FAM No.18 of 2019

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

(Judgment Reserved on 06.05.2022)

(Judgment Delivered on 11.05.2022)

FAM No. 18 of 2019

1. Nimish S. Agrawal, S/o Sunil Agrawal, aged about 37 years, R/o. 1/46, Motilal Nehru Nagar (East) Bhilai, Tahsil and District Durg, Chhattisgarh

----Appellant

Versus

1. Smt. Ruhi Agrawal, W/o Nimish Agrawal, D/o. Vijay Agrawal, aged about 33 years, R/o. Deepak Nagar, Road No.3, Durg, Tahsil and District Durg, Chhattisgarh
2. Ku. Nirvana Nimish Rai, D/o. Nimish Agrawal, Minor, through her natural guardian/mother Smt. Ruhi Agrawal, Present R/o. Deepak Nagar, Road No.3, Durg, Tahsil and District Durg, Chhattisgarh

---- Respondents

For Appellant	:	Shri R.P. Agrawal, Sr. Advocate with Shri Manoj Paranjpe, Shri Rahul Gupta & Shri Vivek Mishra, Advocates
For Respondents	:	Shri Gagan Gupta and Shri Jay Deep Singh Yadav, Advocates

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Hon'ble Shri Justice Goutam Bhaduri

& Hon’ble Shri Justice NK Chandravanshi

CAV JUDGMENT

Per Goutam Bhaduri, J

1. Heard.

2. The present appeal is filed by the father/husband against the order dated 17.12.2018 passed by the family Court, Durg in Civil MJC No.2/17, whereby the custody of the child-respondent No.2, claimed by the father was denied except the visitation right.

3. The facts of this case are that the appellant Nimish S. Agrawal and respondent No.1 Ruhi Agrawal were married on 16.01.2007 and out of the wedlock one child Ku. Nirvana Nimish Rai was born on 12.01.2012. Subsequently, the relation in between the husband and wife entered into rough weather and blame game started. Series of FIRs and counter allegations were made against each other and they started living separately followed by different litigation. Since child was in the custody of the mother/respondent No.1 an application under Section 25 of the Guardians and Wards Act, 1890 was filed. The voluminous evidence were produced by both the parties before the Family Court wherein both the parties claimed that the welfare of the child would be in custody of each individually i.e. the father/husband for himself and mother for herself and on different aspect led voluminous evidence. The learned Family Court, after the trial, ordered that the custody of the child would be with the mother. Hence this appeal.

4. Shri R.P. Agrawal, learned senior counsel along with Shri Manoj Paranjpe, learned counsel for the appellant would submit that the learned family Court failed to take into account to consider the conduct of the mother to come to a finding that it would be in the welfare and the interest of the child to be in

custody of father. Referring to the provisions of Sections 2 & 6 of the Hindu Minority and Guardianship Act, 1956 he would submit that as per Section 6 of the Act, 1956 the natural guardian of Hindu first would be father and thereafter mother. He would further submit that ordinarily uptill the age of 5 years, the custody can be given to the mother but beyond that it would be the father who would be entitled. Further referring to Section 13 of the Act, 1956, he would submit that the welfare being the paramount interest for the child and the financial status of the father, which has been proved by the evidence, would show that the child can be admitted to the best School in India and best education can be given to her. He would further submit that the child was admitted to a school which was not recognized and was being run by the mother, these factors were ignored by the learned family Court.

5. Learned counsel would further submit that even if considering the fact that both these circumstances are balanced for both father & mother, the family Court failed to take into account that what would be the factor which would favour the custody to be with the mother. It is further submitted that the paramount interest has to be judged by the actions and omissions of respective parties and the circumstances if so point out that paramount welfare would be in the interest of the father, which is supported by the statute, ordinarily the father should be in the custody of the child after 5 years of the age and accordingly, the Court should have granted the custody. He would further submit that only half an hour visiting rights have been conferred to the father and the appellant being the father has all the desire to show love and affection to the child, the same cannot be denied only on impractical limited visiting rights.

