Rosy Jacob

Vs

Jacob A. Chakramakkal

Civil Appeals Nos. 1295 and 1296 of 1972

(C.A. Vaidialingam, I.D. Dua, A. Alagiriswami JJ)

05.04.1973

JUDGMENT

DUA, J. -

1. The real controversy in these two appeals by special leave preferred by the wife against her husband, lies in a narrow compass. These appeals are directed against the judgment and order of a Division Bench of the Madras High Court allowing the appeals by the husband and dismissing the cross-objections by the wife from the judgment and order of a learned single Judge of the same High Court dismissing about 25 applications seeking diverse kinds of reliefs, presented by one or other party. According to the learned single Judge (Maharajan, J.) "these 25 applications represent but a fraction of the bitterness and frustration of an accomplished Syrian Christian couple who after making a mess of their married life have endeavoured to convert this Court into a machinery for wreaking private vengeance". This observation reflects the feelings of the husband and the wife towards each other in the present litigation. The short question which we are called upon to decide relates to the guardianship of the three children of the parties and the solution of this problem primarily requires consideration of the welfare of the children.

2. The appellant, Rosy Chakramakkal (described herein as wife) was married to respondent Jacob A. Chakramakkal (described herein as husband) sometime in 1952. Three children were born from this wedlock. Ajit alias Andrews, son, was born in 1955, Maya alias Mary was born in 1957 and Mahesh alias Thomas was born in 1961. Sometime in 1962 the wife started proceedings for judicial separation (O.M.S. 12 of 1962) on the ground that the husband had inflicted upon her several acts of physical, mental and moral cruelty and obtained a decree on April 15, 1964. Sadasivam, J., while granting the decree directed that Ajit alias Andrews (son) the eldest child should be kept in the custody of the husband and Mary alias Maya (daughter) and Thomas alias Mahesh (youngest son) should be kept in the custody of the wife. The husband was directed to pay to the wife Rs. 200 per mensem towards the expenses and maintenance of the wife and the two children. The wife applied to Sadasivam, J., sometime later for a direction that Ajit alias Andrews should also be handed over to her or in the alternative for a direction that the boy should be admitted in a boarding school. In this application (No. 2076 of 1964) it was alleged by the wife that the husband had beaten Ajit on the ground that he had accepted from his mother (the wife) a fountain pen as a present. This was denied by the husband but the learned Judge, after elaborate enquiry, held that he had no doubt that the husband had caused injuries to the boy on account of his sudden outburst of temper on learning that Ajit had received a fountain pen by way of present from his mother on his birthday. Ajit was accordingly directed to be handed over to the mother subject to certain conditions.

3. The husband preferred an appeal against the decree made in O.M.S. 12 of 1962 (O.S.A. 63 of

1964) and another appeal against the order made by Sadasivam, J., (in application No. 2076 of 1964 in O.M.S. 12 of 1962) directing the custody of the eldest son, Ajit to be handed over to the wife (O.S.A. 63 of 1964). On August 2, 1966, the appellate bench confirmed the decree for judicial separation granted by Sadasivam, J., and also issued certain directions based on agreement of the parties with respect to the custody of the children, as also reduction of the monthly maintenance payable by the husband to the wife from Rs. 200 to Rs. 150 p.m., inclusive of maintenance payable for Mahesh. According to this order the eldest boy Ajit alias Andrews was directed to remain in the custody of the father and to be educated by him at his expense : Mahesh alias Thomas was directed to be in the custody of the mother to be educated at her expenses : and the second child Maya alias Mary was directed to be put in a boarding school, the expenses of her board and education to be met in equal shares by both the parents. The husband also undertook that "he will arrange to have the presence of his mother or sister at his residence to attend to the children whenever they are with him and never to leave the children alone at his residence or to the care of his servants or others". Later both the husband and the wife presented a series of applications in the appellate court seeking modifications of its directions. That Court ultimately made an order on February 2, 1967, modifying its earlier directions. The modified order directed Maya to be lift in the exclusive custody of the wife who was at liberty to educate her in the manner she thought best at her own cost. The appellate court also modified the directions regarding maintenance and ordered that the husband should pay to the wife maintenance at the rate of Rs. 200 p.m. as awarded by the learned single Judge. Subsequently the directions of the appellate court regarding access of the mother and the father to the children were also sought by the parties to be modified to the prejudice of each other. The matters are stated to have been heard by most of the Judges of the Madras High Court at one stage or the other and according to Maharajan, J., the parties even tried to secure transfer of these proceedings by making wild allegations of partiality against some of the Judges. The husband who is an advocate of the Madras High Court, had, according to the wife, who, been filing cases systematically against her and the wife, who, in the opinion of Maharajan, J., has the gift of the gab also argued her own cases. The children for whose welfare the parents are supposed to have been fighting as observed by Maharajan, J., are given a secondary consideration and the quarreling couple have lost all sense of proportion. On account of these considerations the learned single Judge felt that it would be a waste of public time to consider in detail the trivialities of the controversy pressed by both the parties to this litigation. According to the learned single Judge the following four points arose for his judicial determination :

