



2020:KHC:14304-DB

-: 1 :-

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 11TH DAY OF SEPTEMBER, 2020

PRESENT

THE HON'BLE Mrs. JUSTICE B.V. NAGARATHNA

AND

THE HON'BLE Mr. JUSTICE N.S.SANJAY GOWDA

M.F.A. No.1536 OF 2015 [GW]

C/w.

M.F.A. No.137 OF 2015 [GW/WC]

IN MFA No.1536 of 2015:

BETWEEN:

SMT. SAVITHA SEETHARAM
AGED ABOUT 36 YEARS,
D/O. S.K. SEETHARAM,
NO.48, MATHRU SADANAM,
10TH MAIN, 16TH CROSS,
MALLESHWARAM,
BENGALURU - 560 055.

... APPELLANT

(BY SRI ABHINAV R., SRI M. SUNIL SASTRY &
MRS. CHAMPOO K.S., ADVOCATES)

AND:

SRI RAJIV VIJAYASARATHY RATHNAM
AGED ABOUT 38 YEARS,
S/O. PROF. R.K. VIJAYASARATHY,
NO.1619, VAISHNAVI, 5TH 'B' CROSS,
BSK 1ST STAGE, 2ND BLOCK,
BENGALURU - 560 050.

... RESPONDENT

(BY SRI RAJIV VIJAYASARATHY RATHNAM, PARTY-IN-PERSON)

THIS MFA IS FILED UNDER SECTION 47(a) OF THE
GUARDIANS & WARDS ACT, AGAINST THE ORDER DATED:
21.11.2014 PASSED IN G & WC NO.101 OF 2012 ON THE FILE



OF THE III ADDITIONAL PRINCIPAL JUDGE, FAMILY COURT,
BANGALORE, SEEKING FOR APPOINTMENT AND DECLARATION
AS THE GUARDIAN OF THE MINOR CHILD.

- - -

IN MFA No.137 of 2015:

BETWEEN:

SRI RAJIV VIJAYASARATHY RATNAM
AGED ABOUT 38 YEARS,
S/O. PROF. R.K. VIJAYSARATHY,
NO.1619, VAISHNAVI, 5TH 'B' CROSS,
BSK 1ST STAGE, 2ND BLOCK,
BANGALORE - 560 050. ... APPELLANT

(BY SRI ABHILESH J., ADVOCATE)

AND:

SMT. SAVITHA SEETHARAM
AGED ABOUT 36 YEARS,
D/O. S.K. SEETHARAMU,
NO.48, MATHRU SADANAM,
10TH MAIN, 16TH CROSS,
MALLESHWARAM,
BANGALORE - 560 055. ... RESPONDENT

(BY SRI ABHINAV R., SRI M. SUNIL SASTRY &
MRS.CHAMPOO K.S., ADVOCATES)

THIS MFA FILED UNDER SECTION 47(a) OF THE
GUARDIAN AND WARDS ACT, AGAINST THE JUDGMENT AND
AWARD DATED:21.11.2014 PASSED IN G & WC NO.101 OF
2012 ON THE FILE OF THE III ADDITIONAL PRINCIPAL JUDGE,
FAMILY COURT, BANGALORE, APPOINTING AND DECLARING
THE PETITIONER AS GUARDIAN TO THE MINOR CHILD.

THESE APPEALS COMING ON FOR *HEARING* ON
27/08/2020 AND THE SAME HAVING BEEN HEARD AND
RESERVED FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY,
NAGARATHNA J., PRONOUNCED THE FOLLOWING:



J U D G M E N T

These appeals have been preferred by the wife and husband respectively assailing order dated 21.11.2014 passed in G.& W. case No.101 of 2012 by the III Additional Principal Judge, Family Court, Bengaluru. The said petition was filed by the wife (mother of minor child Aditya Rajiv Ratnam) under Sections 7 and 17 of the Guardians and Wards Act, 1890 (hereinafter referred to as 'the Act' for the sake of brevity) seeking appointment of herself as guardian of the minor child and to grant permanent custody to her. The said petition was contested by the husband/father of the child.

2. The mother of the child let-in her evidence as PW-1 and another witness (petitioner's mother) was examined as PW-2. She produced fifty documents which were marked as Exs.P-1 to P-50. The respondent/father of the child examined himself as RW-1. He produced ninety-five documents which were marked as Exs.R-1 to R-95. Thereafter, the Family Court raised the following points for its consideration:



- (i) "Whether the petitioner-mother is entitled to be appointed and declared as the guardian of the minor child-Master Aditya Rajiv Ratnam?
- (ii) Whether the petitioner is entitled for permanent custody of the minor child?
- (iii) Whether the respondent is entitled for permanent custody of the minor child?
- (iv) What order?"

3. The Family Court answered point Nos.1 and 2 in the affirmative, point No.3 in the negative and declared the mother as the guardian of the minor child Master Aditya Rajiv Ratnam and that the child shall continue to be under the care and custody of the mother. However, certain directions were issued regarding visitation rights for the respondent/father. Being aggrieved, both the parents of the child have preferred their respective appeals.

4. We have heard learned counsel for the respective parties in the presence of the parties and we also interviewed the minor child on 10.02.2020.



5. In the connected case M.F.A. No.4749 of 2019, the parents had sought dissolution of their marriage by a decree of divorce by mutual consent and a petition under Section 13B of the Hindu Marriage Act, 1955 was filed in M.F.A.No.4749 of 2019 and an application under Section 13B(2) was also filed seeking waiver of six months period stipulated under the said provision.

