**AFR**

**Court No. - 84**

**Case :-** HABEAS CORPUS WRIT PETITION No.- 9 of 2020

**Petitioner :-** Reshu @ Nitya And 2 Others
**Respondent :-** State Of U.P. And 3 Others
**Counsel for Petitioner :-** Rajeev Sawhney,Rajiv Lochan Shukla,Ramanuj Yadav,Virendra Kumar Yadav
**Counsel for Respondent :-** G.A.,Abhinav Gaur,Ankur Verma,Manoj Kumar Rajvanshi,Prakash Chandra Yadav

**Hon'ble Dr. Yogendra Kumar Srivastava,J.**

1. Heard Sri M.D.Mishra along with Sri Ramanuj Yadav, learned counsel for the petitioners, Sri Vinod Kant, learned Additional Advocate General, appearing along with Ms. Sushma Soni, learned Additional Government Advocate for the State respondents and Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Ankur Verma, learned counsel for respondent no. 4.

2. The present habeas corpus petition was initially filed by the paternal grand-parents, arrayed as petitioner nos. 2 and 3, seeking custody of the petitioner no. 1, corpus, a minor child stated to be of age about 19 months at that point of time, who was said to be with the respondent no. 4, her maternal grand-father.

3. The pleadings in the petition are indicative of the fact that the petitioner no.1, corpus, was born on 04.06.2018 from the wedlock of the son of the petitioner nos. 3 and 4 and the daughter of respondent no. 4. It is stated that the mother of the petitioner no. 1 was seriously ill, thereafter she along with the petitioner no. 1 went away along with the respondent no. 4 for medical treatment and subsequently she died on 31.07.2019 due

to acute cardiac respiratory arrest and after her death the petitioner no. 1 is in the custody of respondent no. 4. It is contended that despite requests, the respondent no. 4 is not handing over the custody of the petitioner no. 1 to the petitioner nos. 2 and 3 and that the same amounts to illegal detention.

4. A counter affidavit has been filed on behalf of the respondent no. 4 wherein it is pointed out that the respondent no. 4 was forced into bringing his daughter back due to continuous torture and cruelty inflicted upon her by the in-laws, which resulted in her death, and the newly born girl child, the petitioner no. 1, is under the care of the respondent no. 4 since the death of her mother. It is stated that the respondent no. 4, who is the maternal grand-father of the petitioner no. 1, is providing good care to her and it cannot be said that she is under any kind of illegal custody. It is, at this stage, as reflected from the order-sheet, that an application seeking impleadment of the father of the petitioner no. 1 (corpus) was moved, which was allowed on 14.02.2020 and he was permitted to be impleaded as a petitioner in the case.

5. A supplementary counter affidavit was filed on behalf of the respondent no. 4 containing assertions with regard to the harassment of the daughter of respondent no. 4 for dowry and torture and cruelty inflicted upon her which ultimately resulted in her death. Particulars of a criminal complaint and an FIR dated 12.2.2020, lodged under Sections 498-A, 304-B IPC and Section 3/4 Dowry Prohibition Act, 1961 in which the petitioner nos. 2, 3 and 4 (i.e. father and the paternal grand parents of the

corpus), are named as accused, have also been mentioned.

6. A rejoinder affidavit and a supplementary rejoinder affidavits have been filed on behalf of the petitioners disputing the assertions made in the counter affidavit and the supplementary counter affidavit, respectively, and reiterating the claim with regard to custody and guardianship of the petitioner no. 1, corpus.

7. Learned counsel for the petitioners has sought to contend that the petitioner no. 1 being a minor child, in the absence of her mother, the petitioner no. 2, her father, who is the only surviving parent, would be her natural guardian, as per Section 6 of the Hindu Minority and Guardianship Act, 1956[1] and accordingly the respondent no. 4 is not entitled to retain her custody and that the same is illegal. In support of his submissions, reliance has been placed upon the decisions in **Tejaswini Gaud Vs. Shekhar Jagdish Prasad Tewari and others**[2] and **Kumari Palak (Minor) and another Vs. Raj Kumar Vishwakarma and others**[3].

8. Controverting the aforesaid assertions, learned Senior Counsel appearing for the respondent no. 4 has submitted that the admitted facts of the case are that the petitioner no. 1 is a minor girl child of age about three years and that she is under the care and custody of respondent no. 4, her maternal grand-father, ever since she was an infant of less than two years of age when the mother was tortured for dowry and forced to go to her

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1. HMGA
2. (2019) 7 SCC 42
3. (Habeas Corpus Writ Petition No. 61687 of 2016, decided on 12.04.2017)

parental home along with the minor child.