6. He would further submit that when the visitation right given by the learned family Court was sought to be availed, false FIR was lodged against father. He would further submit that the order-sheet of the Court dated 12.07.2019 of the High Court would show that the child was directed to appear in person before the Court on 05.08.2019 but to avoid such meeting with the father, the false FIR was lodged on 01.08.2019. He would further submit that therefore, these circumstances and conduct of the mother should also be considered and the mother should not have been given the custody. It is further submitted that the false FIR was lodged under Section 498A of the IPC along with other sections of IPC and while the entire family was in jail, they were forced to execute an agreement whereby an amount of Rs.3.5 crores was received by wife and there being no further alternative, the appellant had to pay. He would further submit that after obtaining such money, nothing has come on record that what the mother did with the money towards the welfare of the child. Referring to the reports made and the mark-sheet of the child it is further submitted that the false and fabricated documents were prepared, which would be evident from the height of the child which was shown of different year and therefore, the mother who fabricated the false documents, her conduct cannot be ignored that what kind of education she would be giving to the child.

7. It is further submitted that while the appellant's family was in jail, since certain family dispute was existing that of the appellant with their brother, the wife entered into a rent agreement with the other brother of the family of the appellant to humiliate and to render their efforts of rival claims to become futile. It is further submitted that the date of agreement would be in between 07.05.2016 to 12.05.2016 while the appellants were in jail in the judicial

custody. Further it is submitted that the appellant being the father he was not allowed to meet the child as such he made an application before the welfare committee under the Juvenile Justice Act and the independent three member committee after consideration of the facts narrated in the application and after due enquiry ordered that the child should be produced, but child was not produced by the mother to allow any meeting.

8. It is further submitted that the documents would show that the wife is suffering with Arteriovenous Malformation (AVM) disease and referring to the certain research paper, it is submitted that no specific medical treatment is available for such disease, which is a life threatening. Referring to the statement of Dr. Rajiket Sharad Chandra Dixit (PW-3) and Dr. Alka Sardesh Pandey (PW-4) it is submitted that they have proved the fact that the wife is ailing whereas as compared to it there is no sign of ailment with the husband/appellant, therefore, the future of the child would always be safe in the hands of the father instead of ailing mother. Further advancing an argument of comparative assessment he would submit that the husband has passed out B.E. in Telecommunication from the University of Denver, Colarado America, whereas as compared to it the wife education is not to the extent which can be said to be of the standard which would have a vision. Therefore, the child in the custody of the husband/father would have a larger vision and exposure.

9. Further referring to the document, the counsel would submit that the child was admitted to a school Shloka Birla Bhilai which was shutdown which was affirmed by the letter of District Education Officer and was not recognized. Thereafter the daughter was admitted to a School at Raipur which was also

shutdown and presently she was admitted to Rungta Public School, Bhilai. Whereas the counsel would submit that the undertaking may be noted down that if the child is given in the custody of the father, she would be placed in the best School in India. Learned counsel further referred to donations given by the father in name of daughter and would submit that different donations given by the father on behalf of the daughter would show the love and affection which is a massive and also referred to the photographs and the messages to show that how much father loves her daughter, therefore, the father would be entitled when the comparative study is made about the welfare of the child. Referring to the financial status of the parties, it is submitted that the appellant/father is the Director of LNS Industries and the Income Tax Return would show that the company which is run by the husband where some companies are also part of it have an income more than 1 crore and the company of which the appellant is the Director has assets worth in crores. It is stated that the different Fixed Deposits have also been made by the father in name of the daughter. He would further submit that all these facts would show the love and affection for the daughter apart from the financial status of father to get the custody of child.