6. These, and other connected cases were adjourned from time to time in order to evolve a settlement between the parties who have been litigating for quite a few years before several fora, before the trial court and this Court as well as before the Hon'ble Supreme Court and also in the Courts of United States of America (USA).

7. The parties were granted a decree of divorce by mutual consent by judgment dated 27/08/2020 subject to the terms agreed upon by them. Clause (5) of the petition filed under Section 13B of the Act reads as under:

"5. The Parties have agreed to withdraw the cases between them and their family members. The parties have not been able to reach any consensus ad-idem in relation to matters relating to child



custody and visitation of their minor child Master Aditya Rajiv Ratnam and consequently, they have agreed that this Hon'ble Court be pleased to pass an order in relation to the same, which shall be part of this settlement."

(underlining by us)

8. Whenever, the husband and wife seek to dissolve their marriage, the conflict over the custody of the child, particularly a minor child, assumes significance. Whenever there is opposition by a party for giving custody of the child to another party and vice versa, the conflict can become extreme and aggravated sometimes resulting in dilution of any settlement that could be arrived at between the parties to seek dissolution of their marriage. One cannot underestimate the fact that in the case of separation of parents on account of dissolution of marriage by a decree of divorce, the children of the marriage are most affected physically, emotionally and their upbringing would take a beating.

9. One of the ways to resolve the conundrum is, by the emerging concept of shared parenting. In some overseas jurisdictions, the concept of shared parenting has been in vogue and prevalent but not so well entrenched in



India and has been ordered only in a handful of cases. It is necessary to remind ourselves that a child requires both parents, the mother and the father in jointly bringing up the child which would have a holistic impact on the overall growth of the child. This is because both parents have a joint responsibility in bringing up their children as each parent would contribute in a unique way to the mental, physical and emotional/psychological development of the child. Hence, whenever there is a separation between the parents, shared parenting would mean that the joint responsibility would continue subject to certain arrangements being put in place.

10. In this context, it is necessary to understand two terminologies, namely, joint physical custody and joint legal custody. Joint legal custody means that both parents have equal rights and responsibilities towards the child including the child's education and upbringing, whereas the joint physical custody would mean, both parents would share the physical custody of the child by spending equal time and having equal contact with the child.



11. The International Council on Shared Parenting (ICSP) at its conference held at Bonn, Germany, in July 2014 has arrived at certain areas of consensus as under:

- (i) That "shared parenting" is defined to include both the shared parental authority (decision making) and shared parental responsibility for the day-to-day upbringing and welfare of the children, between both the parents keeping in mind children's age and stage of development. Thus, "shared parenting" is defined as the presumption of shared rights in regard to the parenting of children by fathers and mothers who are living together or apart.
- (ii) Shared parenting is a post-divorce parenting arrangement for the optimal development of the child including children of high conflict parents. That if there is a 50-50 parent time, it would be an optimal time that each parent could expect during week days or week-ends, as the case may be.
- (iii) There is also a consensus that shared parenting orders could be passed even if one parent opposes it. As shared parenting is in consensus with International Human Rights and Constitutional Rights of the children to be raised by both their parents.



- (iv) Any judicial discretion to be exercised by the Court must be in the best interest of the children.
- (v) Though the shared parenting would not apply to situations where there is violence and child abuse or maltreatment of the child in any form including parental alienation.
- (vi) Accessible network of family relationship centers that would render relevant support services and family mediation are necessary and vital for the success of shared parenting.

12. At the outset, it would be useful to refer to a decision of the Hon'ble Supreme Court in the case of ***Thrity Hoshie Dolikuka vs. Hoshiam Shavaksha Dolikuka, [(1982) 2 SCC 544]***, wherein it has been observed as under:

"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."



13. Justice V. Ramasubramanian, as His Lordship was at the Madras High Court (now at the Apex Court), at paragraphs 31, 32, 41 and 48 of his judgment dated 21.03.2011, in the case of **Mr.S.Anand vs. Ms.Vanitha Vijaya Kumar and another, [(2011) 4 Mad LJ 494]**, has observed as under:

"31. It is quite unfortunate that the Courts still dabble with the age old concepts of custody and visitation rights. These terms emanate from a rights regime rather than a responsibilities regime. Today the emphasis has shifted from the regime where we were concerned with the rights of the parents over the child, to a regime where we should be concerned about the responsibilities of the parents towards the child. After the advent of the Children Act, 1989 in U.K., the old terminology of "custody", "guardianship" and "custodianship orders", have gone {see Cheshire and North's Private International Law-Thirteenth Edition-Lexis Nexis Butterworths Publication (page 857)}. Instead, Section 8 of the Act, uses the terms "residence" and "contact" (or access). Taking the law from the rights regime to the responsibilities regime, the Hague Conference concluded a Convention in 1996 known as "Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility for the Protection of Children". The provisions of this Convention lay



emphasis on parental responsibility and it requires that the child should be treated as an individual and not simply as an appendage of its parents.

32. Therefore, I wish to fix responsibility on both the parents, as an interim measure, in view of the fact that the homes of the applicant as well as the respondents provide different sets of advantages (as well as disadvantages) to the child. While the home of the applicant provides the advantage of an affectionate father focussing on a single child, with a devoted grandmother, the home of the respondents provides the advantage of an affectionate mother with two younger siblings of the minor child, available for him to share love, affection and the hard realities of life."

