, especially young ones, need the love, affection, and protection of both parents – Maintaining contact with both parents is essential – Courts should encourage overnight custody arrangements when feasible. [Para 29-31, 34]

Parental Disputes – Custody disputes can be detrimental to the child's well-being – Negotiated settlements between parents are preferable for the child's future relationships – Parents should prioritize the child's interests over their differences – The child's psychological balance is affected by parental conflict. [Para 38-40]

Custody Decision – Custody decisions should prioritize the child's interests and welfare – The desire and welfare of the child are crucial considerations – The child should not be deprived of the love and affection of both parents – Custody arrangements should be designed to ensure the child's access to both parents. [Para 41-45]

Referred Cases:

- Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42
- Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413

Representing Advocates:

For Petitioner(s): Mr. B. N. Majumder, Sr. Advocate, Mr. S. Lodh, Advocate. Mr. B. Paul, Advocate.

For Respondent(s): Mr. P. Roy Barman, Advocate. Mr. S. Bhattacharjee, Advocate

JUDGMENT & ORDER [ORAL]

Heard Mr. B. N. Majumder, learned senior counsel and Mr. S. Lodh, learned counsel assisted by Mr. B. Paul, learned counsel appearing for the petitioners also heard Mr. P. Roy Barman, learned counsel assisted by Mr. S. Bhattacharjee, learned counsel appearing for the respondent.

- [2] The present petition has been filed under Section-482 of Code of Criminal Procedure for setting aside the impugned judgment passed by the learned Additional Sessions Judge, Gomati Judicial District, Udaipur in Criminal Appeal No.14 of 2022 dated 01.09.2023.
- [3] The case in brief is that the petitioner Mr. Rakesh Chandra Saha and respondent Smti. Puja Dey Saha are married on 09.08.2015 and are blessed with a daughter, namely, Miss. Padmakshi Saha born 23.10.2017. Both the husband and wife stayed in Udaipur. The respondent, who is a married wife of the petitioner No-1 without intimating anything to anybody, left the matrimonial house on 27-05-2022 at about 8.30 P.M leaving behind the minor daughter, aged about 4 and half years, who was sleeping at that time. When the petitioners came to know that the respondent is missing searched for her to all known places and without finding her approached the R. K. Pur P.S. and filed a missing diary vide R. K. Pur P.S. G. D. Entry No. 27 dated 27.05.2022 and also published missing report in all leading newspapers of the state. On 06.06.2022 R.K.Pur P.S. recovered the respondent and informed the petitioner No.1, at the police station that she denied to come back the house of the petitioners even refused to go with parents. She made a declaration before the O.C. R.K.Pur PS that she had left the house voluntarily and she does not want to go back with the petitioners and will never ask for the custody of the minor.
- [4] Subsequently, the petitioner No.1 was also intimated by the R.K.Pur P.S. that the respondent eloped with another person and married another person namely Prasun Deb. Further, also declared that she will give divorce to the petitioner No.1 on mutual consent. On 23-09-2022, the respondent filed a case against the petitioners under DV Act, claiming custody of the minor daughter along with a prayer for temporary custody of the child vide No. CR (DV)55 of 2022 and CR (DV) (interim) 05 of 2022 order.
- [5] The learned JMFC passed an ex-parte order on 27-09-2022 for the custody of the child in favour of the respondent and fixed 30.09.2022 for SR/WO. When the petitioners received the information of initiation of said proceeding by the respondent, even without receiving the notice of the court, voluntarily appeared before the court on 29.09.2022 and submitted written objection detailing all the facts that the respondent had left the house of the petitioner on 27.05.2022 leaving the minor child uncared and even refused to come back when she was recovered by the police on 06.06.2022 giving a

declaration that she will never come back and will not ask for the custody of the child and will file mutual divorce case.

[6] The learned Trial Judge heard the matter on 29.09.2022 and 30.09.2022 and had recalled the interim order of custody giving liberty to the wife to seek right of visitation. The respondent did not resort to the right of visitation rather filed appeal against the said order dated 30.09.2022 and the learned Appellate court vide its order dated 01.09.2023, passed in CrI. Appeal No. 14 of 2022, without considering the facts and the contentions of the petitioners and also without coming to a conclusion that the facts of the case and without also considering that since the wife has no source of income the welfare of the minor child would be effective under the custody of the mother, reversed the order dated 30.09.2022 and allowed the custody of the child to the mother respondent which is not only illegal but the welfare of the minor child would be seriously affected.