> "(1) Whether by defaulting to pay the maintenance decreed, the husband must be held guilty of contempt and shall not be allowed to prosecute his applications before he purges himself of contempt ?
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> (2) What is the proper order to pass as regards the custody of the three children of the marriage in the light of the events that have occurred subsequent to the judgment of the appellate court and under the Guardians and Wards Act ?
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> (3) What is the proper order to pass as to the access of either parent to the children in the custody of the other ?
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> (4) Whether in the light of the subsequent events, the order regarding maintenance allowance should be reduced, enhanced or altered in any manner and if so, how ?"

4. On the first point the learned single Judge came to the conclusion that the husband could not be declined hearing merely because he had not paid the maintenance as directed by the matrimonial

court. The amount in respect of which the husband had defaulted payment could be recovered through execution proceedings. On point No. 2 the learned single Judge proceeded to consider the question of the custody of the three children with the preliminary observation that the controlling factor governing their custody would be their welfare and not the right of their parents. The eldest child Ajit alias Andrews, according to the learned Judge, was doing well at the school and was progressing satisfactorily both mentally and physically. There was accordingly no reason to transfer his custody from his father to his mother. As regards the second child Maya alias Mary, as she was about to attain puberty and the wife being anxious that till she got married she must be in the mother's vigilant and affectionate custody she was to remain with her mother. Mahesh alias Thomas, who was considered to be of tender years and in the formative stage of life requiring sense of emotional security which a mother alone could give, was also kept in the custody of his mother. With respect to Maya and Mahesh it was further observed that from their educational point of view the wife was a more suitable custodian than the husband because she was running a primary school from nursery to fifth standard with more than a hundred pupils and was also residing in a portion of the school premises enjoying certain facilities in her capacity as the founder and principal of the school. The husband, who was described as a grass widower without female relatives to look after the children, was not preferred to the wife as, while being with her, the children would be living in an academic atmosphere. With respect to the husband's complaint that from the moral point of view the wife was not fit to have the custody of the children, Maharajan, J., observed that earlier that earlier Sadasivam, J., had dealt with the entire evidence relating to this charge and had found no sufficient ground for such imputations and that they were likely to cause mental pain to the wife and affect her health. The husband had even been held guilty of mental and moral cruelty to the wife. The husband's contention that this opinion was reversed by the appellate bench was disposed of by Maharajan, J., after quoting the following passage from the appellate judgment, dated August 2, 1966 :

> "But it is to be clearly understood that there should be no slur on the part of either the appellant or the respondent because of the several proceedings in court and other happenings outside. The decree for judicial separation which is confirmed does not cast any could on the reputation or character of the husband or the wife. They have reached this settlement keeping in view all the circumstances and particularly the welfare of their minor children."

