

Thrity Hoshie Dolikuka

Vs

Hoshiam Shavaksha Dolikuka

Civil Appeal No. 3032 of 1981

(R. S. Pathak, A. N. Sen JJ)

04.08.1982

JUDGMENT

AMARENDRA NATH SEN, J. -

1. Whether the father or the mother should have the custody of their minor daughter now aged 11 years, is the question which falls for consideration in this appeal by special leave granted by this Court.

2. Irreconcilable differences between the father and the mother and embittered relationship between the two have resulted in a sad protracted litigation. Unfortunately, in the various proceedings in court between the father and the mother, the child had become the central figure and the child had appeared in court on occasions for being interviewed by the learned Judges of the Bombay High Court. The child, it appears, is quite bright and rather sensitive. The unfortunate litigation between the father and the mother appears to have badly affected the normal and healthy growth of the child. The situation appears to be all the more unfortunate, as the father and the mother both love the child dearly and the child is fond of both her parents. It is, indeed, sad that the parents who are both genuinely fond of their daughter and have her welfare in their hearts, could not compose their differences and work out a solution which would be most conducive to the welfare of the child. The responsibility has, therefore, devolved on the court. The task of the court is indeed difficult and delicate. The court in this case, is concerned with a human problem affecting the future of a little girl. We feel that in a case of this nature a decision of the court however, many not succeed in solving the real problem and in achieving the desired goal. Anyway, as all attempts by courts to bring about an agreed solution of the problem to the satisfaction of all concerned have failed, the court must proceed to discharge its duty, however painful and delicate that task may be.

3. We shall now proceed to state some of the broad facts relevant for the purpose of the disposal of this case.

4. The appellant who is the mother of the child and the respondent who is the father of the child, both belong to the Parsi community and they were married in Bombay on December 27, 1960 according to the rites and ceremonies of the Zoroastrian religion and custom. A son was born to them on May 6, 1965. The son who is called Shiavux is now more than 16 years of old. A daughter was born to the appellant and the respondent on April 18, 1971. The daughter is named Gospi and she is now nearly 11 years of age. In this appeal we are concerned with the custody of this girl Gospi. The appellant who is the mother and whom we shall describe in the judgment either as the appellant or the mother, has been in the employment of Tatas for a long time and she now works as a Confidential Secretary to one of the Directors and gets a salary of Rs 2500 per month. The

respondent obtained training in Architectural Engineering and had obtained in diploma. The respondent had also obtained a licence from the authorities to enable him to function as an Architect. The respondent had worked with various concerns from time to time and had also worked at times of his own as an Architect. The respondent at present owns a taxi which he plies himself. According to the respondent he makes a gross earning on an average of something between Rs 125 to Rs 150 per day, by plying his taxi. After the marriage on December 27, 1960 the respondent set up their matrimonial home in Mount Villas at Bandra, the tenancy of which stood in the name of the appellant. As the appellant is an employee of Tatas, the tenancy was granted to her by Ratan Tata Trust which owns the premises. It appears that unfortunate differences arose between the appellant and the respondent and the appellant left the matrimonial home on May 21, 1978. It is indeed unfortunate that the parents could not reconcile their differences at least in the interest of their children and on April 21, 1979 the appellant filed a suit being Suit No. 14 of 1979 for judicial separation. On April 24, 1979 the appellant in her Suit No. 14 of 1979 made an application for getting the custody of both the children i.e. the son Shiavux and daughter Gospi. By consent of the parties on April 27, 1979, an interim order was passed in the said application and the said order is the following effect :

The children to spend the week-ends commencing from Saturday, April 28, 1979 with the petitioner and to stay overnight with the petitioner on Saturdays and Sundays. Defendant to send the children to the petitioner at 10.00 a.m. on Saturdays. Petitioner to return the children to the defendant by 9.00 a.m. on Mondays.

Liberty to the petitioner to take the children out of Bombay to Lonavala or Matheran for a fortnight commencing from May 5, 1979 and ending May 20, 1979. Petitioner undertakes through her learned counsel to bring the children back to Bombay on May 20, 1979 and to give written information thereof forthwith to the Prothonotary and Senior Master. The petitioner shall return the children to the defendant on May 21, 1979 by 9.00 a.m.

Liberty to the defendant to take the children out of Bombay to Matheran or Lonavala from May 22, 1979 till June 3, 1979 and to bring the children back to Bombay on or before June 3.

Should however the defendant not desire to take the children out of Bombay from May 22 till June 3, 1979, the petitioner shall be at liberty to take the children out of Bombay during this period and shall return the children to the defendant by 9.00 a.m. on June 4. Should however neither the petitioner nor the defendant be in a position to take the children out of Bombay from May 22 till June 3, the children shall remain with the defendant and the petitioner shall have week-end access to the children in the manner stated in clause (1) above.

In the event of the defendant being unable to take the children out of Bombay from May 22, the defendant shall give written intimation of his inability to do so to the petitioner's Advocate on or before May 15, 1979 in which event the petitioner shall be at liberty to keep the children with her either at Lonavala or Matheran till June 3, 1979 and shall return the children to the defendant by 9.00 a.m. on June 4, 1979.

This arrangement shall be till June 15, 1979.