9. It is further submitted that subsequent to the death of her mother on account of the torture and cruelty inflicted upon her, the minor child is under the care and custody of respondent no. 4 which can in no manner be held to be illegal. Pointing out to the fact that the petitioner nos. 2, 3 and 4 are named accused in the FIR relating to offence of dowry death inflicted upon the mother of the corpus and are facing criminal trial, it is submitted that it would be totally against the interest of the minor child to grant her custody to the said petitioners. To support his submissions, reliance is placed upon the decisions in **Neelam Vs. Man Singh**[4], **Smt. Anjali Kapoor Vs. Rajiv Baijal**[5], **Athar Husain Vs. Syed Siraj Ahmed and others**[6], **Shayamrao Maroti Korwate Vs. Deepak Kisanrao Tekram**[7], **Nil Ratan Kundu and another Vs. Abhijit Kundu**[8], **Syed Saleemuddin Vs. Dr. Rukhsana and others**[9], **Kirtikumar Maheshankar Joshi Vs. Pradip Kumar Karunashankar Joshi**[10], **Vaibhavi Sharma (Minor) and another Vs. State of U.P. and others**[11], and **Vahin Saxena (Minor Corpus) and another Vs. State of U.P. and others**[12].

10. Heard learned counsel for the parties and perused the record.

11. In a petition seeking a writ of habeas corpus in a

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4. 2014 SCC OnLine P&H 25034
5. (2009) 7 SCC 322
6. (2010) 2 SCC 654
7. (2010) 10 SCC 314
8. (2008) 9 SCC 413
9. (2001) 5 SCC 247
10. (1992) 3 SCC 573
11. 2020 (12) ADJ 654
12. 2021 SCC OnLine All 593

matter relating to a claim for custody of a child, the principal issue which is to be taken into consideration is as to whether from the facts of the case, it can be stated that the custody of the child is illegal.

12. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is a writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held in **Mohammad Ikram Hussain vs. State of U.P. and others**[13] and **Kanu Sanyal vs. District Magistrate Darjeeling**[14]**.** The observations made in the Constitution Bench decision in the case of **Kanu Sanyal** (supra) with regard to the nature and scope of a writ of habeas corpus are being extracted below.

> "4. It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint". The form of the writ employed is "We command you that you have in the King's Bench Division of our High Court of Justice–immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody–together with the day and cause of his being taken and detained *to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf*". The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined

13. AIR 1964 SC 1625
14. (1973) 2 SCC 674

> and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C. in *Cox v. Hakes* (supra), "the essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end."

13. The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant becomes entitled to the writ as of right.

14. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in **Nithya Anand Raghvan Vs. State (NCT of Delhi) and another**[15], and it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.

15. Taking a similar view in the case of **Syed Saleemuddin vs. Dr. Rukhsana and others**[9], it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be

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15. (2017) 8 SCC 454
9. (2001) 5 SCC 247

unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. It was stated thus:-

> "11...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court..."

16. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others**[2], and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:-

> "14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

2. (2019) 7 SCC 42

x x x

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

17. In the case of **Smt. Anjali Kapoor Vs. Rajiv Baijal**[5]**,** where the custody of a minor child was being claimed by the father being natural parent from the maternal grand-mother, the mother having died in child birth, it was held that taking proper care and attention in upbringing of the

5. (2009) 7 SCC 322

child is an important factor for granting custody of child and on facts, the child having been brought up by the grand-mother since her infancy and having developed emotional bonding, the custody of the child was allowed to be retained by the maternal grand-mother. While considering the competing rights of natural guardianships vis-a-vis welfare of the child, the test for consideration by the Court was held to be; what would best serve the welfare and interest of the child. Referring to the earlier decisions in **Sumedha Nagpal Vs. State of Delhi**[16]**, Rosy Jacob Vs. Jacob A.Chakramakkal**[17]**, Elizabeth Dinshaw Vs. Arvand M. Dinshaw**[18]**,** and **Muthuswami Chettiar Vs. K.M.Chinna Muthuswami Moopanar**[19]**,** it was also held that welfare of child prevails over legal rights of parties while deciding custody of minor child. The observations made in the judgment in this regard are as follows:-