10. Learned counsel further placed reliance in the cases of **Nil Ratan Kundu and another Vs. Abhijit Kundu {(2008) 9 SCC 413}**, **Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tiwari and others {(2019) 7 SCC 42}** and also for visitation right, the reliance is placed in the case of **Yashita Sahu Vs. State of Rajasthan and ors. Reported in (2020) 3 SCC 67** , **Gaurav Nagpal Vs. Sumedha Nagpal reported in (2009) 1 SCC 42** and the judgment passed by this Court in the case of **Lalit Kumar Jatwar Vs. Smt. Sushma Jatwar (FAM No.185 of 2019, decided on 03.02.2022)**. It is further submitted that the father

is facing a criminal trial but until the innocence is proved no inference can be drawn. Therefore, it is submitted that under the circumstances the father be given the custody of the child.

11. Per contra, learned counsel for the respondents opposes the argument advanced by learned counsel for the appellant. It is submitted that the medical literature which is sought to be relied on by the appellant was not part of the record before the learned family Court and even otherwise it would not be an admissible evidence. It is further contended that in the written statement of the wife/mother it is clarified that she has suffered from AVM disease only after the marriage as a result of mental cruelty the husband has caused to her in the matrimonial home and there is no admission on her part that she is suffering with an incurable disease. Referring to the statement of the doctors, counsel would submit that the real test is nature of disease, its duration, its impact on the well being of respondent No.1, its curability, the extent of its impact and the consequence thereof on the ability of the respondent No.1 to look after the respondent No.2 and the statement of the doctor would show that the disease is completely subsided which would support the respondent.

12. It is further submitted that since the respondent No.2 the daughter was 5 years old she was with her mother and mental well being and growth is better taken care by the mother which is evident from the progress of child. It is further submitted that the mother though suffered with the AVM disease initially but thereafter she had recovered and is leading a healthy life. Referring to the Income Tax Return it is contended that the considerable income is being generated through different business modes of respondent/wife. Therefore, the

submission of the appellant that they would be in a better position to give quality life to the child is only on the surmises. Referring to different documents including the Job Visa, Driving License, License of Pilot, etc., the counsel would submit that respondent No.1 is capable to take care of the child in a better way. Answering to the issue about receipt of amount of Rs.3.5 crores, it is submitted that the money which was invested by the father of respondent/wife with the appellant was returned in lieu of the business transactions, therefore, no prejudice can be caused by referring that if receipt of Rs.3.5 crores the whereabouts and expenses towards the child has not been shown.

13. It is further submitted that since the respondent initially admitted the child in a school which was being run by the respondent/mother he would submit that because of the mental trauma of the child after disturbances in the marriage and various false reports, the mother thought it proper to keep the child before her in the initial days of school but subsequently when she grew up a little she was admitted to Rungta Public School, which is a well known school at Bhilai. Referring to the different FIR lodged by the wife, he would submit that not only wife was treated with cruelty for demand of dowry but animal like behaviour was meted out by the husband for which an offence under Section 376, 377 & 323 of IPC was registered. Therefore, in order to save the child from such animal like behaviour, it would be better that the child be kept in the custody of the mother without any visitation rights. Further while execution of visitation right, it is further submitted that during the pendency of the case before the family Court the father when went to meet the child, filthy abuse was hurled to the child and the mother, which would be evident from the statement of the child herself and

there is no reason as to why the child should hear filthy abuses from her father.

14. He referred to law laid down by the Supreme Court in the case of ***Githa Hariharan (Ms) and another Vs. Reserve Bank of India and another {(1999) 2 SCC 228}*** and would submit that gender inequality cannot be set into motion and the natural guardian cannot be given a preference under the Hindu Minority and Guardianship Act, 1956 as such the father cannot be given a preference and the mother cannot be declared disqualified during lifetime of the father. Further the reliance is placed in the case of ***Gaytri Bajaj Versus Jiten Bhalla {(2012) 12 SCC 471}, Nil Ratan Kundu and another Versus Abhijit Kundu {(2008) 9 SCC 413}*** and it is submitted that the interest and welfare of the minor to be the paramount consideration and that will only prevail to decide the interest of the child as an ultimate consideration. It is submitted that under the circumstances, the judgment passed by the learned family Court is well merited which do not call for any interference.

15. We have heard learned counsel for the parties and perused the record of the Court below, orders and the documents attached with the appeal.