Liberty to the defendant to take the children to Undwada and Shirdi between June 4 and 8, 1979.

5. The application came up for final disposal before Lentin, J. The learned Judge interviewed the

children in his chambers before passing his order on the said application on June 28, 1979. As this happens to be the first order passed by the court after interviewing and speaking to the children, it will be appropriate to set out the order which reads :

I have talked to the children in my chambers. The boy has completed 14 years of age and the girl has completed 8 years of age. I have found both the children extremely intelligent and sensible. Both appear to be distressed at the present state of acrimony between their parents. Both have expressed their desire to spend their time with each of the parents since it is not possible for them, in view of the present state of affairs to spend their time with both the parents at the same time.

After having talked to the children and after having ascertained their wishes, I pass the following order for access in the interest of both the children.

The father shall have access to the children from Monday to Friday and the mother shall have access to the children during the week-ends, viz. Saturday and Sunday.

The children shall be sent by the father to the mother directly from school on Saturday and the children shall remain with the mother till Monday morning when the mother will leave the children or arrange for them to be left at the school.

The mother shall have access to the children on public holidays from 10.00 a.m. of such holiday till the following morning when she will leave or arrange for the children to be left at the school.

It is clarified that though Monday, August 27, 1979 is a public holiday (Novroz Day) the children shall spend August 27, 1979 with the father. The mother shall return the children to the father's residence by 11.00 a.m. on August 27, 1979.

Though the order passed by the learned Judge was in the circumstances a very proper order passed in expectation that the order would be worked out smoothly to the satisfaction of all concerned and would serve for the time being the best interest of the children, yet as subsequent events go to indicate the order failed to achieve the purpose mainly in view of the attitude of the father who was not willing to part with the children and to allow them to stay with the mother. It appears that the father had made an application for variation of the order passed by Lentin, J. alleging in the petition that the children were not willing to live with their mother on Saturdays and Sundays as ordered by the court. It further appears that no further order was made on the said application of the father. A copy of this order unfortunately does not form part of the records. There does not, however, appear to be any dispute that Mehta, J. disposed of this application after speaking to the children in chambers on August 10, 1979.

6. On April 24, 1980, the appellant took out chamber summons for an order against the respondent for allowing her access to the minor children Shiavux and Gospi by having them with her from May 16, 1980 to June 15, 1980 and for half for period of each subsequent school/college vacation in addition to having them with her on week-ends and holidays, as the respondent had refused to give such access to the appellant. Agarwal, J. who heard the chamber summons spoke to the children alone in his chambers and passed the following on May 2, 1980 :

During the current summer vacation beginning from April 15, 1980 and ending on June 15, 1980 the children are already with the father from April 15, 1980 and they will continue to live with the father till May 14, 1980. On May 15, 1980 the father will hand over the children to their mother and from May 15, 1980 till June 15, 1980

the children will remain with their mother. On June 15, 1980, she will bring back the children to the house of their father. The rest of the arrangement between the parties as per order dated June 28, 1979 will continue.

It may be noted that I have ascertained the wishes of the children before passing the present order.

Liberty to the mother to take the children outside Bombay, if she so desires.

The present arrangement of the parents sharing the company of the children during the vacation to continue in the coming October and December vacations on the basis of the children remaining with the father in the first half of the vacation and with mother in the other half.

This arrangement of sharing the company of the children during the vacation will also apply for coming years pending the hearing and final disposal of the suit.

It is clarified that the order, whereby the children go to their mother every week-end, will not be effective during the vacation period as the children for the first half of the vacation will be exclusively with the father and the other half exclusively with the mother.

Chamber summons absolute accordingly with no order as to costs.

It may be mentioned that the daughter Gospi had been admitted to Carmel Convent High School in K.G. Class and she had been studying in that School. Shiavux was a student of St. Anne's High School. It appears that on June 15, 1980, the respondent without informing the appellant and without her knowledge or consent removed Gospi from Carmel Convent High School and put her in St. Anne's High School. On June 20, 1980 the appellant made an application in her suit for an order for custody of her two children and also for an order that the child Gospi be forthwith removed from St. Anne's High School and be put in Carmel Convent High School. The said application was disposed of by Kania, J. on July 9, 1980 and the learned Judge who had also spoken to Gospi was pleased to pass the following order :

This is a petition for the custody of the two minor children and for the decision of the question as to whether the minor daughter Gospi should be removed from St. Anne's High School where she has just been got admitted by her father. As far as the question of final custody is concerned, it appears, particularly in view of the orders passed earlier by Lentin, J. and Agarwal, J. that that question can be more conveniently decided when the suit is disposed of. This position is accepted by both the parties.

As far as the question of change of school is concerned, it is regrettable that the respondent-husband has changed the minor's school from Apostolic Carmel Convent High School to St. Anne's School without previously informing the petitioner as he should have done. However, after talking to the child, I find that she is anxious to continue in St. Anne's School at present. Moreover, she has already been admitted to that School. In view of this I see no reason why the respondent should be directed to remove her from St. Anne's School and to try to get her readmitted to Carmel Convent High School. If the child is not very happy in the new school i.e. St. Anne's School, the question of changing her school and getting her admitted in Carmel Convent High School can be considered at the end of the academic year. No order as to costs.