5. According to Maharajan, J., the appellate bench had felt satisfied that the charge of immorality levelled by the husband against the wife was not established because had it not been so satisfied the bench would not have entrusted two of the three children to the wife. The husband was in the circumstances held by Maharajan, J., disentitled to reopen the question of the wife's immorality. In any event, Maharajan, J., also rejected the charge of immorality as unproved, for the same reasons which had weighed with Sadasivam, J. With respect to point No. 3 the learned single Judge gave the following directions :

> "(1) On the first Sunday of every month, except during the school vacations, the husband shall send Ajit alias Andrews to the wife by 8.00 a.m. and the wife shall send back the child by 8 p.m. the same day.
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> (2) The wife shall send Maya alias Mary and Thomas alias Mahesh to the husband's house by 8 a.m. on the last Sunday of every month, except during the school vacations, and the husband shall send them back by 8 p.m. the same day.

> (3) Each party shall send the children by a conveyance taxi, rickshaw or bus, after repaying the fare thereof.
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> (4) The wife shall send Mary alias Maya and Thomas alias Mahesh to the husband, so that they might stay with him and Ajit alias Andrews for thirty days during the summer vacation. The exact time and dates of departure and arrival will be fixed with reference to the convenience of parties and after change of letters between them at least one month prior to the commencement of the vacation. Likewise, the husband will send Ajit to the wife to enable him to spend the whole Dasara and Christmas vacations in the company of his mother, sister and brother."

On the fourth point the learned single Judge, after considering at length the wife's allegations against the husband with respect to his extravagance and inability, reduced the quantum of maintenance payable by him to the wife to Rs. 100 p.m., the reduced amount being payable with effect from January 1, 1971. The husband was directed to pay the monthly maintenance on or before the 10th of the succeeding month. This order was made with the observation that the earning capacity of the wife was superior to that of the husband.

6. It is unnecessary to refer to the formal orders separately passed in the various applications. Suffice it to say that the parties were left to bear their own costs and hope was expressed in the concluding para of the judgment by Maharajan, J., that "the parties will refrain from rushing to this Court with applications of the kind that have been dismissed and will apply themselves assiduously to the improvement of their status in their respective professions and to alleviation of the pain of material failure, which has unfortunately been visited upon the three lovely and sprightly children that they have produced".

7. Contrary to the hope expressed by the learned Judge, the matter was taken to the appellate bench of the High Court under Clause 15 of the Letters Patent (O.S. Appeals Nos. 2 and 3 of 1971). The wife also presented cross-objections against the reduction of alimony and against directions as regards the father's access to Maya. A large number of applications were presented to the Court by both parties praying for diverse reliefs including action for contempt of court for disobedience of the court's orders. The hearing of the appeal somewhat surprisingly lasted for more than a year (March 1971 to March 1972). We find no justification for such prolonged hearing on a fairly simple matter like this. According to the Letters Patent Bench the arguments on both sides "mainly rested upon the character of each". The husband is said to have repeatedly accused the wife with immorality. In the opinion of the Letters Patent Bench "the truth or otherwise of the matter may assume importance only for the purpose of deciding upon the fitness of the person to be the guardian of the children". Final orders were passed on April 26, 1972, by means of which the husband was held to be better fitted to be the guardian of the three children and to have their custody. This decision was stated to be based on evidence and in view of Sections 17, 19 and 25 of the Guardians and Wards Act. This is what one of the Judges constituting the Letters Patent Bench (Gokul Krishnan, J.) said in this connection :

> "In our opinion, the principles to be applied to cases of this kind will be the same both under the Indian Divorce Act and the Guardians and Wards Act, 1890. But since the father has specifically filed a petition, C.P. No. 270 of 1970, under Section 25 of the Guardians and Wards Act, and that being a special law for the purpose will certainly apply, we shall concentrate on the Guardians and Wards Act, 1890."

After quoting Section 19 of the Guardians and Wards Act the learned Judge proceeded :

> "It is thus clear that the special enactment definitely states that the father is the guardian of the minor until he is found unfit to be the guardian of the person of the minor. The welfare of the minor is the paramount consideration in the matter of appointing guardian for the person of a minor, and cannot be said to be in conflict with the terms of Section 19 of the Guardians and Wards Act which recognize the father as the guardian. Bearing this in mind, we proceed to consider as to who is fit and proper to be the guardian for the person of the minor children in this case."