16. The statute which deals with the situation is the Guardians and Wards Act, 1890 and Section 4 of the Act, 1890 defines minor as a person who has not attained the age of majority. Guardian means a person having the care of the person of a minor or of his property, or of both his person and property. Ward is defined as a minor for whose person or property or both, there is a guardian.

17. Chapter II (Sections 5 to 19) relates to appointment and declaration of guardians. Section 7 deals with `power of the Court to make order as to

guardianship' and reads as under:

> *7. Power of the Court to make order as to guardianship*.-(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made--
>
> (a) appointing a guardian of his person or property, or both, or
>
> (b) declaring a person to be such a guardian, the Court may make an order accordingly.
>
> (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.
>
> (3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

18. Section 8 of the Act enumerates the persons entitled to apply for an order as to guardianship. Section 9 empowers the Court having jurisdiction to entertain an application for guardianship. Sections 10 to 16 deal with procedure and powers of the Court. Section 17 is another material provision and is reproduced;

> 17. Matters to be considered by the Court in appointing guardian.- (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
>
> (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.
>
> (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

* * * * *

> (5) The Court shall not appoint or declare any person to be a guardian against his will.
>
> (emphasis supplied)

19. Section 19 prohibits the Court from appointing guardians in certain cases.

20. Chapter III (Sections 20 to 42) prescribes duties, rights and liabilities of guardians.

21. The Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as "1956 Act") is another equally important statute relating to minority and guardianship among Hindus. Section 4 defines "minor" as a person who has not completed the age of eighteen years. "Guardian" means a person having the care of the person of a minor or of his property or of both his persons and property, and inter alia includes a natural guardian. Section 2 of the Act declares that the provisions of the Act shall be in addition to, and not in derogation of 1890 Act.

22. Section 6 enacts as to who can be said to be a natural guardian. It reads thus;

> 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 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.

23. Section 8 enumerates powers of a natural guardian. Section 13 is an extremely important provision and deals with welfare of a minor. The same may be quoted in extenso;

> 13. Welfare of minor to be paramount consideration.
>
> (1)In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.
>
> (2)No, person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.
>
> (emphasis supplied)

24. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

25. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the `welfare of the child' and not rights of the parents under a statute for the time being in force.

26. The Supreme Court in the case of ***Nil Ratan Kundu and another Versus***

Abhijit Kundu {(2008) 9 SCC 413} at para 52 has observed that in deciding a difficult and complex question as to the custody of a minor, a Court of law should keep in mind the relevant statutes and the rights flowing therefrom. Further the Court held that but such cases cannot be decided solely by interpreting legal provisions. It further observed that it is a human problem and is required to be solved with human touch. The Court at para 52 has held thus:-

> 52……. *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.

27. Further the Supreme Court in the case of ***Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others*** **{(2019) 7 SCC 42}** has observed that the welfare of the minor child is the paramount consideration. The Court in para 26 & 27 reiterated the law laid down in the case of ***Nil Ratan Kundu and another Versus Abhijit Kundu {(2008) 9 SCC 413}.*** It further referred to the case of ***Goverdhan Lal v. Gajendra Kumar {2001 SCC OnLine Raj 177}*** and has observed thus in para 26:-

> "26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought

to be child interest and welfare of the child."

28. Therefore, it is the ultimate welfare of the child which would be dominant matter for consideration of Court when the Court is confronted with the conflicting demands made by parents, both demands are to be justified and cannot be decided on the legalistic basis and 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. It further held that 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. Therefore, 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.

29. The Supreme Court further in the case of ***Githa Hariharan (Ms) and another Vs. Reserve Bank of India and another {(1999) 2 SCC 228}*** has held that on a cursory reading of mandate of Hindu Minority and Guardianship Act, 1956, Section 6 thereof gives an impression that the mother can be considered to be the guardian of the minor after the life time of the father. The Supreme Court while interpreting the same observed that whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a Court of law, the word "after" in the section would have no significance, as the Court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. It held that the question, however, assumes importance only when the mother acts as the guardian of the minor during the

lifetime of the father, without the matter going to the Court, and the validity of such an action is challenged on the ground that she is not the legal guardian of the minor in view of Section 6 (a) of the Hindu Minority and Guardianship Act, 1956. The Court further observed that the word "after" need not necessarily mean "after the lifetime". Therefore, the averment of the appellant that the father is the natural guardian after 5 years cannot be given a preference and the welfare of the minor would be the paramount consideration.