> "14. The question for our consideration is, whether in the present scenario would it be proper to direct the appellant to hand over the custody of the minor child Anagh to the respondent.
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> 15. Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law. (See ***Sumedha Nagpal* v. *State of Delhi***[16] (SCC p. 747, paras 2 & 5).
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> 16. In ***Rosy Jacob* v. *Jacob A. Chakramakkal***[17]*,* this Court has observed that:
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> > "*7*...the principle on which the court should decide the fitness of the guardian mainly depends on two

16. (2000) 9 SCC 745
17. (1973) 1 SCC 840
18. (1987) 1 SCC 42
19. AIR 1935 Mad 195
16. (2000) 9 SCC 745
17. (1973) 1 SCC 840

> factors: (*i*) the father's fitness or otherwise to be the guardian, and (*ii*) the interests of the minors."

This Court considering the welfare of the child also stated that: (SCC p. 855, para 15)

> "*15*.…The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society…."

17. In ***Elizabeth Dinshaw*** **v.** ***Arvand M. Dinshaw***[18], this Court has observed that whenever a question arises before court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

18. At this stage, it may be useful to refer to the decision of the Madras High Court, to which reference is made by the High Court in the case of ***Muthuswami Moopanar***[19], wherein the Court has observed, that, if a minor has for many years from a tender age lived with grandparents or near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance, having bearing upon the question of the interest and welfare of the minor and on the bona fides of the petition by the father for their custody. In our view, the observations made by the Madras High Court cannot be taken exception to by us. In fact those observations are tailor-made to the facts pleaded by the appellant in this case. We respectfully agree with the view expressed by the learned Judges in the aforesaid decision."

18. In **Anjali Kapoor** (supra), it was held that ordinarily, under the Guardian and Wards Act, 1890[20], the natural guardians of the child have the right to the custody of the child, but that right is not absolute and the courts are expected to give paramount consideration to

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18. (1987) 1 SCC 42
19. AIR 1935 Mad 195
20. GWA

the welfare of the minor child.

19. The question as to how the court would determine what is the benefit of the child was considered *in* ***Re: McGrath (infants)***[21] and it was observed by **Lindley L.J.**, as follows :-

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

20. The issue as to welfare of the child again arose in ***Re O. (an infant)***[22] where **Harman L.J.**, stated as follows :-

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

21. The question as to what would be the dominating factors while examining the welfare of a child was considered in **Walker Vs. Walker & Harrison**[23], and it was observed that while material considerations have their place, they are secondary matters. More important are stability and security, loving and understanding care and guidance, and warm and compassionate relationships which are essential for the development of the child's character, personality and talents. It was stated as follows :-

> "Welfare is an all-encompassing word. It includes

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21. [1893] 1 Ch. 143 C.A.
22. [1965] 1 Ch. 23 C.A.
23. 1981 New Ze Recent Law 257

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

22. In the context of consideration of an application by a parent seeking custody of a child through the medium of a habeas corpus proceeding, it has been stated in **American Jurisprudence, 2nd Edn. Vol. 39**[24] as follows :-

> "…An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment."

23. The question of a claim raised by maternal grand-father for guardianship of a minor child whose mother had died after giving birth to the child was subject matter of consideration in **Shyamrao Maroti Karwate Vs. Deepak Kisanrao Tekham**[25]**,** and reiterating that in the matter of custody of a minor child, paramount consideration is welfare of minor and not rights of parents or relatives, it was held that the appointment of the maternal grand-father as guardian, was justified. Referring to the judgments in **Gaurav Nagpal Vs.**

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24. American Jurisprudence, 2nd Edn. Vol. 39
25. (2010) 10 SCC 314