14. The United Nations Convention of Rights of the Child, 1989 is an International Treaty which encompasses civil, political, economic, social, health and cultural rights of children, to which India is a signatory. The quintessence of the right of the child in the context of separated parents is that a child should not be separated from his or her parents against his will except when the court determines so in accordance with the applicable law, to the effect that such separation is necessary and in the best interest of the child. The relevant Articles of the said Convention for the purpose of this case are as under:

**" Article 3:**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

x x x

Article 5:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

x x x

Article 9:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine,



in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 10:

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

x x x

Article 12:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express



those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

x x x

Article 14:

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

x x x

Article 18:

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing



responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

x x x

Article 27:

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. "

15. Thus, the concept of shared parenting would assume greater importance after the divorce of parents by a dissolution of their marriage. Questions such as custody and visitation rights would then assume significance in the context of the responsibilities of the parents towards their children. Thus, the concepts such as "joint legal custody" or "joint physical custody" have emerged over a period of time in several legal regimes. In Australia, the Family Law (Shared Parental Responsibility) Amendment Act, 2006 has introduced changes to the original Act of 1975 i.e., Family Law Act, 1975. The object of the amendment is to encourage shared and co-operative parenting after the



separation of parents, bearing in mind the best interests of the child which is the paramount consideration. While considering the same, the factors such as compatible parenting, co-operation, degree of maturity, attitude and behaviour of the parents and the willingness to communicate with other parent are considered. In United Kingdom, joint custody arrangements take into consideration the welfare principles which are in the interest of the child.

16. The Dutch Parliament in 1996 passed a law mandating that joint legal custody as the presumed standard for post-divorce parenting in the Netherlands. From the year 2009 onwards, all divorces are accompanied by a parenting plan based on the assumption of the shared parenting system. If no plan can be agreed upon or the plan is not amenable, the Judge has discretion to send the divorcing parents to a mediator in order to acquire such a plan before continuing the divorce proceedings. The plan must include: the division in the care and parenting tasks; how to inform and consult each parent on parenting the children and the costs of caring and parenting the children, etc.



17. The Children's Act No.38 of 2005 in South Africa deals with parental responsibility to include the responsibility and the right (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child. Shared parenting norms are also prevailing in Canada, Singapore, Kenya, etc.

[*Source: Article on "***Shared Parenting System vis-à-vis Custody of Child – Is India in need of Legislation for Caring Children?***"

By CAESAR ROY, Assistant Professor in Law, Midnapore Law College, Vidyasagar University, Midnapore, Paschim Medinipur, West Bengal, published in SCC Online, (CNLU LJ (6) [2016-17] 65).]

18. The Law Commission of India had released a Consultation Paper on "*Adopting a shared parenting system in India*" and after several rounds of discussions and deliberations, the Commission expressed the following views:

- (i) "strengthening the welfare principle in the Guardians and Wards Act, 1890 and emphasize its relevance in each aspect of guardianship and custody related decision-making;
- (ii) providing for equal legal status of both parents with respect to guardianship and custody;



- (iii) providing detailed guidelines to help decision-makers assess what custodial and guardianship arrangement serves the welfare of the child in specific situations; and
- (iv) providing for the option of awarding joint custody to both parents, in certain circumstances conducive to the welfare of the child."

The above could be found in 257th Report titled "*Reforms in Guardianship and Custody Laws in India*". Thus, the jurisprudence on the custody of the minor children of separated parents has evolved over the decades and both parents are recognized as having equal responsibilities in the custody of their children and thus, the concept of *shared parenting* is gradually emerging in the legal firmament of India also. The following extracts from chapter V of the said Report are apposite and are extracted as under:

"A. Factors to Consider for the Best Interest Standard

A number of jurisdictions have statutes that enumerate specific factors to guide courts when they consider the best interests of a child. Generally, these factors relate to: the physical and mental condition of the child; the physical and mental condition of each parent; the child's



relationship with each parent; the needs of child regarding other important people (siblings, extended family members, peers, etc.); the role each parent has played and will play in the child's care; each parent's ability to support the child's contact and relationship with the other parent; each parent's ability to resolve disputes regarding the child; the child's preference; any history of abuse; and the health, safety, and welfare of the child. However, these factors are not exhaustive, and some statutes expressly indicate that courts should consider "other factors as the court deems necessary and proper to the determination."

B. Determining the Preference of the Child

A child's preference in matters of custody is generally taken into consideration if the child is sufficiently intelligent and mature. The preference must also be reasonable—the child's wishes will not be considered by the court if, e.g., it is based on which parent's home has better toys. In determining the preference of the child, some courts will interview the child in court chambers (after asking for each parent's permission to do so outside their presence). The attorneys may be present, but they may or may not be allowed to ask questions during the interview. The judge will usually make a record of the interview (e.g., by using a court reporter), but the judge can also order that the interview be kept confidential if doing so would be in the best interest of the child.



Alternatively, instead of an interview, the court can appoint a guardian ad *litem* to represent the child's interests. The guardian ad *litem* can submit a report regarding what is in the child's best interests, including the child's wishes for custody. The guardian ad *litem* can also testify about the child's preferences. The court can also have a social worker or other mental health professional testify about the child's opinion.

x x x

H. Parenting Plan

A number of jurisdictions require divorcing parents (either jointly or individually) to submit a shared parenting plan to the court. The plan must address major areas of decision making, including: the child's education; the child's health care; religious upbringing; procedures for resolving disputes between the parties with respect to child-raising decisions and duties; and the periods of time during which each party will have the child reside or visit with him, including holidays and vacations, or the procedure by which such periods of time shall be determined. Some jurisdictions provide additional guidance regarding communication (between parents and between the child and the non-custodial parent); transportation to and from the other parent's residence; what to do if a parent wishes to relocate; how to change scheduled parenting time; and exchanging information about the child. The parenting plan



itself is not a legal document; it must be approved by a court to have legal effect.