30. Much submission has been made about the medical condition of the mother that she is suffering from AVM disease which is a life threatening and non-curable. The reference of certain research papers have been made during the argument. The said documents were not part of the record before the family Court. The husband at para 7 of the petition has pleaded that the wife is suffering from AVM disease which she came to know in the year 2008 and thereafter she was operated by the doctor at a High Medical Center. In reply to it the wife has attributed the allegation that she was subjected to mental trauma and torture and she was even made to clean the bathroom, to wash the clothes and utensils, therefore, in the year 2008 because of the mental pressure she was detected with AVM.

31. The doctors namely Dr. Rajiket Sharad Chandra Dixit and Dr. Alka Sardesh Pandey were examined as PW-3 and PW-4 respectively. Dr. Rajiket Sharad Chandra Dixit (PW-3) has deposed that he treated Ruhi Agrawal and she had a hemorrhage in the brain for which she was operated. Narrating the symptoms the doctor says, the patient with disease shown severe headache or epilepsy attack or paralysis, but it do not happen to all patients. He further deposed that

if the treatment is given at proper time, the medicines are required to be taken for a long for 3 -4 years the patient can lead healthy life and it depends on the system. He deposed that when the fits do not occur for 3 -4 years, the medicine is also not required to be taken further and according to him Ruhi Agrawal i.e. the wife was under control and she did not have any fits further. In the cross-examination further the doctor deposed that after examination of Ruhi Agrawal he found that the patient did not have any permanent symptom. He further stated that a patient of AVM can look after the child and it would depend much on the present situation. He further stated that AVM has different kinds and all the symptoms cannot be treated at par.

32. Likewise the statement of Dr. Alka Sardesh Pandey (PW-4) she deposed that one day Ruhi Agrawal came along with her mother -in-law thereafter she received a shock and subsequently she was immediately referred to Apollo Hospital, thereafter, she has not examined Ruhi Agrawal. On query she further stated that she came to know that Ruhi Agrawal was admitted in I.C.U. and was detected with AVM disease.

33. The pleading and the evidence led by the husband that the wife was suffering from AVM disease, therefore, cannot take care of the child do not appear to be conclusively established. The doctors on the other hand have stated that it is not necessary that everyone will have the similar type of symptom and if the medicines are taken regularly the disease can be cured. In the written statement the allegations of AVM disease is not been admitted by the wife, instead the allegations have been passed over to the conduct of the husband and their family members. Therefore, the conjoint reading of the pleading and

the evidence led by the parties do not show that the respondent No.1 is still suffering with the AVM disease and would be incapable to take care of the child.

34. The another submission which is made that the husband is highly qualified and B.E. in Telecommunication from the University of Denver, Colarado America the said fact of qualification is not in dispute. As against this the appellant has made averment that after the birth of the child both husband and wife stayed at Dubai and they used to travel from Bhilai to Dubai often. In the deposition the appellant has stated that it was decided that since the parents were living in Dubai as such it was decided that respondent No.1/wife would also stay at Dubai and with the consent of her the job Visa was obtained. The Ex. D-2 proved by respondent No.1 is a document of Space Star Gen. Trdg. L.L.C. of Dubai, which shows that she was provided a job in the company with a salary of AED 12,000.00. The said document since been issued by Dubai company would show that she was working there. Another document Ex. D/12 would show that respondent No.1 was issued Student Piolt's Licence, which was issued in the year 2001. As a consequence the qualification of respondent No.1 though may not match with the appellant but the certificates and the mark-sheet show that she is also reasonably qualified and worked abroad and has the practical knowledge of the outer world. Furthermore, in the facts of this case the weighment of qualification of husband and wife would not have much effect to claim a priority in the custody battle by the husband.