**Sumedha Nagpal**[26]**,** and **Anjali Kapoor Vs. Rajiv Baijal**[5]**,**

it was stated as follows :-

> "17. In ***Gaurav Nagpal* v. *Sumedha Nagpal***[26]*,* this Court held: (SCC p. 57, para 51)
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> > "*51*. The word 'welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its *parens patriae* jurisdiction arising in such cases."
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> 18. In the light of the above background, let us consider whether the custody of the minor is to be entrusted with the maternal grandfather as ordered by the District Court or with the father as directed by the High Court.
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> 19. We have already referred to the fact that on 23-3-2003, after giving birth to the child, the mother died and the child was taken by the maternal grandfather. The maternal grandfather filed a petition for custody on 7-8-2003 and the father also made a similar petition for custody on 15-10-2003. Before the District Judge, it was highlighted that immediately after the death of his wife, the respondent husband married another woman and also has a son from his second marriage. Though the exact date of marriage is not mentioned anywhere, the fact remains that within a period of one year after the death of Kaveri, daughter of the appellant herein, the respondent husband married another woman. It is also highlighted by the appellant that the respondent is working as an Operator in Maharashtra State Electricity Board at a distance of 90 km from his residence. It is further stated that the place where the respondent is residing is a rural village and there is lack of better educational facilities.
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> 20. It is the claim of the maternal grandfather that he is a pensioner getting sizeable income by way of pension and other retiral benefits and also owns agricultural properties. It is his further claim that he is living with his wife i.e. maternal grandmother of the child and other relatives such as sons and a daughter. It is also his claim that he is residing in a taluk centre where good

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26. (2009) 1 SCC 42
5. (2009) 7 SCC 322
26. (2009) 1 SCC 42

> educational facilities are available.
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> 21. Though several allegations have been made by the parties against each other, we feel that in the absence of any specific finding by the courts below on either of them, it is unnecessary to refer to the same.
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> 22. It is true that under the 1890 Act, the father is the guardian of the minor child until he is found unfit to be a guardian of the minor. In deciding such question, this Court consistently held that the welfare of the minor child is the paramount consideration and such a question cannot be decided merely on the basis of the rights of the parties under the law. This principle is reiterated in ***Anjali Kapoor* v. *Rajiv Baijal***[5].
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> 23. Though the father is the natural guardian in respect of a minor child, taking note of the fact that welfare of the minor to be of paramount consideration inasmuch as the respondent father got married within a year after the death of his first wife Kaveri and also having a son through the second marriage, residing in a rural village, working at a distance of 90 km and of the fact that the child was all along with the maternal grandfather and his family since birth, residing in a taluka centre where the child is getting good education, we feel that the District Judge was justified in appointing the appellant maternal grandfather as guardian of the minor child till the age of 12 years. The High Court reversed the said conclusion and appointed the father of the child as his guardian."

24. It may be apposite, at this stage, to refer to the law relating to guardians and wards, which is governed in terms of the Guardian and Wards Act, 1890[20] and an order with regard to guardianship upon an application filed by a person claiming entitlement may be passed under the aforesaid enactment.

25. The GWA consolidates and amends the law relating to guardians and wards. Section 4 of the Act 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 his property, or of both his

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5. (2009) 7 SCC 322
20. GWA

person and property". "Ward" is defined as "a minor for whose person or property, or both, there is a guardian". Sections 5 to 19 of the Act relate to appointment and declaration of guardians.

26. Section 7 thereof deals with "power of the court to make order as to guardianship" which 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."

27. Section 8 of the Guardian and Wards Act, 1890 enumerates persons entitled to apply for an order as to guardianship. Section 9 empowers the Court having jurisdiction to entertain application for guardianship. Sections 10 to 16 deal with procedure and powers of court.

28. Section 17 is another material provision and may be reproduced hereunder:

> "**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.
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> (3) If the minor is old enough to form an intelligent preference, the court may consider that preference.
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> ….
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> (5) The court shall not appoint or declare any person to be a guardian against his will."

29. The Hindu Minority and Guardianship Act, 1956[1] was enacted to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The Act is supplemental to the Guardians and Wards Act, and in terms of Section 2 thereof its provisions are in addition to and not in derogation to the Guardians and Wards Act.

30. Section 4 of the HMGA 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 person and property", and includes a "natural guardian". "Natural guardian" means any of the guardians mentioned in Section 6 of the HMGA.

31. 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—
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> (*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;

1. HMGA

(*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 stepfather and a stepmother."

32. Section 8 thereof enumerates powers of a natural guardian and Section 13 deals with welfare of a minor, and the same read as under :-

**"8. Powers of natural guardian.—**

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,—

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in the case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular—

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;

(b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and

(c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section "court" means the city civil court or a district court or a court empowered under section 4A of the Guardian and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

**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."

33. The provision with regard to making of an application regarding claims based on entitlement of guardianship is under the GWA and under Section 12 thereof the court is empowered to make interlocutory orders for protection of a minor including an order for temporary custody and protection of the person or property of the minor.