[7] The learned counsel below after hearing the parties and appreciation of the material evidence on record has observed as under:

- “23. In the result, the instant appeal is hereby allowed.
24. Accordingly the order dated 30.09.2022 passed by the learned JMFC, Court No.2, Udaipur, Gomati Judicial District in Misc (Int.) 05 of 2022 in connection with CR(DV) 55 of 2022 is hereby reversed and set aside. The temporary custody of the minor daughter namely Miss Padmakshi Saha is hereby granted in favour of the Appellant with the visitation and access right to the Respondents on every alternate day from Monday to Sunday between 8:00 AM to 8:00 PM till disposal of the main case bearing CR(DV) 55 of 2022.
25. Thus the appeal is hereby disposed of on contest.
26. The Judgment/Order is announced in the open Court.
27. Enter the result in the relevant Register.
28. Record be consigned to the District Record Room after the expiry of appeal period.
29. Supply the copies of this Judgment/Order to the parties free of cost.
30. Send back the LC Record along with a certified copy of this Judgment/Order.”

[8] Being aggrieved by and dissatisfied with the order dated 01.09.2023 in CrI. App. No.14 of 2022 passed by the learned Addl. Sessions Judge, Udaipur, Gomati Judicial District, Tripura, the present criminal petition has been preferred by the petitioners before this Court for redress.

- [9] Mr. B. N. Majumder, learned senior counsel and Mr. S. Lodh, learned counsel appearing for the petitioners have submitted that the order dated 01.09.2023 passed in CrI. App. No.14 of 2022 is perverse, illegal and not sustainable in the eye of law. The learned Court below has miserably failed to appreciate the facts involved in this case as well as the law relevant for the purpose for deciding the question of interim custody of the minor girl, hence the impugned dated 01.09.2023 is liable to be interfered with and quashed.
- [10] It has been further contended that from a bare reading of the judgment and order dated 01.09.2023 reflects that the learned Court below has not perused the written objection filed by the petitioners as opposite parties. The learned Court below has miserably failed appreciate the power granted under the DV Act for temporary custody precedes with a condition that the learned Court feels it necessary to pass such an order of temporary custody. In the instant case the learned Court below has in no uncertain words has held in the order dated 30.09.2022 *"Hearing both the parties at length, this court has repeatedly mentioned that the first paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute and in no manner the psychology of the child shall not be hampered and as such, the custody of the child namely Miss Padmakshi Saha shall remain with the respondents. However, the aggrieved-petitioners shall be given the visitation rights with proper leave of the Court if she desires to, although no such plea has been submitted by the aggrieved-petitioners either verbally or written and for the permanent custody both the parties may approach the appropriate forum."*
- [11] The said conclusion of the learned trial Judge makes it abundantly clear that the learned Court below did not feel it necessary to give the temporary custody of the child in favour of the aggrieved petitioner on the basis of the material placed before it at the time of consideration of temporary custody of the minor child. The learned Court below has committed manifest error in substituting the satisfaction of the learned Court while dealing with temporary custody without any valid ram and reason.
- [12] The learned Court below in paragraph-9 of the judgment has dealt with the foundation based on which the order of the learned Court has been reversed. It is extraneous to notice that at the initial stage of the proceeding the Court below thought it to find that the grounds stated by the petitioners in the written objection submitted by them to the effect that the respondent is not entitled to the custody of the child has not been prove by cogent evidence. This finding

is in itself contrary to the basic principal of passing an interim relief where only with prima facie case, balance of conveniences and inconveniences and reasonable consequences of such order is to be considered as such reversing the order of the Ld. Magistrate on the score of in absence of cogent material by the petitioner's side is absolutely illegal.

[13] The learned Appellate Court although mentioned that welfare of the child has to be given more weightage over the rights of the parents but failed to explain as to how the custody of the minor child would be better taken care of by the mother respondent when she has no source of income to maintain herself and that she has left the minor child on 27.05.2022 having a slightest concern about the minor child.

[14] The learned Appellate Court did not considered that the learned Magistrate vide order dated 30.09.2022 had given a liberty to the respondent wife to seek the visitation right with proper leave of the court. But the wife respondent had never approached the learned Court for such right instead filed the appeal which itself is demonstrative of the fact that the concern of the minor daughter, as expressed in the petition for custody is nothing but a crocodile tear. The learned Appellate Court failed to appreciate the aforesaid fact.