In his view the principle on which the Court should decide the fitness of the guardian mainly depends on two factors : (i) the father's fitness or otherwise to be the guardian and (ii) the interests of the minors. Considering these factors it was felt that both the parties in the present case loved their children who were happy during their stay with both of their parents. There was, in his view, absolutely no proof as regards disqualification of the husband to be the guardian of the minor children. It may here be pointed out that both the Judges constituting the Letters Patent Bench wrote separate judgments. Gokulakrishnan, J., commenting on the judgment of Maharajan, J., observed thus :

> "Maharajan, J., in his judgment under appeal no doubt referred to Section 19 of the Guardians and Wards Act, but would observe that if the Court finds that the welfare of the minor children could be protected only in the maternal custody, the Court has power to put the children in the care and custody of the mother. The learned Judge clearly observes that Ajit, the eldest boy, who is in the custody of the appellant, is quite healthy and cheerful, doing well at school and that his sojourn with the father has not prejudicially affected him physically or mentally. But at the same breath, the learned Judge says that Maya and Mahesh 'are of tender years and in the formative stage of their life and need a sense of emotional security, which a mother alone can give'. In the case of Maya and Mahesh, the learned Judge has applied a different standard in regard to their custody. Considering the present age of both Maya and Mahesh and taking into consideration the upbringing of Ajit by the appellant having him in his custody, we are of the view that the same amount of sense of emotional security can be enjoyed by Maya and Mahesh at the hands of the appellant also. The learned Judge's reasoning that the mother is running a school and has also facilities to make these two children live in the academic atmosphere rather than with their father, cannot have any force in view of the clear and categorical principles laid down in the various decisions notice (supra) and also in view of the clear intendment and spirit of the Guardians and Wards Act, which prescribes that father is the guardian of his minor child unless otherwise found unfit. The academic qualification of the mother, her financial status and the other standards cannot at all weigh in the matter when the appellant has not been rejected as person unfit to be the guardian of the minors. If they should weigh, the poorer an affectionate father with moderate capacity to protect his children will be deprived of the custody of the minor children on the flimsy ground of 'welfare of the minor children. That is how and why 'the welfare of the minor children' must be read with 'fitness or unfitness of the father' to be the guardian of the minors. Once it is found that the father is the fit and proper person to be the guardian of his minor children, unless it is otherwise found that he is not fit, it must be presumed that the children's interests will be properly protected by the father. As far as the present case is concerned, when the trial court itself has

> found that Ajit has been properly looked after and brought up very well in his academic career by the appellant, there cannot be any difficulty in coming to the conclusion that Maya and Mahesh will also be looked after and protected and imparted with proper education by the affectionate father, the appellant."

8. After reproducing certain observation from the judgments of (i) : Sadasivam, J., dated April 15, 1964, (ii) Veeraswamy, J., (as he then was) and Krishnaswami Reddy, J., dated February 12, 1967, in C.M.P. 415 in O.S.A. Nos. 63 and 65 of 1969, Ramamurty, J., dated April 24, 1968, in application Nos. 769 and 770 of 1968 in O.M.S. 12 of 1962 and after referring to the view of Maharajan, J., that Ajit when produced in Court was found quite healthy and cheerful and was doing well at school, Venkataraman, J., in his concurring Judgment observed thus :

> "Regarding the other children, he gave their custody to the mother, because he thought that they were of tender years and needed emotional security which a mother alone could give. Here, with respect we must differ from the learned Judge. We find that the father is quite fit to have the custody of the children, and, in law, custody of the minor children cannot be refused to him. We are also satisfied from what we saw of the appellant and heard from him during the several hearings, that he is very deeply attached to his children and is quite competent to have their custody. It will be enough if the mother is allowed a some-what liberal access to the three children."