I. Visitation

A number of jurisdictions have detailed visitation schedules that courts can use verbatim or modify as needed. These serve as templates so that the court does not have to start from scratch. Although these sample schedules vary across jurisdictions, there are some common themes. Generally, the schedule will depend on the child's age and the distance between the parents' homes. There must be a fair allocation of holidays, birthdays, and school vacations. A child must have time with his/her siblings and other important people in the child's life (grandparents, etc.). A parent's ability to care for a young child (especially infants) may be considered. Some basic options for scheduling parenting time are:

- The child alternates between the parents on a regular basis (e.g., daily, weekly, or monthly)
- The child lives with one parent when school is in session, and lives with the other parent during school vacations
- The child lives primarily with one parent, but visits the other parent on alternating weekends and 1–2 evenings per week (possibly including an overnight stay)

Guidelines on scheduling have been provided by both Indiana and Michigan, which recommend that a child visit a non-custodial parent every other



weekend and one weekday evening per week. The Indiana and Michigan guidelines also recommend dividing holidays (some are given to each parent) and then alternating them every year. However, some holidays (such as winter school vacation) are not alternated, but rather shared equally by the parents every year (i.e., the child spends the first half of the vacation with one parent, and the second half with the other). Both states also have additional guidelines for parents that live far away from each other and for young children.

In India, visitation rights have been defined by the Supreme Court in *Roxann Sharma v. Arun Sharma* as "a non-custodial parents or grandparent's Court ordered privilege of spending time with a child or grandchild who is living with another person, usually the custodial parent." In a number of cases, the Supreme Court has granted visitation rights to the non-custodial parent and grandmothers, adoptive parents, maternal uncles and aunts. The prime consideration for visitation rights is the welfare of the child and the proximity of the child to the relation concerned.

For example, in *Prabhat Kumar v. Himalini*, the Court held that the welfare of the child is determined by the benefit of care and affection the minor would receive in granting visiting rights to such family members of the hostile family. The onus of proving such benefit is upon the family member claiming the right. Another important consideration is the nearness of the child to the



family member. Here, the Court upheld the order for interim visitation for the father and his relatives, due to a reinforced relationship between the child and father on account of regular visits ordered by the guardianship Judge.

The Commission believes it is necessary and useful to lay down broad guidelines on visitation rights, such that they are conducive to the welfare of the child, and to ensure that both parents are able to spend time with the child.”

19. In some cases, the concept of shared parenting may not work at all, particularly when one of the parents resides abroad or in a place different from the residence of another parent. It all would all depend on the facts and circumstances of each case, but there is a clear momentum in law towards shared parenting with the child in focus and the rights of the child being the over-riding factors rather than the rights of the separated parents. It would be ideal if the parents jointly submit a plan for shared parenting. In the alternative, the Court must exercise its *parens patriae* jurisdiction.

20. There may be certain drawbacks in shared parenting also particularly, when one of the parents is a habitual perpetrator of domestic violence, child abuse,



child kidnap or child neglect or showing disinterest in the child. The other is when once separated parents re-marry, the second spouse may not be interested in the parenting of the child or maintaining links with the child from the first marriage. Therefore, there would be a dislike towards the child, which may cause emotional problem or harm to the minor child. Very often, differences in the finance and social status of the parents can cause a void, which the child would have to put up with. More importantly, the child would have to be moving between two homes. The ideal situation is, if the child is consistently in one home and the parents move in and out of the home. Nevertheless, it must be understood that children of divorced parents need both parents both emotionally and physically and hence, exclusive custody to one parent with visitation rights to the other cannot be a complete remedy. Thus, what emerges is that the expression 'best interest' and 'welfare of the child' must be imbibed in the context in which the child is positioned between the parents. The facts and circumstances of each case would vary and what is good in one case, may not be good in the other case and *vice versa*.



21. That while preparing a joint parenting plan, care must be taken so that there is no instability or inconvenience caused to the child. Also the expression “joint” or “shared” would not mean mathematical exactitude or precision, as there must be pragmatism and innovation required at every stage. The personal profile of the parent, their educational qualification, residence, economic and social status, etc., would be important factors while developing the joint parenting plan. As there is no legislation as such in India on shared parenting, the same must evolve with judicial interference, innovation and involvement in assessing the requirements of each child.

22. In the instant case, the petition was filed by the mother of the child-Aditya under Sections 7 and 17 of the Act. The said Sections read as under:

“ 7 . Power of the Court to make orders 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



-: 26 :-

(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 provision of this Act.

x x x x

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 Courts 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.

(4) Deleted.