On September 9, 1980, the respondent filed a contempt application against the appellant

complaining of the violation of the order of the court in the matter of handling over of the girl Gospi to him. The said application of the respondent was disposed of by Lentin, J. on September 22, 1980. The learned Judge talked to the children together and also individually and it appears that the learned Judge had a fairly long conversation with the girl Gospi for about 40 minutes. The learned Judge thereafter passed an order on the said contempt application of the respondent to the following effect :

I have talked to the children together and individually. From my conversation with the daughter (aged 9) which extended to wellnigh 40 minutes. I do not think that she has either been 'brainwashed', 'tutored' or 'pressurised' into not going to the father. She is undergoing a tremendous mental and emotional upheaval which finds her bewildered and totally unhappy at the increasing acrimony between her parents. She desperately needs her mother and cannot bear to be parted from her and it is not mere childish pique, or 'brainwashing' or 'tutoring' that is behind it. I am aware that normally a parent is given access to his or her child. However, In this case, I fear that if this little girl who is mentally and emotionally disturbed, is compelled to go to her father against her wishes, the consequences on her well being and her mind in its present state are predictable and will be disastrous.

Her conversation with me did not reveal any intention on the part of the mother to want to flout my order of June 28, 1979 as urged on behalf of the father. If at all, it showed some resentment on the child's part against the mother for trying to induce her to go to her father against her will. The husband's contention that the wife should have applied for modification of that order, does not take into account (i) that she was trying to persuade the girl to go to her father (ii) that this at best is a technical breach, and (iii) that confining the wife to civil prison, or otherwise punishing her, would in this case be no solution to what is basically a human problem, more so when looked at from the view of the child who is intelligent enough to speak up for herself and whose interest and well-being must be the paramount consideration.

Taking all the facts and circumstances into consideration, I pass no order on the motion with no order as to costs. I suspend my earlier order dated June 29, 1979 to the extent that it gives the husband access to the girl from Mondays to Fridays and clarify that until the disposal of the suit which, I am told, is ripe for hearing, the mother shall have uninterrupted access to the girl and shall not be bound to send the child to the father against the wishes of the child. For the mental and emotional well-being of his child, the husband should in good grace make this sacrifice. It is further clarified, if clarification is at all necessary, that the implication of this order is that the husband shall not, until the disposal of the suit, visit the girl at her school, for such visits she dreads, resulting in spells of nausea and black-outs and which visits she finds upsetting and humiliating before her friends before whom she naturally wants to maintain the facade that all is well between her parents.

7. Against the said order of Lentin, J. the respondent filed an appeal. During the pendency of the appeal, the suit filed by the appellant and the counter-claim filed in the suit by the respondent came up for final bearing. It may be noted that in the counter-claim filed by the respondent in the said suit of the appellant, the respondent had made certain allegations against the appellant. On November 10, 1980 the suit and the counter-claim were disposal of. By the decree passed in the suit filed by the appellant, divorce was granted on the ground of desertion of the appellant and the allegation of cruelty made by the appellant against the husband, the respondent, was withdrawn by the appellant. The respondent had also withdrawn all the allegations made against the appellant and the decree for divorce was passed in favour of the appellant, as already noted, only on the ground of desertion. A

consent order was passed with regard to other reliefs and under the consent order, the appellant got back her flat in Mount Villas from which she was earlier ousted. The appeal filed by the respondent against the order of Lentin, J. dated September 22, 1980 was also withdrawn, and it was agreed that the question of custody of the children would be decided by the court on a petition for custody to be filed by either of the parties. On December 3, 1980 the respondent filed a petition for custody of both the children. Since the son Shrivastav would complete 16 years of age in May 1981, and was outside the jurisdiction of Parsi Matrimonial Court, the appellant could not resist the respondent's prayer for custody of Shrivastav and the appellant contested the respondent's prayer for custody of daughter Gospi. The said custody petition of the respondent came to be heard by Dinshaw Mehta, J. and the learned Judge passed an order directing the custody of the children to be given to the father. It is desirable to set out the following observations of the learned Judge while passing his order on the custody application. The learned Judge has observed :

I have interviewed both the minor children individually and also in the presence of each of the parents. I have also talked to the petitioner and the respondent in the presence of the children. I consider both the petitioner as well as the respondent as persons capable of looking after the welfare of their children. The only hurdle in the way of the respondent was that she was not available to the minor Gospi for most of the day after the child returned from school at about 1.00 p.m. and till 7.00 p.m. The minor during this period was looked after by Mr and Mrs Kotwal. This, to my mind is an unfortunate situation. However, benevolent, hospitable and kind the neighbours be, I do not see why the child should grow up on the charity of neighbours, particularly when her own kith and kin were available, especially her brother Shrivastav. I am informed that Shrivastav and Gospi have not met each other for the last six months. I do not know how this situation has been allowed to arise, but I can only say that it is most unfortunate. Both the brother and the sister appear to be fond of each other and have expressed their desire to live together. I would have willingly given the custody of the minor Gospi to the mother, but for the fact that she is not available to the minor for long hours of the day and again the child will be left to be looked after by neighbours or servants. In the petitioner's household there are three sisters of the petitioner who can look after the welfare of both Shrivastav and Gospi in the absence of the petitioner. As pointed out earlier, one of the sisters is a qualified teacher and can look after the education of the children.