9. With respect to alimony the appellate bench concluded that the wife was managing her school very successfully; she had purchased a mini-bus and also possessed wet lands in her village. The husband on the other hand was not getting on well in his profession which he attributed to the present litigation : his house at Adyar was stated to be under mortgage and he had practically sold everything in his native village with the exception of one or one and a half acres of land. In view of the financial position of the wife and husband and in view of the fact that all the three children were to be in the custody of the husband the appellate bench considered it unnecessary for the husband to pay any maintenance to the wife. The payment of the arrears of alimony was also suspended as the appellate bench considered itself empowered to do so under the proviso to Section 37 of the Indian Divorce Act. Insofar as access of the wife to the children is concerned a detailed order was passed by the bench about the right of the wife to take the daughter with her during the summer and Christmas vacations and also during several days every month, particularly during the periods. We do not consider it necessary to state in full the details of that order. With respect to Ajit and Mahesh also a detailed order was made fixing the precise days and even time when the wife could bring the children from the father to stay with her. In the event of any difficulty in getting custody of the children from the wife, it was ordered at the instance of the husband, that he could take the police help on the strength of the High Court judgment. We find it extremely difficult to appreciate this directions. Orders from the Court in execution would have been more appropriate. Police intervention in such personal domestic differences in the present case where parties belong to educated respectable families should have been avoided.

10. In this Court a preliminary objection to the hearing of the wife's appeal was raised by the husband, who, being an advocate, personally addressed us in opposing these appeals. Indeed, in June, 1972, he had presented Civil Miscellaneous Petitions Nos. 4188 and 4189 of 1972 for revoking special leave and it was these applications which he pressed before us at the outset. These lengthy applications covering nearly 50 pages mainly contain arguments on the merits and there is hardly any cogent ground made out justifying revocation of the special leave. It is no doubt open to this Court to revoke special leave when it transpires that special leave had been secured by the

appellant on deliberate misrepresentation on a material point having a bearing on the question of granting such leave. The extraordinary discretionary power vested in this Court by the Constitution under Article 136 is in the nature of a special residuary power exercisable in its judicial discretion outside the purview of ordinary law in cases where the needs of justice demand interference. Being discretionary power intended only to promote the cause of justice when there is no other adequate remedy, this Court expects those seeking resort to this reserve of constitutional power for securing justice to be absolutely fair and frank with this Court in correctly stating the relevant facts and circumstances of the case. In the event of a party making a misrepresentation on a point having a bearing on the question of the exercise of judicial discretion and thereby trying to over-reach this Court the party forfeits the claim to the discretionary relief : the same is the case when such misrepresentation is discovered by this Court and brought to its notice after the grant of special leaves and this Court is competent and indeed it considers it proper to revoke the special leave thus obtained. But the misrepresentation must be deliberate and on a point having such relevance to the question of special leave that if true facts were known this Court would have in all probability declined special leave. Applying this test to the present case we are unable to find any such deliberate misrepresentation by the appellant indicating intention to mislead or over-reach this Court. The points to which our attention was drawn seem to relate to the merits of the controversies between the parties which would fall for determination on the hearing of the appeal after considering the arguments pro and con. The preliminary objection thus fails and must be disallowed.

11. Turning to the merits of these appeals, it may be pointed out that with the exception of C.P. No. 270 of 1970, filed by the husband under Section 25 of the Guardians and Wards Act all the other applications presented by the parties and disposed of by Maharajan, J., were off-shoots of O.M.S. 12 of 1962 in which the wife had obtained a decree for judicial separation. The first contention raised on behalf of the appellant was that O.P. No. 270 of 1970 did not lie. It was strenuously pressed by Shri Balsubramania Iyer the counsel for the appellant-wife that the husband's application under Section 25, Guardians and Wards Act was not competent because none of the children had been illegally removed from the lawful custody of their father, the custody of the two children having been lawfully entrusted to the wife in proceedings to which the husband was a party. It was emphasised in this connection that the custody of the girl Maya and of the boy Mahesh had been lawfully entrusted to the wife by a competent Court and unless there is actual physical removal of the children from the custody of the father, Section 25 would not be attracted.