[15] Further contention of the petitioners was that the petitioners by way of submitting the written objection to the prayer of interim custody, on the basis of information received from their sources however not received any notice from the court, appeared voluntarily on 30.09.2022 and led their oppositions for giving the temporary custody of the minor to the respondent wife and submitted multiple documents which are thus, (i) G.D. Entry vide No. 27 of 2022, dated 27.05.2022. (ii) Missing information published in news papers. (iii) Declaration by the respondent before the Notary Public dated 08.06.2022. (iv) FIR dated 22.09.2022 vide No. R.K.Pur Women P.S. Case No. 43 of 2022. (v) Photographs of marriage of the respondent with another person namely Prasun Deb.

[16] These documents by themselves are demonstrative of the *prima facie* fact that the aggrieved petitioners had fled away with some person inspite of the fact that she is married, left the minor daughter without thinking any welfare of the minor daughter and that she has no source of income which the respondent has mentioned in the petition of the maintenance case filed by the respondent vide case No. Cr. Misc/FC/UDP 124/2022.

[17] A conspectus of the facts *prima facie* would lead to an irresistible conclusion to a sensible person that the respondent aggrieved petitioner is not appropriate person to whom the custody of the minor child be given by a judicial order, be it temporary or permanent and the said facts and situations has not been considered by the learned Appellate Court and as such, the impugned order dated 01.09.2023 is a nullity in the eye of law.

[18] The minor daughter who is about 6 years of age and studying in an English medium school namely Brilliant Star School in KG-II standard class and she is taken care of by the petitioners and her every expense is also borne by the petitioners. Giving her custody to the respondent would result to an unhealthy lifestyle of the minor child and moreover the respondent has no source of income as such the respondent would not be able to maintain and bear the expenses of the minor child.

[19] The learned Appellate Court has also failed to appreciate the provision of the Hindu Minority and Guardianship Act, 1956 which provides "Section 6 - Natural guardians of a Hindu minor. 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 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;

(b) In the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;

(c) In the case of a married girl-the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

(a) If he has ceased to be a Hindu, or

(b) If he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation: In this section, the expressions "father" and "mother" do not include a step-father and a step-mother."

[20] On the contrary, learned counsel appearing for the respondent has submitted that the learned Court below has failed to appreciate both in laws and facts regarding the custody of minor child. The learned Court below has failed to consider that mother is the natural guardian of minor daughter who is aged about 5 ½ years old. Keeping in view the emotional and psychological aspect,

the learned Court ought to have given custody of the minor daughter to the mother i.e. the respondent herein.

[21] The learned counsel further argued that the learned Court below also failed to consider that the petitioners are guilty of causing disobedience and disregard of the order dated 27.09.2022 and as such petitioners are not entitled to get custody of minor daughter. It was again argued that the child is a female and mother is the best caregiver in case of female child who would be deprived of love & affection of her mother. It has been argued on behalf of the respondent-wife that the learned Court below has rightly passed the Order dated 30.09.2022 after taking into consideration all the materials on record.

[22] It has been further contended that the Protection of Women from Domestic Violence Act, 2005 (in short DV Act, 2005) not only protects the rights of aggrieved women but also keeps in mind the wellbeing of children in a way that the act allows the aggrieved woman to put forth an application in Court for obtaining an order for temporary custody of her child or children. Section-21 of the DV Act, 2005 talks about child custody. The section reads as under:

“Section-21. Custody orders- Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent:

Provided that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.”

[23] In view of above discussions made by the learned counsel appearing for the parties and the material evidence placed on record, this Court is of the opinion that to substantiate the ends of justice, all the evidence needs to be relook once again.

[24] For appreciation of the facts, the order of the learned trial Court is extracted hereunder:

“Hearing both the parties at length, this court has repeatedly mentioned that the first paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute and in no manner the psychology of the child shall not be hampered and as such, the custody of the child namely, Miss. Padmakshi Saha shall remain with the respondents. however, the aggrieved-petitioner shall be given the visitation rights with proper leave of the Court if she desires to, although no such plea has been submitted by

the aggrieved-petitioner either verbally or written and for the permanent custody both the parties may approach the appropriate forum.

Thus, the instant case is disposed off on contest.

Supply a copy of this to both the parties free of cost.

Make necessary entry in the relevant T/R.”

[25] The learned Appellate Court after hearing the parties and appreciation of the material evidence on record and also keeping mind the observations made by the learned trial Court has observed as under:

“23. In the result, the instant appeal is hereby allowed.

24. Accordingly the order dated 30.09.2022 passed by the learned JMFC, Court No.2, Udaipur, Gomati Judicial District in Misc (Int.) 05 of 2022 in connection with CR(DV) 55 of 2022 is hereby reversed and set aside. The temporary custody of the minor daughter namely Miss Padmakshi Saha is hereby granted in favour of the Appellant with the visitation and access right to the Respondents on every alternate day from Monday to Sunday between 8:00 AM to 8:00 PM till disposal of the main case bearing CR(DV) 55 of 2022.
25. Thus the appeal is hereby disposed of on contest.
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29. Supply the copies of this Judgment/Order to the parties free of cost.
30. Send back the LC Record along with a certified copy of this Judgment/Order.”