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

a) Section 7 of the Act empowers the Court to appoint a guardian for the person or property of a minor. While exercising jurisdiction under the said Section, the Court has to bear in mind the paramount welfare of the minor child. The Court can exercise jurisdiction once it is satisfied that the order to be passed is in the welfare of the child. Thus, the Court must be assured of the satisfaction that the order to be made is towards the welfare of the child. In other words, the issue has to be decided on the basis of who would best serve the interest of the minor child and not on the basis of the legal right of the parties. The paramount consideration is the interest and welfare of the minor child. The expression *welfare of the minor* has a broad connotation and takes within its scope and ambit several facets such as, educational, physical, moral,



financial, religious, etc. This would depend on the facts and circumstances of each case. While making a consideration under the Section, the Courts must not be persuaded only by the material welfare of the child, but also look into the security and comprehensive development of the child, its personality and talents.

b) Section 17 of the Act deals with the matters to be considered by the Courts in appointing guardians. Once again, the emphasis is on the welfare of the minor. The expression must be construed in its widest sense. It is not just the physical well-being of the child, but the moral and psychological welfare must also weigh with the Court. Also the expression *custody and guardianship* bear a subtle distinction while the custody of a child may be with one parent, a guardian could be the other parent.

c) Sub-section (3) of Section 17 of the Act states that if the minor is old enough to form an intelligent preference, the court may consider that preference. Thus, along with the concept of welfare of the minor, the inclination and opinion of the minor has assumed significance. Thus, the Court must initially infer that the



minor is intelligent enough to make a preference, having regard to his age, upbringing and such other factors. In many cases, the minor's inclination or opinions have been the deciding factors. Even then, it is ultimately the welfare of the child which will be a paramount consideration. It is not possible to lay down any rules governing the determination about the welfare of a minor, but each case has to be decided on its own facts and circumstances. If a minor is capable of understanding what is happening around him, his education and future prospects, his views and desires have to be given weightage and it is the responsibility of the Court to ascertain the desire in person. At the same time, the wishes of the child are not the only governing factor. The willingness of the minor and his wishes is one of the factors to be considered under Section 17(3) of the Act.

d) Reference could also be made to Section 26 of the Hindu Marriage Act, 1955. Section 26 of the Hindu Marriage Act, 1955, is extracted as under:

"26. Custody of children.—In any proceeding under this Act, the court may, from time to time, pass such interim orders and make



such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made:

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent."

e) Though the said provision would apply in any proceeding arising under that Act, it nevertheless has a relevance to the case at hand. What needs to be emphasized on a reading of Section 26 of the Act is that the matter of custody of the child has to be decided consistently with the wishes of the child and it is an important factor to be taken into consideration. However, at the same time, one has to bear in mind that the wishes



of the child is based on an intelligent decision and not tutored by others. This also would depend upon the age of the child and its capacity to have an independent and intelligent mind.

23. We have referred to the principle of shared parenting which is defined to include shared parenting authority as well as shared parenting responsibility in the day-to-day upbringing and welfare of the children, as it has evolved over the decades, in the context of custody of minor children. The Hon'ble Supreme Court in a catena of decisions has held that in dealing with the 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. Over a period of time, the concepts of custody and visitation rights have transformed themselves into the responsibility of parents towards children. A central theme of this transformation is the emphasis on parental responsibility which requires that the child should be treated as an individual having his or her own capabilities and limitations as well as independent opinions. A child is not an



appendage of his parents. The focus of attention must actually be on the child.

24. The United Nations Convention on the Rights of the Child, 1989, has emphasized that a child should not be separated from his or her parents against his or her will except when competent authorities, subject to judicial review, determine in accordance with applicable law and procedures, that such separation is necessary in the best interests of the child. The principle of best interest of the child is also a variable principle inasmuch as what is in the best interest of the child in one case may not be so in another case. Each case must be looked at individually by focusing on the special facts and circumstances so as to envisage the pros and cons while passing an order on the custody of the child. Article 12 of the said Convention clearly states that the views of the child who is capable of forming his or her own views must be given due weightage in accordance with age and maturity of the child by the court and other authorities. The parents or, as the case may be, the legal guardians have a primary responsibility for the upbringing and development of the child for, the best interest of the child must be their basic concern. In



this regard, we have referred to the concepts of joint legal custody and joint physical custody in various over-seas jurisprudence and we find that joint physical custody is a species of joint legal custody inasmuch as the goal must be to encourage shared and co-operative parenting after the separation of parents, bearing in mind the best interests of the child which is the paramount consideration. Thus, the welfare principles which are in the interest of the child, assume importance. Therefore, prior to passing of the decree of divorce, it is necessary to seek a parenting plan post-divorce from the parties themselves. In this regard, we have also referred to the report of the Law Commission on adopting the shared parenting system in India where equal legal status of both parents with respect to guardianship and custody is emphasized. The Law Commission Report also highlights the factors to be considered for the best interest standards, which we have extracted and also determined the preference of the child.

25. In India, the norm that the father is the natural guardian of the child is no longer valid and there have been instances where the mother is given the custody with visitation rights to the father or *vice versa*.



In ***Kumar V. Jahgirdar vs. Chethana Ramatheertha, [(2004) 2 SCC 688]***, (*Kumar V.Jahgirdar*), the Hon'ble Supreme Court observed that the mother is not always the natural guardian and the custody need always be given to her. In ***Rosy Jacob vs. Jacob A.Chakramakkal, [(1973) 1 SCC 840]***, (*Rosy Jacob*), the Hon'ble Supreme Court observed that it is necessary to strike a just and proper balance between the requirement and welfare of the minor child and the rights of their respective parents, over them. In ***Gaurav Nagpal vs. Sumedha Nagpal, [(2009) 1 SCC 42]***, (*Gaurav Nagpal*), while dealing with Section 26 of the Hindu Marriage Act, 1955, it was observed that with respect to the custody, maintenance and education of the minor children, orders could be passed consistently with their wishes, wherever possible. That while considering the issue of custody of minor child, the paramount consideration is the welfare of the child and not the rights of the parents under a statute for the time being in force. The departure from the principle that the father is the natural guardian of the child was more emphatic in ***Sheila B. Das vs. P.R. Sugasree, [(2006) 3 SCC 62]***, (*Sheila B.Das*), wherein it was observed that



either parent, provided he or she is financially stable and able to take care of the child, is fit to be the guardian. In the said case, the custody of the twelve year old minor daughter was given to the father (an advocate) with visitation rights to the mother (a doctor).