35. The appellant further tried to canvas that the degree of love and affection is much more towards the child and in order to project the same various donation receipts vide Ex. P/34 to P/70 in the name of the daughter is placed. The

appellant further has filed certain photographs Ex. P-2 to P-19 then again from Ex. P-76 to P-83 then again Ex. P-102 to P-114, WhattsApp messages Ex. P-131. Note written on the currency note Ex. P-132 to Ex. P-133, photographs Ex. P-134 to P-136 to show the affection towards the child. Certain letters written by the respondent No.1 also been exhibited as Ex. P-142 to Ex. P-150 to project that the appellant's behaviour towards the wife was very nice, but at the same time when the relation subsequently became strange, different criminal cases registered. The documents, photographs and communication though would reflect that there was a bonding in between the father and the daughter but unfortunately that did not last. So much so, with the passage of time when the Court interacted with the daughter to ascertain the wishes of the child, the order-sheet dated 05.08.2019 before this Court records that the child expressed that she is willing to reside with her mother. When such interaction was made, the child was about 9 years.

36. The Supreme Court in the matter of **Nil Ratan Kundu and another Vs. Abhijit Kundu {(2008) 9 SCC 413}** observed that if the minor child 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. The documents filed before this Court would show that the child is studying in Class 5th at Rungta Public School, Bhilai, as such the circumstances, therefore, do not show that the respondent No.2 child is not getting love and affection from her mother. The Court cannot ignore the fact that here the custody is sought of a girl child and on attaining puberty she may be more frank with her mother and may need her support and the controlling consideration is only the welfare of the child should

prevail. It is not the negative test that the father is not unfit or disqualified to have the custody but applying the positive test we are of the opinion that custody would be in the welfare of the minor would be much more with the mother. A child being not a property or commodity and the issue relating to the custody of minor and tender aged children have to be handled with love, affection, sentiments and by applying human touch to the problem. Therefore, considering the same and as per the desire of the child, we deem it appropriate that the child would be better in the custody of her mother.

37. Now coming to the financial status of the husband and wife. It is contended that an amount of Rs.3.5 crores was paid by husband to the wife. The husband filed various pass-book and documents vide Ex. P/23 to Ex. P/25 to show the balance in the savings account and the assets being the Director of the LNS Match industries, LNS Dhanraj Tobacco Export, VSS Tobacco Pvt. Ltd. along with income tax return of the mother of the appellant which shows more than 1 crore apart from the various fixed deposits. As against this the wife has produced the Income Tax Return vide Ex. D/3 to show a gross total income of Rs.1915752/- and Ex. D/4 to show income of Rs.63113448/- and the income tax return by way of I.A. of the subsequent assessment year. Examination of both the list of assets and income by the husband as also wife, it would show that the wife may not be in hold of the assets worth in respect to the appellant but the financial capacity of the wife cannot be ignored too. There is no exorbitant difference in between the level of income and apart from it, it is not that the income of the parent will bring the joy and smile to the face of the child. A child may be comfortable in a company of someone who may have a lower financial status it is always contrary to general expectation. It is not the measurement to

be carried out while deciding the custody of the child. Prima facie the documents produced by the parties would reflect that financial capacity of both husband and wife are reasonable.

38. The submission of the appellant that he undertakes to give his child the best education in a School anywhere in India may also not be a deciding factor if we look from the angle of the child. It is not a tug of war between wealth and personality traits. Placement of the child in the best boarding school cannot be a benchmark for happiness of a child. A child may be happy in a regional local school in company of the parents instead of living in isolation in the hostel the domino effect may be otherwise. Consequently, we do not agree to proposition that child would get the better development if she is placed in the best school in India according to the father. Education and upbringing are two different aspect of life. The education cannot be equated with the literacy. The education includes knowing her own culture, family traditions and the respect for the elders. Consequently, therefore, the ambition expressed by the father would not be a sole criteria and it may prove to be a dilapidated joy ride for children specially in a battle between the parents. The crisis of the like nature would not abate until peace prevails.