34. The aforestated provisions make it clear that in a matter of custody of a minor child, the paramount consideration is the "welfare of the minor" and not rights of the parents or relatives under a statute which are in

force. The word "welfare" used in Section 13 of the HMGA has to be construed liberally and must be taken in its widest sense.

35. The subject matter relating to custody of children during the pendency of the proceedings under the Hindu Marriage Act, 1955[27] is governed in terms of the provisions contained under Section 26 thereof. The aforesaid section applies to "any proceeding" under the HMA and it gives the power to the court to make provisions in regard to: (i) custody, (ii) maintenance, and (iii) education of minor children. For this purpose the court may make such provisions in the decree as it may deem just and proper and it may also pass interim orders during the pendency of the proceedings and all such orders even after passing of the decree.

36. The provisions under Section 26 of the HMA were considered in **Gaurav Nagpal v Sumedha Nagpal**[26], and it was held as follows:-

> "42. 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."

37. While determining whether father or mother should get the custody of a minor child, in **Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka**[28], it was held that the only consideration for the court in such matters should be the welfare and interest of the minor. It

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27. HMA
26. (2009) 1 SCC 42
28. (1982) 2 SCC 544

was stated thus :-

> "17. The principles of law in relation to the custody of a minor appear to be well-established. It is well-settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

38. Further, referring to **para 428** of **Halsbury's Laws of England, 3rd Edn., Vol. 21**[29], in **Thrity Hoshie Dolikuka's** case, it was observed as follows :-

> "18. In ***Halsbury's Laws of England*, 3rd Edn., Vol. 21**, the law is succinctly stated in para 428 at pp. 193-94 in the following terms:
>
> "*428. Infant's welfare paramount.*—In any proceedings before any court, concerning the custody or upbringing of an infant or the administration of any property belonging to or held on trust for an infant or the application of the income thereof, the court must regard the welfare of the infant as the first and paramount consideration, and must not take into consideration, whether from any other point of view, the claim of the father, or any right at common law possessed by the father in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father. This provision applies whether both parents are living or either or both is or are dead.
>
> Even where the infant is a foreign national, the court, while giving weight to the views of the foreign court, is bound to treat the welfare of the infant as being of the first and paramount consideration whatever orders may have been made by the courts of any other country."

39. Examining the factors to be considered in matters relating to custody of a minor child, in **Mausami Moitra**

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29. Halsbury's Laws of England, 3rd Edn., Vol. 21

**Ganguli Vs. Jayant Ganguli**[30], it was held that better financial resources, love for child, or statutory rights are no doubt relevant but welfare of the child would be paramount. It was observed as follows :-

> "19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.
>
> 20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

40. The principles as to custody and upbringing of a minor as delineated in **para 809** of ***Halsbury's Laws of England*** **4th Edn., Vol. 13**[29], were also referred in **Mausami Moitra Ganguli** and it was stated thus:-

> "22. In ***Halsbury's Laws of England*** **(4th Edn.,Vol. 13)**,

30. (2008) 7 SCC 673
29. Halsbury's Laws of England 4th Edn., Vol. 13

> the law pertaining to the custody and maintenance of children has been succinctly stated in the following terms:
>
> "809. *Principles as to custody and upbringing of minors*.—Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

41. The principles in relation to custody of a minor child again came up for consideration in **Gaurav Nagpal Vs. Sumedha Nagpal**[26], and it was reiterated that the paramount consideration in such matters would be 'welfare of the child' and not rights of parents under a statute for the time being in force. The court would have to give due weightage to the child's ordinary comfort, contentment, health, education, intellectual development, and favourable surroundings but over and above physical comfort, moral and ethical values would also have to be given importance. It was stated thus :-

> "**50.** When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in ***Mausami Moitra Ganguli***[30]***,*** the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings

26. (2009) 1 SCC 42
30. (2008) 7 SCC 673

> but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.
>
> **51.** The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its *parens patriae* jurisdiction arising in such cases."

42. A similar view was taken in **Gaytri Bajaj Vs. Jiten Bhalla**[31], and it was held that in a matter relating to child custody, the welfare, interest and desire of child has to be given paramount importance. It was observed as follows :-

> "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 the 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 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 parent concerned 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 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."