12. Now the first thing to be noticed is that this objections as to the competence of the application under Section 25 is in the nature of a preliminary objection. But it was not raised either before the learned single Judge or before the Letters Patent Bench in the manner in which it is pressed before us. In this Court also in the special leave appeal the objection seems to be based on the argument that the Guardians and Wards Act would be inapplicable to cases where orders have been made in matrimonial proceedings, and Section 19 of the Guardians and Wards Act cannot control the custody of children given by a consent decree under the Indian Divorce Act. However, as the objection was stated to pertain to jurisdiction we allowed the parties to address us on this point.

13. For determining the question of competence of the husband's application under Section 25 of the Guardians and Wards Act (18 of 1890) it is necessary to examine the scheme of that Act as also the relevant provisions of the Indian Divorce Act. The Guardians and Wards Act was enacted in order to consolidate and amend the law relating to Guardian and Ward. But as provided by Section 3, this Act is not to be constructed, inter alia, to take away any power possessed by any High Court. According to Section 4, which is the definition section, a "minor" is a person who, under the provisions of the Indian Majority Act, 1875 is to be deemed not to have attained his majority. Under

Section 3 of that Act this age is fixed at 18 years, except for those, for whose person or property or both a guardian has already been appointed by a court of justice (other than a guardian for a suit under Chapter XXXI, C.P.C.) and for whose property, superintendence has been assumed by a court of Wards, for whom it is fixed at 21 years. A "ward" under this Act means a minor for whose person or property or both there is a guardian and "guardian" is a person having the care of the person of a minor or of his property or of both. Chapter II of this Act (18 of 1890), consisting of Section 5 to 19 (Section 5 applicable to European British subjects has since been repealed), deals with the Appointment and Declaration of Guardians. Section 7 empowers the Court to make orders as to guardianship where it is satisfied that it is for the welfare of the minor that an order should be made appointing his guardian or declaring a person to be such guardian. Section 7(3) places certain, restrictions with respect to cases where guardians have been appointed by will or other instrument or appointed or declared by court. Section 8 provides for persons entitled to apply under Section 7 : they include Collectors as specified in clauses (c) and (d). Section 9 to 11 provide for jurisdiction of courts, form of applications and procedure on admission of applications. Section 12 provides for interlocutory orders subject to certain restrictions. Next important sections are Sections 17 and 19. Section 17 which provides for the matters to be considered by the court in appointing or declaring guardian reads :

> "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.
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> (2) In considering what will be the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of the 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."

Section 19, which prohibits the Court from appointing guardians in certain cases, reads :

> "19. Guardians not to be appointed by the Court in certain cases. - Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person -
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> (a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or
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> (b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or
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> (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

Chapter III (Section 20 to 42) prescribes duties, rights and liabilities of guardians. Section 20-23 (General provisions) do not concern us. Section 20 provides for the fiduciary relationship of guardian towards his wards and Section 22 provides for remuneration of guardians appointed or declared by the Court. Sections 24 to 26 deal with "Guardian of the Person". Under Section 24 the guardian is bound, inter alia, to look to his ward's support, health and education. Section 25 which is of importance for our purpose provides for "Title of Guardian to custody of Ward" and reads :

> "25. Title of guardian to custody of Ward. - (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it, will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.
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> (2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by Section 100 of the Code of Criminal Procedure, 1898.
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> (3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

Section 27 to 37 deal with "Guardian's Property" and Sections 38 to 42 deal with "Termination of Guardianship". Chapter IV (Section 43 to 51) is the last chapter dealing with supplementary provisions.