[26] Learned counsel argued that on 05.07.2022 a mutual divorce petition under Section-13B of HMA, 1955 was filed before the learned Judge, Family Court, Udaipur wherein the wife has made assertion that she would never demand for the custody of minor daughter which was sworn in by affidavit dated 5th July, 2022. The main *lis* involved in this case is with regard to custody of the minor boy aged about 6 years, to be shared by both the parents. The petitioner No.1 is the father and the respondent is the mother of the child respectively in this petition.

[27] Then on 22.09.2022 an FIR under Section-498A of IPC was filed in the R.K. Pur Women PS vide case No.43 of 2022 and on 23.09.2022 the present proceeding under the DV Act has been filed. Learned counsel more fully argued that on 27.05.2022 the wife had eloped with a man namely Prasan Deb of Nandy Lane, Radhakishorepur, Gomati and they got married

on 01.07.2022. It was further argued that the wife is leading a life of unchastity in spite of the fact that their divorce has not been granted by a competent Court.

[28] Under Section-21, the order of custody that is passed is temporary in nature, and can be passed only during the pendency of an application for protection order or for any other reliefs under the DV Act, 2005. Under Section-21, it is only an aggrieved mother who can approach the Court for obtaining child custody orders.

[29] While deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands, then technical objections cannot come in the way. However, while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must, therefore, be very wary of what is said by each of the spouses.

[30] A child, especially a child of tender years, requires the love, affection, company; protection of both parents and in the present case, the child is 6 years of old. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents.

[31] Even if the custody is given to one parent, the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts

dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights. Courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

[32] Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases, the visitation rights must be given over long weekends, breaks and holidays. In cases like the present one where the parents are in two different places far away from each other, effort should be made to give maximum visitation rights to the parent who is denied custody.

[33] In addition to "visitation rights", "contact rights" are also important for development of the child, especially in cases where both parents live in different States or countries. The concept of contact rights in the modern age would be contact by telephone, e-mail, or in fact, the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes every day. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained, the child will have no difficulty in moving from one home to another during vacations or holidays. The purpose of this is, if one happy home with two parents cannot be provided to the child then let the child have the benefit of two happy homes with one parent each.

[34] There are various factors to be taken into consideration while deciding what is best in the interest of the child. No hard and fast rules can be laid down and each case has to be decided on its own merits. This Court is also not oblivious of the fact that when two parents are at war with each other it is impossible to provide a completely peaceful environment to the child. The court has to decide what is in the best interest of the child after weighing all the pros and cons of both the respective parents who claim custody of the child. Obviously, any such order of custody cannot give a perfect environment

to the child because that perfect environment would only be available if both the parents put the interest of the child above their own differences. Even if parents separate, they may reach an arrangement where the child can live in an environment which is reasonably conducive to her/his development.

[35] It is very surprising to believe the version of the mother that on one hand she says that she is having more concerned towards the welfare of the child and trying to keep away the child from the father and on the other hand and she is willing to continue the sharing of the child custody. It is evident from the declaration given by the wife-respondent in the P.S. as under: *“.....I am not willing to lead conjugal life with my husband Shri Rakesh Chandra Saha and also will not cohabit with my husband and I hereby declare that I shall not claim my right on any moveable or immoveable property of my husband. In case I make any claim over property of my husband or maintenance the shame shall be not acceptable before any Court and I will be under obligation to oblige for the legal consequences. In future I will file a divorce case and I shall help my husband in obtaining the decree of divorce and I shall also not claim the custody of my child Miss Padmakshi Saha, if I claim I shall be answerable to the Court.”*

[36] The Hon'ble Apex Court *in Gaurav Nagpal v. Sumedha Nagpal*, reported in **(2009) 1 SCC 42** has set out the principles in relations to the custody of minor child in certain terms. The Court held that welfare of the minor child is the first and paramount consideration and in order to determining child custody, the jurisdiction exercised by the Court rests on its own inherent equality powers where the Court acts as *„Parens Patriae.’* The Hon'ble Apex Court also held that children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian Court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over him.