At this stage, I may advert to the conduct of Gospi during the forty-five minutes that she was in my chamber. Almost throughout this period, Gospi kept crying or sobbing or whining although there was no provocation to do so, and this was so even in the presence of her mother, the respondent. The child appeared to be nervous and kept biting her nails. I had an occasion to meet Gospi and Shrivastav about a year ago when a Chamber Summons taken out by the respondent, was heard by me. At that time during my talks with both the children. I found them to be intelligent, exuberant and confident. They expressed a desire to live with both the parents. The situation has changed radically today. Gospi has developed an aversion for the father and expressed her desire to live with the mother. On three different occasions she stated that she was not tutored and brainwashed. It appears to me that the child is under considerable mental pressure and at present she is not a normal child. It is important to create an atmosphere where the child will live a normal and healthy life. It will only be under such conditions that the child's progress at school will improve. Between September 1980 and today the child's education has been neglected for some reason and this is evident from the fact that the child failed in October 1980 examination in three subjects. Normally I would have given preference to the desire of the child and would have acceded to her request. In the instant case, however, I do not think that it is in the interest of Gospi to permit her to remain in the custody of the respondent. The child has been sadly neglected. If the child is to return to normalcy, it is very necessary that she should be returned to the custody of the father. Such an arrangement will permit

both the brother and the sister to grow up together and it will allow both of them to take comfort and counsel from each other. I consider this arrangement to be in the interest of both the children Shiavux and Gospi.

I, therefore, order that both the minor Shiavux and Gospi will remain in the custody of the petitioner till such time as they reach the age of majority i.e. 16 years. Both the minors will remain with the petitioner during the course of the week i.e. from Mondays till Fridays. The petitioner will take the children on Saturday mornings at 9.00 a.m. to the house of the respondent and leave them with her till Sunday 7.00 p.m. when respondent will hand over both the minors back in the custody of the petitioner. During the school vacations, half the period of the vacation will be spent by the children with the petitioner and half with the respondent by mutual arrangement. There will be no order as to costs of the petition.

Mrs Ponda states that this order be stayed as her clients desire to proceed further. This order will be stayed till March 9, 1981.

The appellant preferred an appeal on March 6, 1981 and the appellant also applied for interim stay of the order passed by Mehta, J. It appears that an ad interim stay was granted by the Division Bench. On March 20, 1981 a Division Bench consisting of Madon and Khurdukar, JJ. disposed of the said application in the following terms :

Pending the hearing and final disposal of the appeal, the order dated February 19, 1981 appealed against stayed as far as it relates to the minor Gospi alone.

Until the St. Anne's High School in which the minor Gospi is at present studying closes for the summer vacation, the respondent to be entitled to take the child to his residence on Thursdays from 9.00 a.m. till 8.00 p.m.

The respondent, who is present in Court, gives an undertaking through his Advocate to return the child Gospi to the appellant's residence each Thursday by 8.00 p.m.

So far as the school vacations are concerned, the appellant to keep the child Gospi with her for the first half of each vacation and the respondent to keep the child for the second half of each vacation. The respondent to take the child to his residence by 9.00 a.m. on the first day of the second half of each vacation and to return the child by 8.00 p.m. on the last day of the second half of each vacation.

The respondent who, as mentioned earlier, is present in Court, through his Advocate gives an undertaking to take the child Gospi to the appellant's residence and leave her there by 8.00 p.m. on the last day of the second half of each vacation.

We may record that we had seen the child Gospi in chambers on March 10, 1981 and had found her to be an extremely bright and intelligent child. We may further record that the child stated that she did not have any aversion to spend the day with her father, namely, the respondent, but was greatly apprehensive that if she did so, she would not be allowed to return to her mother, namely, the appellant, with whom she wanted to stay or that some application would be made to the Court on behalf of the respondent for the purpose of not returning the child to the appellant but to keep her with him.

Notice of Motion made absolute in terms of prayer (c) also the above directions with respect to the

respondent's access on Thursdays during the school terms and the order with respect to the sharing of school vacations also to apply if the child Gospi gets readmission in the Apostolic Carmel Convent High School from the next academic year for the school terms and vacations. If the child Gospi does not get readmission in the Apostolic Carmel Convent High School but continues in the Anne's High School, the above directions with respect to the respondent's access on Thursday during the school terms and the sharing of vacations to other school terms and vacations.

Costs of this Notice of Motion will be costs in the appeal.

As the respondent had not returned Gospi to the appellant, in terms of the order and the undertaking given by the respondent to the court, the appellant on April 3, 1981 orally applied to the Division Bench consisting of the same learned Judges viz. Madon and Khurdukar, JJ. complaining of the breach of the undertaking and on the said application the court passed, inter alia, the following order :

There were some allegations and counter-allegations made by the parties against each other, into which we do not desire to go. We, in the privacy of our chambers, talked to the child. We also talked separately to both the parties. We have also talked separately to both the parties. We have also heard both counsel. An unfortunate position in that the child's final examination in the Vth standard in which she is studying commences tomorrow and will finish on April 15, 1981. Purely bearing this circumstance in mind, we permit the child to continue to be with the respondent until April 16, 1981. On that day we will give further directions in the matter. We are passing this order purely in order not to make the child travel back and forth between the the residences during her examination.