14. Now it is clear from the language of Section 25 that it is attracted only if a ward leaves or is removed from the custody of a guardian of his person and the Court is empowered to make an order for the return of the ward to his guardian if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian. The Court is entrusted with a judicial discretion to order return of the ward to the custody of his guardian, if it forms an opinion that such return is for the ward's welfare. The use of the words "ward" and "guardian" leave little doubt that it is the guardian who, having the care of the person of his ward, has been deprived of the same and is in the capacity of guardian entitled to the custody of such ward, that can seek the assistance of the Court for the return of his ward to his custody. The guardian contemplated by this section includes every kind of guardian known to law. It is not disputed that, as already noticed, the Court dealing with the proceedings for judicial separation under the Indian Divorce Act, (4 of 1869) had made certain orders with respect to the custody, maintenance and education of the three children of the parties. Section 41 of the Divorce Act empowers the Court to make interim orders with respect to the minor children and also to make proper provision to that effect in the decree : Section 42 empowers the Court to make similar orders upon application (by petition) even after the decree. This section expressly embodies the legislative recognition of the fundamental rule that the Court as representing the State is vested with the power as also the duty and responsibility of making suitable orders for the custody, maintenance and education of the minor children to suit the changed conditions and circumstances. It is, however, noteworthy that under Indian Divorce Act the sons of Indian fathers cease to be minors on attaining the age of 16 years and their daughters cease to be minors on attaining the age of 13 years : Section 3(5). The Court under the Divorce Act would thus be incompetent now to make any order under Sections 41 and 42 with respect to the elder son and the daughter in the present case. According to the respondent-husband under these circumstances he cannot approach the Court under the Divorce Act for relief with respect to the custody of these children and now that these children have ceased to be minors under that Act, the orders made by

that Court have also lost their vitality. On this reasoning the husband claimed the right to invoke Section 25 of the Guardians and Wards Act : in case this section is not applicable, then the husband contended, that his application (O.P. 270 of 1970) should be treated to be an application under Section 19 of the Guardians and Wards Act or under any other competent section of that Act so that he could get the custody of his children, denied to him by the wife. The label on the application, he argued, should be treated as a matter of mere form and, therefore, immaterial. The appellant's counsel on the other hand contended that the proper procedure for the husband to adopt was to apply under Section 7 of the Guardians and Wards Act. Such an application, if made, would have been tried in accordance with the provisions of that Act. The counsel added that Sections 7 and 17 of that Act also postulate welfare of the minor in the circumstances of the case, as the basic and primary consideration for the Court to keep in view when appointing or declaring a guardian. The welfare of the minors in the present case, according to the wife, would be best served if they remain in her custody.

15. In our opinion, Section 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian to properly look after the ward's health, maintenance and education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian the necessary assistance from the Court in effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare. If the Court under the Divorce Act cannot make any order with respect to the custody of Ajit alias Andrew and Maya alias Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under Section 19 during his life-time, if the Court does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is Section 25. Without, therefore, laying down exhaustively the circumstances in which Section 25 can be invoked, in our opinion, on the facts and circumstances of this case the husband's application under Section 25 was competent with respect to the two elder children. The Court was entitled to consider all the disputed questions of fact or law properly raised before it relating to these two children. With respect to Mahesh alias Thomas, however, the Court under the Divorce Act is at present empowered to make suitable orders relating to his custody, maintenance and education. It is, therefore, somewhat difficult to impute to the legislature an intention to set up another parallel Court to deal with the question of the custody of a minor which is within the power of a competent Court under the Divorce Act. We are unable to accede to the respondent's suggestion that his application should be considered to have been preferred for appointing or declaring him as a guardian. But whether the respondent's prayer for custody of the minor children be considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan, J., with which observation we entirely agree, "the controlling consideration governing the custody of the children is the welfare of the children and not the right of their parents". It was not disputed that under the Indian Divorce Act this is the controlling consideration. The Court's power under Section 25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom - if ever - identical. The contention that if the husband 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 does not take full notice of the real core of the statutory purpose. In our opinion, the dominant consideration in making orders under Section 25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of their children, the approach has to be somewhat different from that adopted by the Letters Patent Bench of the High Court in this case. There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominately in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under Section 25 merely because there is no defect in his personal character and he has attachment for his children - which every normal parent has. These are the only two aspects pressed before us, apart from the stress laid by the husband on the allegations of immorality against the wife which, in our firm opinion, he was not at all justified in contending. Such allegations, in view of earlier decisions, had to be completely ignored in considering the question of custody of the children in the present case. The father's fitness from the point of view just mentioned cannot override considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute generally to be better fitted to look after the children - being normally the earning member and head of the family - but the Court has in each case to see primarily to the welfare of the children in determining the question of their custody, in the background of all the relevant facts having a bearing on their health, maintenance and education. The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they get their due share of affection and care from both the parents in their normal parental home. Where, however, family dissolution due to some unavoidable circumstances becomes necessary the Court has to come to a judicial decision on the question of the welfare of the children on a full consideration of all the relevant circumstances. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition, because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them. The children are not mere chattels : nor are they mere play-things 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 and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us to have erred in reversing him on grounds which we are unable to appreciate.