43. The question with regard to custody of a minor was again subject matter of consideration in **Vivek Singh vs. Romani Singh**[32], and it was observed that welfare of the child would be the prime consideration and psycho-social as also physical development of child for shaping of an

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31. (2012) 12 SCC 471
32. (2017) 3 SCC 231

independent personality would be of foremost concern of court as *parens patriae* in deciding grant of custody of a child. It was observed as follows :-

> "12. We understand that the aforesaid principle is aimed at serving twin objectives. In the first instance, it is to ensure that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of family/custody disputes according the optimal growth and development of the child primacy over other considerations. The child is often left to grapple with the breakdown of an adult institution. While the parents aim to ensure that the child is least affected by the outcome, the inevitability of the uncertainty that follows regarding the child's growth lingers on till the new routine sinks in. The effect of separation of spouses, on children, psychologically, emotionally and even to some extent physically, spans from negligible to serious, which could be insignificant to noticeably critical. It could also have effects that are more immediate and transitory to long lasting thereby having a significantly negative repercussion in the advancement of the child. While these effects do not apply to every child of a separated or divorced couple, nor has any child experienced all these effects, the deleterious risks of maladjustment remains the objective of the parents to evade and the court's intent to circumvent. This right of the child is also based on individual dignity.
>
> 13...It has been emphasised by this Court also, time and again, following observations in ***Bandhua Mukti Morcha* v. *Union of India***[33].
>
> > "*4*. The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the

33. (1997) 10 SCC 549

> potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood — socially, economically, physically and mentally — the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development."
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> 15. It hardly needs to be emphasised that a proper education encompassing skill development, recreation and cultural activities has a positive impact on the child. The children are the most important human resources whose development has a direct impact on the development of the nation, for the child of today with suitable health, sound education and constructive environment is the productive key member of the society. The present of the child links to the future of the nation, and while the children are the treasures of their parents, they are the assets who will be responsible for governing the nation. The tools of education, environment, skill and health shape the child thereby moulding the nation with the child equipped to play his part in the different spheres aiding the public and contributing to economic progression. The growth and advancement of the child with the personal interest is accompanied by a significant public interest, which arises because of the crucial role they play in nation building."

44. In somewhat similar set of facts, in the case of **Nil Ratan Kundu and another vs. Abhijit Kundu**[8], where the custody of a minor was sought in the background of the pendency of a criminal case under Sections 498 and 304 I.P.C. against the father charging him of causing the death of a minor's mother, it was held that the paramount consideration in such matters would be the welfare of the child, and the court, exercising '*parens patriae*' jurisdiction, must give due weightage to a child's ordinary

8. (2008) 9 SCC 413

comfort, contentment, health, education, intellectual development and favourable surroundings as well as physical comfort and moral values and the character of the proposed guardian is also required to be considered. It was held that the pendency of a criminal case, wherein the father has been charged of causing the death of the minor's mother, was a relevant factor required to be considered before an appropriate order could be passed.

45. Referring to the legal position under the **English Law**, **American Law** and the **Indian Law** in **Nil Ratan Kundu's** case, it was observed as follows :-

> **"English Law**
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> 24. **In Halsbury's Laws of England, 4th Edn., Vol. 24, Para 511 at p. 217**[29], it has been stated:
>
> "511. … *Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration*, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."
>
> (emphasis supplied)
>
> It has also been stated that if the minor is of any age to exercise a choice, the court will take his wishes into consideration. (Para 534, p. 229).
>
> 25. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ court is "welfare of the child".
>
> 26. In ***Habeas Corpus***, **Vol. I, p. 581**[34], Bailey states:
>
> "The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the

29. Halsbury's Laws of England, 4th Edn., Vol. 24,Para 511 at p. 217
34. Habeas Corpus, Vol. I, p. 581

> interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."

It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be in the best interest of a child to grant its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment.

27. In ***McGrath (infants)***[21], **Lindley, L.J.** observed :

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

***American Law***

28. The law in the United States is also not different. In **American Jurisprudence, 2nd Edn. Vol. 39**[24], it is stated:

> "As a rule, in the selection of a guardian of a minor, *the best interest of the child is the paramount consideration*, to which even the rights of parents must sometimes yield."
>
> (emphasis supplied)

In Para 148, pp. 280-81, it is stated:

> "Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in passing on the writ in a child custody case, deals with a matter

21. [1893] 1 Ch. 143 C.A.
24. American Jurisprudence, 2nd Edn. Vol. 39

> of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence, a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. *In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration*.

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. *In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment*."