26. This Court in ***K.M.Vinaya vs. B.R.Srinivas, [2013 SCC Online Kar 8269]***, (*K.M.Vinaya*) modified in ***[(2015) 16 SCC 405]***, held that both the parents are entitled to get custody for the sustainable growth of the minor child and the following directions were issued:

- (i) " The minor child was directed to be with the father from 1st January to 30th June and with the mother from 1st July to 31st December of every year.
- (ii) The parents were directed to share equally, the education and other expenditures of the child.
- (iii) Each parent was given visitation rights on Saturdays and Sundays when the child is living with the other parent.
- (iv) The child was to be allowed to use telephone or video conferencing with each parent while living with the other."



27. Different High Courts and the Hon'ble Supreme Court in number of judgments have held that greater economic prosperity of the father and his relatives is not a guarantee of the welfare of a minor and that it does not disturb the presumption in favor of the mother while deciding custody.

28. We have also referred to the applicable provisions under the Guardians and Wards Act and also referred to Section 26 of the Hindu Marriage Act, 1955 as under the said provision, an order to be passed concerning the custody, maintenance and education of minor children must be consistent with the wishes of the children. The relevant judicial precedents on the custody of visitation rights of the parents have been referred to above and we have also elaborated on the advantages and drawbacks in shared parenting. In the light of the above, we have proceeded to consider the case of the respective parties and as to whether the order impugned is just and proper.

29. The centre of controversy, which also was also a factor which caused a delay in the settlement of disputes between the parties in the instant case was regarding



custody of the minor child, Master Aditya Rajiv Ratnam. Several suggestions and counter-suggestions were made in Court on several dates with regard to the manner and method in which the parties could have custody and/or access to the child. Since, the settlement between the parties could not have been arrived at in the connected matters until the custody issue was resolved, this Court thought it fit, in the first instance, to interview the minor child alone and elicit his views in the matter. In the instant case, in order to ascertain the preference of the child Aditya—the minor child in question—we had interviewed the child in our chambers and have recorded the proceedings dated 10.02.2020. In the said interview, Aditya categorically stated that he would be comfortable to reside in the house of both his parents for about six months each in a year and by visiting the other parent during the period of residence with one parent. In this case, we also sought for parenting plan to be submitted by the parties and the learned counsel appearing for the parties, have done so orally. On 10.02.2020, the child was exclusively interviewed and recording of the same is extracted as under:



**" BVNJ & PGMPJ: M.F.A.No.4749/2019
10.02.2020**

ORDER

Pursuant to our order dated 04/02/2020, the case was ordered to be listed on 10/02/2020 at 4.30 p.m. and the child was to be present before this Court at the said time. The appellant has presented the minor child Aditya in Court.

The minor child Aditya, was spoken to and interacted with by us in our chamber. He is about eleven years old. Aditya is quite aware of the dispute between his parents and the fact that he is presently residing with his mother – appellant herein and the respondent has visitation rights.

We had a detailed interaction and discussion with Aditya. He has expressed that there could be an arrangement whereby, six months of the year he resides with one parent and with the other having visitation rights, while in the next six months, there could be a converse arrangement. He has repeatedly told us that the arrangement must be kept a "secret" and the same should not be revealed.

On our assessment of Aditya, we find that he is at ease and comfortable with both parents and is concerned about his studies, hobbies, games and his well being, which is a positive sign. This implies that he has not been dragged into the dispute between his parents and has been able to pursue



his studies as a normal child. He has also stated that he is second in class and his friend Rohan ranks first in the class. He also expressed that apart from his school activities, sports and games, he is learning how to play the violin from Karthik Sir and the violin classes are held very close to his mother's residence. He loves cricket more than football. He said that he is friendly with his cousins and also has a good relationship with his maternal and paternal grandparents. That his father stays at Banashankari and he takes him to meet his great grandmother at J.P.Nagar. That in school, he goes to picnics which are at village resorts. He categorically stated that he would like to concentrate on his studies and he likes Mathematics, English, History, Geography and all other subjects.

Having regard to the fact that Aditya expressed that any arrangement to be made regarding his custody and residence should be kept a "secret", we requested him to visit the High Court Library, so that in the meanwhile, the parents of Aditya could be spoken to.

Certain suggestions have been made, so as to bring an end to the dispute between the parties and to give a stable upbringing to Aditya. Thereafter, advocates for the appellant and the respondent have been appraised of our interaction with Aditya.



Learned counsel for appellant stated that he would discuss the matter with his party and respond. Respondent also stated that he would think over with the matter and respond to the suggestions made by us.

In the circumstances, list this matter on **17/02/2020** at 1.00 p.m.”

30. Subsequently the feelings and mind of the child were explained to the parents and time was granted to them to make suggestions on that basis. Though on several dates these appeals were listed along with other cases, no concrete parenting plan was evolved. In that regard, one of the suggestions made by the Court was to have shared parenting plan as both parties resided at Bengaluru and there was no chance of either of the parties moving away from Bengaluru and the child also studied at Bengaluru. At that time, the child was residing with his mother, while the father was having visitation rights. Earlier, the matter had also been considered by the Hon'ble Supreme Court and observation was made in its order dated 11.09.2018 regarding the point from which the child had to be picked up and dropped.