Mrs Ponda on behalf of the appellant states that the child's text-books, exercise books, the school uniform, etc. are at the appellant's place of residence and that the appellant will hand them over to the respondent. The respondent will collect these articles from the appellant's residence by 4 p.m. today.

The matter will be on board on April 16, 1981 for giving further directions. The parties and the child Gospi will remain present in Court, and the respondent will bring the child to Court on that day.

We also restrain, pending the giving of further directions, the respondent, his servants, agents and family members from taking the child Gospi outside Bombay.

On April 16, 1981, the matter came up again before the same Division Bench for final orders and the court was pleased to pass the following order :

Today in our chamber we have heard both learned Advocates as well as the respondent who wanted to address us. In course of arguments we pointed out to Mr Deshmukh, the learned Advocate for the respondent, that when we had talked with the son of the marriage, Shiavux, as also with the daughter of the marriage, Gospi, on March 10, 1981 we found Shivavux using semi-legal phraseology and words, while we found Gospi speaking naturally like any other bright child of her age. We further pointed out that when we had talked with the child Gospi on April 3, 1981 in our chamber, we had found her using the same type of phraseology and words similar as those used by Shiavux and in speaking of various family matters almost echoing what Shiavux had said. When we

put this to Mr Deshmukh, the learned Advocate for the respondent, he replied that that was because time and again there was talk about this case in the respondent's household. In our opinion, such talks taking place in the presence of a child cannot be conducive to the happy or healthy psychological growth and development of a child. Mr Deshmukh, the learned Advocate for the respondent further made a request to us that though on March 20, 1981 we had directed that Gospi should spend the first half of the vacation with the appellant, that part of the order should be varied because Gospi had just finished her examination yesterday and had been till then in the grip of the examination fever and not able to go about with the respondent, and, therefore, the respondent should be permitted to keep Gospi for the first half of the vacation. At this, Mrs Ponda, the learned Advocate for the appellant, pointed out that during the middle of her examination the respondent had taken Gospi to some person at Goregaon. Mr Deshmukh stated that the said person was known as 'Maiji' and the said person stayed at Goregaon Tekdi and that several persons visit her, for they consider her a holy woman. He further stated that Gospi was taken to the said Maiji to seek her blessings. When we enquired, we were informed that Gospi had also been taken to said Maiji on April 2 when she was staying with the respondent in pursuance of order dated March 20, 1981, that is, before we had talked to Gospi in the privacy of our chamber on April 3, 1981.

Mr Deshmukh also applied that we should reconsider our order passed on March 20, 1981 insofar as it related to readmission of Gospi in the Apostolic Carmel Convent High School and permit her to continue in the St. Anne's High School, which order we had passed after hearing elaborate arguments on the point. In support of this application Mr Deshmukh stated that if we were now to talk with Gospi we would find that she has now changed her mind and does not want to rejoin the Apostolic Carmel Convent High School. Assuming this is so, this fact speaks for itself. We, therefore, reject the application also.

In these circumstances, we feel that this is a fit case in which a home-study should be directed to be made by social welfare expert to be appointed by the Court. For this purpose both parties have agreed to deposit with the Prothonotary and Senior Master of this Court a sum of Rs 300 each. Accordingly, by consent we direct that each of the parties will deposit a sum of Rs 300 with the Prothonotary by 12 noon of April 18, 1981.

Further directions with respect to the home-study and the social welfare expert by whom it is to be conducted will be given by us in our chamber at 11 a.m. on Monday, April 20, 1981. Meanwhile the appellant will take the child Gospi with her to her residence. We reserve the giving of further directions about the party with whom the child will spend the rest of the vacation and with respect to the access of the other parent to the child. The further hearing of this matter is adjourned to 11 a.m. Monday, April 20, 1981 in chambers as part heard.

On April 20, 1981, the court appointed Mrs Clarico D'Souza, B.A., B.Ed., holder of a Diploma in Social Service Administration of the Tata Institute of Social Sciences as a Family Welfare Expert to assist the court in discharging its function in the matter concerning the child with the observations :

Parties are agreed that every facility will be given to Mrs D'Souza for her to interview privately the child Gospi as also the parties themselves and the relatives and neighbours of the parties if Mrs D'Souza desires to interview them or any of them. Both parties are further agreed that Mrs D'Souza will be also at liberty to interview the present as well as the former teachers of the child. The parties are further agreed that Mrs D'Souza if she thinks it necessary to do so, will be at liberty to take the child and keep her with herself at her place for such period or periods,

including overnight stays, as she thinks it necessary, to enable her to make a detached and fair report to the Court.