(emphasis supplied)

29. In ***Howarth* v. *Northcott***[35]**,** it was stated:

> "In habeas corpus proceedings to determine child custody, the jurisdiction exercised by the Court rests in such cases on its inherent equitable powers and exerts the force of the State, as *parens patriae*, for the protection of its infant ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity."

It was further observed:

> "The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but *the primary purpose is to furnish a means by which the court, in the exercise of its judicial*

35. 17 ALR 3d 758 (1965)

> *discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate*."
>
> (emphasis supplied)

It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ issued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child.

***Indian Law***

30. The legal position in India follows the above doctrine. There are various statutes which give legislative recognition to these well-established principles. It would be appropriate if we examine some of the statutes dealing with the situation. The Guardians and Wards Act, 1890 consolidates and amends the law relating to guardians and wards...

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39. The principles in relation to 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."

46. In the aforementioned decision of **Nil Ratan Kundu** (supra) the principles governing custody of minor children were stated as follows :-

> "52. 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 the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided *solely* by interpreting legal provisions. It is a human 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.

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56. In ***Rosy Jacob***[17]***,*** this Court stated :

> "*15*... The contention that if the husband [father] is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading."

It was also observed that the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. The father's fitness cannot override considerations of the welfare of the minor children.

57. In our opinion, in such cases, it is not the "negative test" that the father is not "unfit" or disqualified to have custody of his son/daughter that is relevant, but the "positive test" that such custody would be in the welfare of the minor which is material and it is on that basis that the court should exercise the power to grant or refuse custody of a minor in favour of the father, the mother or any other guardian.

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67. Before about a century, in ***Besant*** **v.** ***G. Narayaniah***[36], under an agreement, custody of two minor sons was with the mother who was staying in England. The father who was residing in Madras instituted a suit for custody of his sons asserting that he was the natural guardian of the minors and was entitled to have custody of both his sons. The trial court decreed the suit which was confirmed by the High Court. The Judicial Committee of the Privy Council held that under the Hindu Law, the father was the natural guardian of his children during their minority. But it was stated that the infants did not desire to return to India and no order directing the defendant mother to send minors to India could have been lawfully made by an Indian court. Upholding the contention, allowing the appeal and

17. (1973) 1 SCC 840
36. (1913-14) 41 IA 314

> dismissing the suit, Their Lordships observed that it was open to the plaintiff father to apply to His Majesty's High Court of Justice in England for getting the custody of his sons:
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> > "…*If he does so, the interests of the infants will be considered and care will be taken to ascertain their own wishes on all material points*." (*Besant case* [(1913-14) 41 IA 314] , IA p. 324)
>
> (emphasis supplied)
>
> Since it was not done, the decree passed by both the courts was liable to be set aside."

47. Considering the facts of the case in particular the allegations against the respondent and pendency of a criminal case for an offence punishable under Section 498-A IPC, it was observed in the decision in the case of **Nil Ratan Kundu** that one of the matters which is required to be considered by a court of law is 'character' of the proposed guardian and that the same would be a relevant factor. It was observed thus :-

> "63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty-bound to consider the allegations against the respondent herein and pendency of the criminal case for an offence punishable under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the "*character*" of the proposed guardian. In ***Kirtikumar***[10]***,*** this Court, almost in similar circumstances, where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with the maternal uncle.
>
> 64. Thus, a complaint against the father alleging and attributing the death of the mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance while deciding the custody of the minor in favour of such a person. To us, it is no answer to state that in case the father is convicted, it is open to the maternal grandparents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and an appropriate order ought

10. (1992) 3 SCC 573

to have been passed."

48. In an earlier decision in the case of **Kirtikumar Maheshankar Joshi vs. Pradipkumar Karunashanker Joshi**[10], where in almost similar circumstances the father was facing a charge under Section 498-A I.P.C., it was held that though the father being a natural guardian, has a preferential right to the custody of the children, but in the facts and circumstances of the case, it would not be in the interest of the children to hand over their custody to the father.

49. It is, therefore, seen that in an application seeking a writ of habeas corpus for custody of a minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody the child presently is.

50. Proceedings in the nature of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy, and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. The power of the High Court, in granting a writ, in child custody matters, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

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10. (1992) 3 SCC 573

51. A writ of habeas corpus, is employed in certain cases, to enable a party to enforce a 'right to control' – arising out of a domestic relationship, especially to enable a parent to get custody and control of a child, alleged to be detained by some other person. The Courts, however, do not go further in these cases than to enquire what is in the best interest of the child, and unless it appears to be for the interest of the child, an order remanding him to custody may not be granted. A claim for guardianship or custody, in a writ of habeas corpus, may not be held to be an absolute right, and would yield to what would appear to be in the interest of the child. In such cases it is not a question of liberty but of nurture and care.