31. When the matter stood thus, on account of COVID-19 pandemic, schools in Bengaluru closed the Academic Year in the 1st week of March-2020 and as a result, summer vacations commenced. In terms of the directions of the Family Court, Bengaluru, the minor child, Aditya who was then in the custody of his mother went to his father's home to spend the summer vacation. But, the pandemic resulted in the Central and State Governments imposing lock-down restrictions with effect from 25.03.2020 which continued up to 04.05.2020 and thereafter, though they were eased with certain relaxations, the schools never resumed classes and consequently, online classes commenced from 01.06.2020. Aditya remained with his father on account of the lock down, not being able to travel from his father's residence to his mother's house as per the directions of the Family Court. In the circumstances, an application was filed by the mother seeking certain interim directions. The said application was disposed of on 02.07.2020. On 02.07.2020, the following order was passed by us:



**"BVNJ & NSSGJ
Pronounced on 02.07.2020**

**MFA.No.1536/2015 c/w. MFA.No.137/2015,
CCC.Nos.1236/2015, 656/2016 , 673/2016,
680/2016, 711/2016, 810/2016, 991/2016,
1144/2016, 1381/2016, 422/2017 &
MFA.No.4749/2019**

**ORDER ON I.A.NO.I/2020
IN
M.F.A.No.1536/2015**

X X X

22. In the result, the application is ***disposed of*** with the following directions:-

(1) Aditya Rajiv Ratnam shall remain in the custody of his father until his physical attendance in the school is mandated or till completion of the period of six months i.e. till 14.09.2020 whichever is earlier.

(2) The respondent to handover custody of the minor child Aditya Rajiv Ratnam to the appellant two days before reopening of the school mandating physical attendance of the minor child in the school or on 14/09/2020, whichever is earlier. Till then, respondent is directed to facilitate the appellant to exercise visitation rights on every Saturday and Sunday starting from 04/07/2020 between 11.00 a.m. on Saturday, till 7.00 p.m. on Sunday. When there are curfew orders, the respondent shall hand over the child to the appellant on Friday evening by 7.00 p.m. and take back the child on Monday morning in time so that



the child could attend to online classes. When the child is with one parent, the other parent shall be permitted to use telephone or video conferencing facility to connect with the child.

(3) In the event, physical attendance of the child in the school till 14/09/2020 is not mandated then, respondent to handover custody of the child to the appellant on the morning of 13/09/2020 which happens to be a Sunday, by about 11.30 A.M. at the designated exchange point. The above direction is subject to orders of curfew to be issued by the State Government on account of the pandemic or otherwise.

It is further clarified that the aforesaid interim arrangement is made having regard to COVID-19 pandemic and the closure of the school of minor child herein and pending a final settlement in the matter.

By the next date of hearing, the parties may arrive at a consensus with regard to terms of settlement in the matter.

List these matters on **17/07/2020** for considering the proposals for settlement."

32. The said order is in operation. It is noticed that since March 2020, Aditya has been with his father and he will have to proceed to his mother's residence as for the last six months, he has been with his father and since July-



2020, his mother is having access the child has been visiting the mother on week ends bearing in mind the lock down and curfew guidelines. Thus, it is seen that since from March-2020 till date, the child has been with the father and from September 13th onwards, the child will be in the actual custody of the mother with visitation rights to the father during weekends. Also, the Academic Year 2020-2021 will come to an end at the end of March-2021. No doubt, there has been no physical attendance of the child in the school (National Academy for Learning, Basaveshwar Nagar, Bengaluru) and the child is being taught through virtual classes which he has been attending regularly. Until the State Government permits the opening of the schools, on being assured that the COVID-19 pandemic would no longer be a risk to children, Aditya would have to continue to attend online classes. Once, the schools are re-opened, he would have to attend the school till completion of the Academic year-2020-21. Thereafter, there would be summer vacation during the months of April and May-2021. The Academic Year 2021-22 would commence around 01.06.2021. Bearing the above aspects in mind, we think that shared parenting of the minor child



Aditya between the parents would be in the following manner until the child attains eighteen years of age. If circumstances are suitable the same arrangement could be continued with required modifications thereafter also:

- (i) Considering that the summer vacation of the schools is two months in a year and bearing in mind that the academic year would commence on 01st June of every year and end on 31st March of the succeeding year, at the outset, we exclude two months namely April and May of every year from the arrangement to be made for shared parenting during the year, while delineating a separate arrangement for the said period of summer vacation.
- (ii) At the beginning of the new academic year, assuming, that it commences on 1st June, two days prior to the commencement of the school, the child will move to the father's residence and be with the father till 31st October. From 01st November, the child will be with the mother till 31st March or till the



commencement of the summer vacation,
whichever is later.

- (iii) When the summer vacation commences, fifty per cent of the said vacation shall be spent by the child with the father in the initial part of the vacation and the subsequent period of the summer vacation will be spent with the mother;
- (iv) Similarly, during Dasara vacation, depending upon the number of days the school is closed, the child could spend fifty percent of the said vacation with the mother in the first instance and with the father later and then return to the mother on November 01st of the year;
- (v) Similarly, in winter vacation, the child will spend his time equally between the parents. When the winter vacation commences, on the first day of the winter vacation, the child will proceed from the mother's residence to the father's residence and in the second half of the winter vacation, the child will return to the



mother's residence and continue to remain with her till the commencement of the summer vacation or 31st March, whichever is later;

(vi) Thus, during the months from June to October (five months), the child will be with the father and during the months from November to March (five months), the child will be with the mother.