16. At the bar reference was made to a number of decided cases on the question of the right of father to be appointed or declared as guardian and to be granted custody of his minor children under Section 25 read with Section 19 of the Guardians and Wards Act. Those decision were mostly decided on their own peculiar facts. We have, therefore, not considered it necessary to deal with

them. To the extent, however, they go against the view we have taken of Section 25 of the Guardians and Wards Act, they must be held to be wrongly decided.

17. The respondent's contention that the Court under the Divorce Act had granted custody of the two younger children to the wife on the ground of their being of tender age, no longer holds good and that, therefore, their custody must be handed over to him appears to us to be misconceived. The age of the daughter at present is such that she must need the constant company of a grown-up female in the house genuinely interested in her welfare. Her mother is in the circumstances the best company for her. The daughter would need her mother's advice and guidance on several matters of importance. It has not been suggested at the bar that any grown-up woman closely related to Maya alias Mary would be available in the husband's house for such motherly advice and guidance. But this apart, even from the point of view of her education, in our opinion, her custody with the wife would be far more beneficial than her custody with the husband. The youngest son would also, in our opinion, be much better looked after by his mother than by his father who will have to work hard to make a mark in his profession. He has quite clearly neglected his profession and we have no doubt that if he devotes himself whole-heartedly to it he is sure to find his place fairly high up in the legal profession.

18. The appellant's argument based on estoppel and on the orders made by the court under the Indian Divorce Act with respect to the custody of the children did not appeal to us. All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based on consent decrees, cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation.

19. We accordingly allow the appeal with respect to the custody of the two younger children and setting aside the judgment of the Letters Patent Bench in this respect, restore that of the learned single Judge who in our view, had correctly exercised his discretion under Section 25 of the Guardians and Wards Act. The directions given by him with respect to access of the parties to their children are also restored.

20. As regards alimony, no doubt, the Letters Patent Bench was, in our opinion, not quite right in with-holding payment of the alimony already fallen due and in arrears. But in view of the fact that the financial position of the wife is far superior to that of the husband who according to his own submission, has yet to establish himself in his profession, we do not consider it just and proper to interfere with that order under Article 136 of the Constitution. With respect to the alimony, therefore, the appeal fails and is dismissed. We also direct that the parties should bear their own costs throughout.

21. Before concluding we must also express our earnest hope, as was done by the learned single Judge, that the two spouses would at least for the sake of happiness of their own off-spring, if for no other reason, forget the past and turn a new leaf in their family life, so that they can provide to their children a happy, domestic home, to which their children must be considered to be justly entitled. The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses before us who are both educated and cultured and who come from highly respectable families must realise that reasonable wear and tear and normal jars and shocks of

ordinary married life has to be put up with in the larger interests of their own happiness and of the healthy, normal growth and development of their off-spring, whom destiny has entrusted to their joint parental care. Incompatibility of temperament has to be endeavoured to be disciplined into compatibility and not to be magnified by abnormal impulses or impulsive desires and passions. The husband is not disentitled to a house and a housewife, even though the wife has achieved the status of an economically emancipated woman; similarly the wife is not a domestic slave, but a responsible partner in discharging their joint parental obligation in promoting the welfare of their children and in sharing the pleasure of their children's company. Both parents have, therefore, to co-operate and work harmoniously for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home.

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