52. While examining the competing rights with regard to guardianship vis-a-vis welfare of the child, the predominant test for consideration would be – what would best serve the welfare and interest of the child. The interest of the child would prevail over legal rights of the parties while deciding matters relating to custody. The court, exercising *parens patriae* jurisdiction, would be required to give due weightage to factors such as child's comfort, contentment, health, education, intellectual development and favourable surroundings as well as physical comfort and moral values – paramount consideration being the welfare of the child.

53. The welfare of a child in the context of claims relating to custody/guardianship, would have to be considered in its widest amplitude. It may include material welfare – in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of

living. However, the material considerations, though having their place,would be secondary. More important would be the stability and security, loving and understanding care and guidance, and warm and compassionate relationships – which are essential for the psycho-social as also physical development of the child and for shaping of an independent personality.

54. In a case where facts are disputed and a detailed inquiry is required, the court may decline to exercise its extraordinary jurisdiction and may direct the parties to approach the appropriate court. The aforementioned legal position has been considered in a recent judgement of this Court in **Rachhit Pandey (Minor) And Another vs. State of U.P. and 3 others**[37]**, Master Manan @ Arush Vs. State of U.P. and others**[38] and **Krishnakant Pandey (Corpus) and others Vs. State of U.P. and others**[39]**.**

55. The judgment in the case of **Tejaswini Gaud** which is sought to be relied on behalf of the petitioners, has already been considered in the preceding paragraphs and it has been noticed that while examining the question of maintainability of habeas corpus petition under Article 226 for custody of a minor, it was held that the petition would be maintainable where the detention by parents or others is found to be illegal and without any authority of law and that the said remedy can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective.

56. The other judgment in the case of **Kumari Palak**

37. 2021 (2) ADJ 320
38. 2021 (5) ADJ 317
39. (2021) 2 AWC 1053 All

**(Minor) and another Vs. Raj Kumar Vishwakarma and others**[3] upon which reliance has been placed on behalf of the petitioners, is distinguishable on facts, inasmuch as it was a case where the father of the minor girl of age about three and half years, who had sought to claim her custody, had been acquitted in the criminal trial, and the Court upon taking into consideration the aforesaid facts and that the mother was no longer alive and that the father was ready to provide his daughter all love, care and affection, granted custody of the minor daughter to the father.

57. The present habeas corpus petition principally seeks to raise claims with regard to guardianship and custody of the petitioner no. 1 (corpus) who is girl child stated to have been born on 04.06.2018 and presently aged about three years. It is not disputed that the mother of the petitioner no. 1, upon being seriously ill was taken away by the respondent no. 4 along with the minor child for medical treatment and she died on 31.07.2019 and since then the petitioner no. 1 is under the care and custody of the respondent no. 4, her maternal grand-father. The lodging of the FIR under Sections 498-A, 304-B IPC and Section 3/4 Dowry Prohibition Act, 1961, in which the petitioner nos. 2, 3 and 4, are named as accused and the pendency of the criminal proceedings are reflected from the records.

58. The aforementioned facts do not indicate that the custody of the minor with the respondent no. 4 can in any manner be said to amount to an illegal and improper detention. The child from her infancy, when she was of a

3. (Habeas Corpus Writ Petition No. 61687 of 2016, decided on 12.04.2017)

tender age, appears to be living with her maternal grand-father. This together with the fact that the father who is claiming custody is named as an accused in a criminal case relating to the death of the mother of the corpus, would also be a relevant factor. The other considerations which would have a material bearing would be the necessity of the child being provided loving and understanding care, guidance and a warm and compassionate relationship in a pleasant home, which are essential for the development to the child's character and personality.

59. It would be relevant to bear in mind that in deciding questions relating to custody of a minor child, as in the present case, the paramount consideration would be welfare of the minor and not the competing rights with regard to guardianship agitated by the parties for which the proper remedy would be before the appropriate statutory forum.

60. This Court, in the facts of the case, is not inclined to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India, to entertain the petition for a writ of habeas corpus.

61. The petition stands dismissed accordingly.

**Order Date :-** 22.10.2021
Pratima

(Dr.Y.K.Srivastava,J.)