(vii) During the aforesaid period, when the child is in the residence of one of the parents, the other parent would have visitation rights, once in two weeks. It shall be on the 2nd and 4th weekend of the month. The parent in whose residence the child is, must ensure that the child shall visit the other parent at 08.00 p.m. on Friday evening and the other must ensure that the child returns on Sunday by 08.00 p.m.

(viii) The child shall be picked up and dropped at the Tirumala Tirupati Devasthanam Temple, Malleshwaram, Bangalore.



- (ix) The parties are restrained from making allegations against the other before the child or in any way prejudice or create a bias in the mind of the child against the other parent.
- (x) All information regarding the health of the child as well as information concerning the school and co-curricular activities, etc., shall be exchanged between the parents.
- (xi) It is the duty of the parents to ensure that even though the child is residing with a parent at a particular point of time and the other parent has visitation rights and *vice versa* during the course of the year, nevertheless there is stability, continuity and a bond with the child so that the child would have the benefit of guidance, support and upbringing by both parents.
- (xii) The parents must ensure that the child does not in any way feel uneasy or have discomfort when the child is residing with one of the parents or while he is visiting the other parent.



A great responsibility is cast on both the parents to ensure this.

(xiii) Both parents must ensure that the child is comfortable and at ease when residing with one of the parents or visiting the other parent. All care must be taken by the parents to ensure the psychological, social, educational and over-all growth and development of the child. In this regard, there must be a joint effort and co-operation between the parties.

(xiv) As regards major festivals, since the child would be with the respective parent during the aforesaid periods and if the festivals do not coincide during the weekends when the visitation rights are given to the other parent, in that event, the child could spend the festival period with either of the parents alternatively. The flexibility in this regard is on account of the fact that the child may be in the midst of school tests or examinations or due to any other valid reason and hence, strict directions



cannot be issued as to where the child must be during the days of festivals. The same could be decided by both parents in consultation with the child, depending upon the academic and co-curricular activities of the child and bearing in mind his health and welfare. Thus, it would be dependent on the paramount interest of the child at the given point of time and the circumstances prevalent at that point of time. This flexibility being provided by the Court should not be taken advantage of by either of the parties by insisting that the child must spend time during the festival in one or the other residence only, rather there must be co-operation between the parties so that the child is able to spend time during the festival with either of the parents or with both the parents, without being discomforted. Hence, we expect that the parties who are educated and who have matured over the years would extend their full co-operation in this regard.



(xv) The aforesaid directions are subject to the father of the child shifting his residence in the vicinity of the school or in the vicinity of the mother's residence so that the child does not have to travel a long distance from Banashankari, where the father presently resides, to the school which is in Basaveshwara Nagar, Bengaluru.

(xvi) In the event, the father is unable to set up residence in the vicinity of the school or in the vicinity of the mother's residence or until he does so, the following directions would be applicable:

(a) The child will stay in the house of the mother. However, during the second and fourth week-ends i.e., on Friday evening by 08.00 p.m., the child will move to his father's residence and on Sunday by 08.00 p.m. return to his mother's residence.

(b) During holidays, the father will have eighty percent of summer vacations, Dasara vacations and winter vacations immediately on the commencement of



the vacation and the mother will have twenty percent vacation, to spend time with the child, which coincides with the period prior to the commencement of the School. In other words, immediately after the vacation commences, the child will move to the father's residence and during the last twenty percent of the vacation, the child will return to the mother's residence.

(xvii) The child's birthday shall be celebrated by the parents jointly, as far as practicable or a consensus could be arrived at in consultation with the child.

(xviii) As per interim order dated 02/07/2020 the child, who is presently residing with the father, has to move to his mother's residence on 13/09/2020, but keeping in mind the arrangements now made for shared parenting, the following arrangement shall be implemented. Instead of 13/09/2020, on 20/09/2020 at about 11.00 a.m., the child shall proceed to his mother's house and reside there till 24/10/2020. At 11.00 a.m. on the



said date, he shall proceed to his father's house. From 24/10/2020 to 01/11/2020 the child shall reside with the father. From 01/11/2020 till commencement of the summer vacation or 31/03/2021, whichever is later, the child shall remain with the mother. Thereafter the direction pertaining to summer vacation arrangement as well as the arrangement for shared parenting stated above shall apply.

(xix) We hope and trust that the aforesaid directions would be scrupulously obeyed by the parents as we think they are in the best interest of the child and keeping in mind comfort, ease and the paramount interest of Aditya, the aforesaid directions have been issued. The same are also made after eliciting the views of the minor child Aditya.

(xx) This judgment shall be read as a sequel to the judgment dated 27/08/2020.



(xxi) It was brought to our notice that the Passport of Aditya—who is an American citizen—has been submitted for renewal and it would be received by his mother soon after renewal along with Overseas Citizen of India (OCI) card. In the circumstances, the mother of Aditya is directed to deposit the Passport soon after it is received by her before this Court. The OCI Card to be also deposited soon after its receipt. The Registrar Judicial shall take steps for the safe keeping of the said documents.

33. These appeals stand disposed of in the aforesaid terms. Parties to bear their respective costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

*RK/- *mvs
Ct: RM*