We may mention that Mrs D'Souza has stated to us that she does not desire any remuneration for the work she may do in this connection. In our opinion, however, it would be unfair to Mrs D'Souza who in order to conduct this home-study may have to travel from Colaba, where she stays, to Bandra by taxi to conduct these interviews and may have to spend at times the whole day in Bandra and may, therefore, also have to incur some other expenses over her meals or refreshments. We do not see why Mrs D'Souza should go out of pocket. We will, therefore, decide after the home-study is concluded the amount that should be paid to Mrs D'Souza out of the moneys which the parties have deposited with the Prothonotary and Senior Master mentioned above. In the first instance, however, we direct the Prothonotary and Senior Master to pay to Mrs D'Souza towards the disbursement of the expenses which she will have to incur, a sum of Rs 300 out of the aggregate sum of Rs 600 deposited by the parties.

For the present we are adjourning the matter as part heard in our chamber at 2.45 p.m. on Tuesday, April 28, 1981 for receiving Mrs D'Souza's report if it is ready. On that day in case the report is ready, the parties are agreed that the Court should decide whether the report should be treated as confidential or should be disclosed to the parties. In case the report is not ready on that day, the parties are agreed that this matter should be decided on a date to which the matter will be further adjourned for the purposes of receiving the report and for deciding whether it should be kept confidential or not.

Meanwhile the child Gospi will continue to reside with her mother, the appellant, and as mentioned in our order dated April 16, 1981 directions as to with whom the child is to spend the rest of the vacation and the right of access of the other parent to the child will be decided by us after receiving the report and after hearing the advocates for the parties.

8. It appears that the minor daughter Gospi who had been living with her mother had been missing from her mother's place on April 30, 1981, resulting in a great shock to the appellant. On the very same day the respondent applied to the Division Bench consisting of the same learned Judges with an affidavit stating that the child had come on her own to the house of the respondent who had brought the child to court to surrender her and abide by the court's directions, as he did not want to commit contempt of the court. As on that date, the appellant was not able to attend the court because of her illness due to the shock of her not being able to find Gospi, the court passed an order that for the time being the child Gospi would go with the respondent and stay with him until May (sic), 1981 and on that date the court would give further directions. On May 13, 1981, the court after considering the report of Mrs Clarico D'Souza, the Family Welfare Expert appointed by the court, passed the following order :

In the circumstances, set out above, we would have had no hesitation in directing that the child Gospi should stay with her mother, the appellant, throughout the summer vacation. However, an unfortunate thing is that the appellant is working in the Tatas and therefore has to be away from home the whole day except during week-ends, while the respondent, who drives his own taxi, can always find time to contact Gospi in the course of the day and lure her away. Bearing these factors in mind, we permit Gospi to stay with the respondent during the vacation. The respondent will, however, take Gospi and leave her at the appellant's residence on every Friday at 8 p.m. and will collect her from the appellant's residence every Monday by 8 a.m. during the

vacation. In our opinion best thing for Gospi would be to go to a boarding school. However, we are sure that the respondent would so poison her mind against any boarding school as to cause yet another psychological turmoil and conflict in her mind. Mrs D'Souza report has also convinced us that it is better for Gospi that she should be in Carmel Convent High School rather than St. Anne's High School, and that part of the order passed by us on March 20, 1981 will stand. During the school term the appellant will be entitled to take Gospi to her residence straight from the school, every Saturday and to keep her with her and to leave her in the school on Monday mornings. During the rest of the days during the school term Gospi will stay at the respondent's residence. The above directions will be operative during the pendency of appeal for all school terms and vacations.

While passing the said order, the court in its judgment observed :

We have very carefully considered the matter. Between the two spouses the person who in our opinion would be best suited to bring up the child Gospi would be the mother - namely, the appellant. Gospi is a girl about 10 years old, and she needs a mother's care, guidance and advice. The appellant has struck us as being refined, mature and has been holding a steady job for the last twenty-one years and is at present drawing a salary of Rs 2500 per month. She appeared genuinely concerned with the interest and welfare of the minor. On the other hand, it appears that the respondent is somewhat immature and erratic, and has never been able to pursue any particular vocation steadily, and appears to labour under a sense of inferiority complex vis-a-vis the appellant. It further appears to us that the custody of the children is more a matter of prestige with the respondent and is a weapon in his armoury to hurt the appellant with. As we had almost on every occasion when the matter was before us talked with the child in the privacy of our chambers, either before or after passing orders, we found when she was with the appellant she behaved as a normal and happy child, but when she was with the respondent, her personality had totally changed and she appeared to be under a strain.

The court further observed :

We find that Gospi has been tutored by the respondent to tell a number of lies. According to what she is alleged to have said, as set out in the said affidavit, the appellant beats and ill treats her. At no stage has Gospi ever mentioned this. On the contrary, she has always expressed how very happy she was with her mother, the appellant. Mrs D'Souza report also bears this out. Another instance is with respect to Gospi's version as to what happened in Court on April 16, 1981. As set out in the said affidavit she is alleged to have told the respondent that when her mother, appellant, came to take her away, she was screaming and shouting and vomited on the Judges' table and that in spite of that, her mother, the appellant, and her lawyer forcefully took her under instructions from the Judges. It is true that when we told Gospi to go with her mother, the appellant, she whimpered for some time and then threw out outside the chambers. That the conflict between the two parents has greatly upset Gospi emotionally, resulting in spells of nausea, has also been noticed by Mr Justice Lentin in his order passed on September 22, 1980. Further, it is clear from Mrs D'Souza's report that when the respondent had made Gospi change her school and made her give up Carmel Convent High School and put her in St. Anne's High School, she was in the habit of vomiting in that School on the least provocation, and she only adjusted herself in the School when she was reassured by her teachers that she would go back to Carmel Convent High School from the next academic year. After the initial fit