[37] The Hon'ble Supreme Court in *Nil Ratan Kundu v. Abhijit Kundu*, reported in **(2008) 9 SCC 413** set out the principles governing the custody of minor children in paragraph 52 as follows:

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

[38] This Court strongly believes that a parent cannot be a guest in the life of their child. If visitation rights only are granted for limited hours, it may not be sufficient for the child to have comfortable time with the father or mother, whoever may be the case. The wider the gap, the bonds get broken quicker and the child is left confused and ends up believing this. Such acts of any parent in separating a child from the other parent should be nipped in the bud otherwise the separated parent ends up becoming a guest in the life of the child. Overnight custody must be encouraged wherever possible and mere meeting and spending time with the parent for couple of hours in court premises, hotel, theatre, Mall, park etc., under the supervision of other parent or relative will not serve any purpose of visitation as the child will be under psychological pressure and will not be comfortable.

[39] Since the rights of the child are involved and interest of the child is paramount important, this Court believes that “Laws Are Made For Citizens And
Citizens Are Not Made For Laws”, in order to put a quietus to the litigation between father, mother and child, this Court while stepping ahead, considering the impact the growing child would have against his litigant parents, the sharing pattern is decided. Children cannot wait too long and they are not people of tomorrow, but are people of today. They have a right to be taken seriously and to be treated with tenderness and respect. They should be allowed to grow into whoever they are meant to be the unknown person inside each of them is our hope for the future. Child rights may be

limited but, they should not be ignored or eliminated since children are in fact persons wherein all fundamental rights are guaranteed to them keeping in mind the best interest of the child and the various other factors which play a pivotal role in taking decision to which reference has been made taking note of the parental autonomy which Courts do not easily discard.

[40] Before conclusion, I would like to observe that it is much required to express our deep concern on the issue. Divorce and custody battles can become quagmire and it is heart wrenching to see that the innocent child is the ultimate sufferer who gets caught up in the legal and psychological battle between the parents. The eventual agreement about custody may often be a reflection of the parents' interests, rather than the child's. The issue in a child custody dispute is what will become of the child, but ordinarily the child is not a true participant in the process. While the best interests principle requires that the primary focus be on the interests of the child, the child ordinarily does not define those interests himself or does he have representations in the ordinary sense.

[41] The child's psychological balance is deeply affected through the marital disruption and adjustment for changes is affected by the way parents continue positive relationships with their children. To focus on the child rights in case of parental conflict is a proactive step towards looking into this special situation demanding a specific articulation of child rights. The judicial resolution of a custody dispute may permanently affect or even end the parties' legal relationship but the social and psychological relationship will usually continue and it seems appropriate that a negotiated resolution between the parents is preferably from the child's perspective for several reasons. A child's future relationship with each of his parents may be better maintained and his existing relationship is less damaged by a negotiated settlement than by one imposed by a Court after adversarial proceedings.

[42] 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

concerned parents 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 emphasized is that while all other factors are undoubtedly relevant, it 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.

[43] Accordingly, the present petition stands disposed with the above directions and observation. Consequently, the order of the learned Court below stands modified as indicated above and the petition is disposed of. No parents can be a guest in the life of the child. It is not just and proper to allow the parents in the time of visitation for couple of hours to see the child in an alone place as a guest visitor. Their matrimonial and other cases are pending in the concerned Courts and both the mother and father are making allegation and counter allegation against each other and this Court is not inclined to enter into the said controversy since, that is not the subject matter before this Court.

[44] For the past one and half years they are staying separately and the respondent, who is present in the Court and submits that she is not staying in Agartala with her parents in their own house. Father/petitioner No.1 is not residing with minor child at Udaipur and the child is studying in local school. Since, this case is only confined with regard to the custody of the child and the child's interest is paramount to this Court and even to the society and considering the issue from the point of view the child, this Court feels that the child cannot be deprived of the love and affection of both parents.

[45] Thus, the custody of the child should be with both the parents and accordingly, (i) Monday, Thursday and Friday will be with the father since the child is attending the school including night stay (ii) Saturday after school and Sunday, the custody will be with the mother since the mother is staying at Agartala at her parental home. Mother will pick up the child and drop at residence of the petitioner without affecting the school timings (iii) on all holidays they share their times equally and on vacation also to be shared equally by both the parents (iv) on birthday of the child, morning to evening 4.00 O'clock the child will be with one parent and after 4.00 O'clock the child will celebrate her birthday with the other parent. In the event, if both the parents wish to celebrate birthday of the child together at a time and at a place as per her wish, they are at liberty to do so. The father shall bear the education and medical expenses of the child and shall take care.

[46] In view of above directions and observations, the present criminal petition stands disposed of consequently, the order(s) passed by the learned Court below is modified as indicated above. As a sequel, miscellaneous applications pending, if any, shall stand closed.

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