39. Further much submission has been made against the conduct of each other by husband and wife and reference is also made to the various criminal cases. The appellant urged that the respondent No.1 forced to pay an amount of Rs.3.5 crores while they were in jail. Likewise on behalf of the wife reference is made to the criminal cases registered under Section 498 A, 376, 377 and 323 of IPC along with Section 3 & 4 of the Dowry Prohibition Act and all the cases

are pending before the trial Court.

40. The perusal of the documents would show that the order-sheets have been filed that the FIR was sought to be challenged by the appellant, which was dismissed as a result, the trial is pending before the Court below. We are afraid that if we guide ourselves by any finding over such pendency of criminal case, it would be beyond the purview of a subject matter to decide the custody battle of a child. To decide the custody battle by the different authoritative pronouncements of Hon'ble the Supreme Court as stated supra the die is cast, therefore, we cannot make a substance addition. Instead the Court has to balance the need and comfort of the child as the progress of the child has to take place despite all hurdles i.e. battle in between the parents. In a custody battle the Court has to pay heed to the wounds of a child which is at the bottom of the pyramid which is caused by the cases and counter cases in between mother and father. Consequently, since in respect of the criminal cases the trial is already going on we do not like to draw any inference as otherwise it may have an impact to cause prejudice to either side during the trial.

41. In view of the aforesaid discussion, after taking into the over all facts, we are of the opinion that considering the paramount interest of the child, it would be proper if the mother holds the custody of the child and accordingly, the finding arrived at by the learned Family Court with respect to custody of child to be with the mother, we refrain to interfere with the same. Now coming to the visitation right, the learned Family Court ordered that the father can be in the company of the child on the first Sunday of each month and can meet between 3-4.30 pm and the place would be informed to the non-applicant No.1 mother apart from

that during Dussehra, Diwali and Holi and on the birthday of the daughter he would meet on the same time of which the information would be given by the non-applicant No.1 to the appellant.

42. The visitation right which has been ordered appears to be too vague and meager. The position of appellant as father cannot be ignored. The visitation rights, was considered by the Supreme court in the case of ***Yashita Sahu Vs. State of Rajasthanand Ors. reported in (2020) 3 SCC 67*** wherein while adjudicating likewise issue, it was observed that it is always the child who is the victim in the custody battle. It further held in the fight of egos and increasing acrimonious battles and litigations between two spouses, 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 get the custody of the child. The court observed that the child of tender years requires the love, affection, company, protection of both the parents. It further held that it is natural requirement of the child which is his/ her basic human right just because the parents are at war with each other, it does not mean the child should deny the care, affection, love or protection of any one of the two spouse. It further held that a child is not an inanimate object which can be tossed from one parent to the other and after every separation, every reunion may have a traumatic and psychosomatic impact on the child.

43. The Supreme Court in case supra further held even after 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. After

the case was decided by the family Court on 17.12.2018 wherein visitation right was given, the respondent has filed a document that a meeting was scheduled on 28.07.2019 at Coffee Cafe Day, Surya Mall, wherein the appellant threatened and abused the respondents both the mother and the child at a public place as the child was not talking to him. As such an FIR was lodged on 02.08.2019 at P.S. Smriti Nagar, District Durg. As against this the appellant would submit that while this appeal was pending before this Court on 12.07.2019 the Court ordered the child to be produced as the child was not allowed to meet the father and in order to frustrate the order of Court or meeting before few days an FIR was lodged on 01.08.2019 before the date of 05.08.2019.