of vomiting, Gospi went away with her mother, the appellant, quite happy and content, and of her own accord she got into the taxi along with her mother. We were watching from the corridor outside our chambers, as we wished to observe Gospi's behaviour while she was going home with the appellant, and in order to enable us to do so we had instructed that the appellant and Gospi should leave the court premises from the entrance facing the Oval Maidan. We had also instructed one of our P.As. to accompany them and to report to us, what is set out in the affidavit, therefore, cannot be anything else but the tutoring of Gospi by the respondent. We have already had occasion to observe in an earlier order that this child who, while staying with the appellant, was talking like a normal child, has started using semi-legal phrases, which she was not doing previously.

9. On June 9, 1981 the respondent made an application to the Division Bench of the Bombay High Court for an order for modification of the earlier order passed on May 20, 1981 to the extent that the child Gospi should not be compelled to go to Carmel Convent High School but should be readmitted to St. Anne's high School. During the pendency of this application the appellant on July 6, 1981 also made an application to the Division Bench for committal of the respondent for contempt of court for violation of the order passed by the Division Bench on March 20, 1981. Both these applications came up for hearing together on July 31, 1981 by the Division Bench consisting of Madon and Mrs Sujata Manohar, JJ. The Division Bench dismissed the application of the respondent for modification of the order dated March 20, 1981 and the Division Bench passed an order on the contempt application taken out by the appellant, committing the respondent to jail for a period of three months and to a fine of Rs 1000. The Division; Bench further directed that the custody of the minor daughter Gospi to be given to the appellant-mother pending final disposal of the appeal and the Division Bench further ordered : "As observed in both; Mrs D'Souza's report and in the order of May 13, 1981 the best thing to do in order to restore Gospi to normalcy would be for her to be in an atmosphere away from where she has been for the last almost two years. The appellant will, therefore, be at liberty to place Gospi in any Boarding School of the appellant's choice outside Bombay. We also make it clear that Gospi will spend all her school vacations with the appellant only without any access to or interference from the respondent, his servants and agents including the respondent's brother and sister or any of them." The Division Bench further suspended the execution of the punishment imposed on the respondent by the said order for a period of four weeks from the date of the order to enable the respondent to file an appeal in this Court, but refused to stay the execution of the rest of the order. Mrs Sujata Manohar, J. who delivered the judgment on behalf of the Bench, considered at great length the various facts and circumstances including earlier proceedings between the parties. As this judgment is under appeal, we do not propose to refer to the various findings and observations made in this judgment at any length. Some of the observations may, however, be noted. The Bench observed :

A number of our brother Judges including one of us (Madon, J.) who have had an occasion earlier to deal with the matter, have consistently considered the mother as a mature and responsible woman who holds a steady job for the last 21 years, fetching her at present a salary of Rs 2500 per month. She is a mature woman who is genuinely and deeply concerned with the welfare of her child. All these Judges have; also remarked that the husband is an unstable person. He is unable to hold any job for any length of time. He also suffers from a deep-seated inferiority complex vis-a-vis his ex-wife and for good reasons. From the respondent's conduct throughout this litigation it is also apparent that he has scant regard for the welfare of his daughter. He has, in order to score a point against his ex-wife, not hesitated to drag his daughter from court resulting in his daughter's near nervous breakdown.

The Division Bench has also observed :

As repeatedly observed by a number of our brother Judges including one of us (Madon, J.) in the course of these proceedings, the girl has appeared happy and normal when she is with the mother. She appears tense and nervous when she is with the father. We have no doubt that the child is being pressurised and terrorised into telling lies by the father. The father's conduct leaves much to be desired.

The Division Bench further observed :

The respondent and his brothers and sisters and mother do not have any interest in the welfare of the children. This is borne out by the fact that they admittedly talk constantly in the presence of the children regarding the present case so much that the children have picked up semi-legal words and phraseology as noticed by the court in various orders.

Against this judgment and order of the Division Bench the respondent (father) filed in this Court an appeal under Section 19(1)(b) of the Contempt of Courts Act and in the said appeal made an application for interim stay. On August 15, 1981 on the said application for interim order, this Court passed an order staying the operation of the order of the Division Bench insofar as the same related to the imposition of punishment of imprisonment and fine on the father but directed that the rest of the order of the High Court would stand. This Court further observed that the matter was of an urgent nature and the appeal which was pending before the High Court should be disposed of as expeditiously as possible. It appears that in pursuance of the order passed by the Division Bench of the Bombay High Court which was not in any way affected by the order passed by this Court on August 15, 1981, the appellant had got the minor daughter Gospi admitted into Kimmins Boarding School at Panchgani.