44. A lot of submissions have been made and the reference has also been made to the statement of the child that she is afraid of her father and she was also abused when she refused to talk to her father. Perusal of the said statement shows that it cannot be a decisive factor to deny the visitation right to a father specially when the minor child is with the mother altogehter. Considering the evidence led by the father and the mother too, the image of the father cannot be painted that of a villain and his visitation right cannot be curtailed. The husband and wife both are living separately and the criminal cases are pending. Therefore, we deem it appropriate that the visitation right of the father cannot be denied in totality. The Supreme Court in the case supra further observed that the concept of "visitation rights" is not fully developed in India. It held that the child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

45. We feel that apart from the father, the child should also learn the culture of the grandparents. The photographs which are placed would show the affectionate bond between the grandparents and the child. Therefore, the grandparents would also have visitation rights along with father which would, in turn, be beneficial for the development of the child. Accordingly, we deem it appropriate that the grandparents of the child should also be part of the visitation right.

46. In addition to "visitation rights", the court observed that the"contact rights" is also important for the development of the child specially in cases were both the parents live in different places the concept of contact rights in the modern age would be contact by telephone, e-mail or in fact we feel the best system of contact, if available between the parties should be video calling. It observed that with the increasing availability of internet, and the courts dealing with the issue of custody of child must ensure the parent who has denied the custody of the child should be able to talk to his/ her child as often as possible. It held that the communication will help in maintaining and improving the bond between the child and the parent who is denied the 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 was held that the court cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each.

47. In a recent judgment rendered in ***Ritika Sharan Vs. Sujoy Ghosh reported in 2020 SCC OnLine SC 878***, the Supreme Court has held that a balance has to be drawn so as to ensure that in a situation wherethe parents are in a conflict, the child has a sense of security. The interests ofthe child are best served by ensuring that both the parents have a presence in his/her upbringing.

Therefore, following the principles laid down in in the case of ***Yashita Sahu Vs. State of Rajasthan and Ors. reported in(2020) 3 SCC 67*** and in the case of ***Ritika Sharan Vs. Sujoy Ghoshreported in 2020 SCC OnLine SC 878.***

48. We hereby order to facilitate the grant of visitation and contact right to father. The following arrangement shall be drawn by both the appellant and the respondent as father and mother:-

- The appellant/ father or grandparents would be able to engage with the child on a suitable video conferencing platform for one hour every Saturday and Sunday and 5- 10 minutes on other days.

- Both the appellant/ husband and the respondent/ mother in order to facilitate the video conferencing in between shall procure smart phones which would facilitate the inter-se video calling.

- Since both the parties are living in the same district, we direct that on a fortnight basis on the working Saturday the child would be produced before the Family Court, Durg at about 10.30 to 11 a.m. by the respondent No.1/wife. Wherefrom the child may be taken by the husband for entire day and shall be returned in between 4.30 to 5 pm before the family Court to enable the mother to get back the custody.

- During the long holiday/vacation covering more than two

weeks, the child would be allowed to be in the company of the father/grandparents for a period of 7 days and in doing so in order to facilitate the same, the curriculum of the School/holidays shall be placed before the Family Court, Durg so that the custody of the child can be decided to be given at prior point of time for a limited period to the father. The period would be fixed by the Family Court after hearing both father and mother.

- During the festival Dussehra, Diwali and Holi, the father may join the company of the child at an independent venue for a limited period of time 1-2 hours for a day and the child would be brought by the person of confidence of mother. The husband would intimate place of venue through the intervention of the family Court well before time.

49. With these aforesaid direction the appeal is disposed of.

SD/-
(Goutam Bhaduri)
Judge

SD/-
(NK Chandravanshi)
Judge

Ashu

HEADNOTE
FAM No.18 of 2019

1. In a custody battle of children, the paramount consideration that of would be child.

2. Visitation right and contact right in a custody battle to other parent along with grandparents would be necessary for over all development of child.

1. बच्चे की अभिरक्षा प्राप्त करने संबंधी मामलों में बच्चे का कल्याण सर्वोपरि होगा।

2. बच्चे की अभिरक्षा प्राप्त करने संबंधी मामलों में बच्चे के सर्वांगीण विकास हेतु,, माता–पिता के साथ–साथ दादा–दादी को भी मुलाकात करने तथा संपर्क स्थापित करने का अधिकार दिया जाना आवश्यक होगा।