10. The appeal preferred by the appellant to the Division Bench of the Bombay High Court against the judgment and order passed by Mehta, J. on February 19, 1981 allowing the custody of the minor daughter to the father came up for hearing before a Division Bench of the High Court consisting of Jahagirdar and Ashok Modi, JJ. in October 1981. It appears that in the course of the hearing of the appeal, the learned Judges had expressed their desire to meet the minor Gospi and directed that the minor Gospi should be brought to Bombay to enable them to see her. Accordingly, Gospi was brought to Bombay and was interviewed by the learned Judges at the residence of Modi, J. on October 9, 1981. We may note that the learned Judges have recorded their impression of the interview with Gospi in a confidential note and had kept the same in a sealed cover for the benefit of this Court in the event of any such occasion arising. On October 16, 1981, the Division Bench dismissed the said appeal of the appellant with the following order :

For reasons to be recorded in the judgment to be delivered later, we dismiss this appeal challenging the order dated February 19, 1981 passed by Mehta, J. This in effect means that the said order awarding the custody of the minor daughter Gospi to the respondent-father is confirmed. However, in view of the fact that the minor daughter is at this moment studying in a residential school at Panchgani, we direct that she will not be brought to Bombay till at least November 3, 1981. The respondent-father is hereby allowed to spend what is called the exit week-end beginning from October 23, 1981 with daughter at Panchgani. After the child is brought to Bombay, the directions contained in the order of Mehta, J. regarding the

minor daughter - spending her week-ends and vacations with the mother - will come into force. However, it must be made clear that if the school in which the minor daughter is admitted is working on Saturdays, the mother will take the child with her after the school hours are over.

The Division Bench delivered its judgment on November 3, 1981.

11. Against this judgment and order of the Division Bench the mother has preferred this appeal in this Court with special leave granted by this Court. In the present appeal this Court passed an interim order on November 12, 1981 to the following effect :

Without expressing any opinion on the merits of the question regarding the custody of the child Gospi, who is the daughter of the appellant and respondent, we direct as a matter of interim arrangement that she shall be allowed to continue her education in the Panchgani School where she is studying at present until the end of the academic year 1981-82. The parents will be at liberty to meet the daughter alternately, in accordance with the rules and regulations of the school. While the girl is in school at Panchgani she will be at liberty to write letters to both the parents.

We are informed that the school will have vacation from November 18, 1981 till about January 18, 1982 and that the girl wants to come to Bombay during the vacation, we direct that during the forthcoming vacation, she will live with the father for the first half of the vacation and with the mother during the second half of the vacation. The father will bring the child from Panchgani to Bombay on the commencement of the vacation and the mother will take the child back to the school when the school reopens after the vacation. At the end of the first half of the vacation, the father will deliver the child to the custody of the mother.

The appeal shall come up for hearing in the second week of March, 1982. Liberty to the parties to apply to this Court in regard to the custody of the child during the pendency of the appeal, if the appeal for any reason is not disposed of before April 15, 1982. The appeal (C.A. No. 1796 of 1981) the contempt matter will be tagged with this appeal.

We direct that the school authorities will submit to this Court a report in the first week of March, 1982 on the progress and performance of the child, and on the question whether she was happy to be away at Panchgani.

12. The appeal came up for hearing before us and on the conclusion of the hearing we reserved judgment for our consideration of the matter. However, taking into consideration the fact that the next term in the Panchgani School will be commencing shortly and there will also be a short recess of the School we passed the following further interim order on April 27, 1982 pending consideration of the matter and delivery of the judgment by us :

We direct that until further orders of this Court the child Gospi, the daughter of the appellant and the respondent, shall be allowed to continue her education in the Kimmins High School at Panchgani. The parents will be at liberty to meet the daughter alternately in accordance with the rules and regulations of the School, the first opportunity of so meeting the daughter being afforded to the father. While the girl is in the School at Panchgani, she will be at liberty to write letters to both the parents.

We are informed that the School is in vacation from April 21, 1982 to May (sic) 12, 1982 and that on the commencement of the vacation the child Gopsi was brought home and is continuing there. We direct that she will live with the father for the first half of the vacation, and thereafter will live with the mother during the second half of the vacation. The child will be handed over by the father to the mother in the presence of the Vacation Judge of the Bombay High Court on May 17, 1982 at an hour convenient to the Hon'ble Judge and we request the High Court to inform this Court of the act of such handing over. We direct further that on the expiry of the vacations the mother will take the child back to the School at Panchgani and entrust her to the custody of the Principal of the School.

The Court trusts that each parent will promote a sense of respect and affection in the child's mind for the other parent and will take active interest in persuading the child to settle down in the School at Panchgani, and so promote an atmosphere conducive to the proper development of her personality, her mental and physical health and the enjoyment of emotional security and well-being.

12-A. Turning to the merits of the appeal, we must observe at the outset that this case which is concerned with the welfare of a bright, sensitive and innocent girl of about 11 years of age now, has in the peculiar facts and circumstances of the case caused us a great deal of anxiety and pain and we have given very careful consideration to the matter.

13. Elaborate arguments have been advanced from the Bar on behalf of the respective parties.

14. Mr Desai, learned counsel for the appellant, has made the following submissions :

1. In deciding the question of custody of the minor, the Court should be guided only by the considerations of the welfare of the minor. Mr Desai in this connection has referred to Section 49 of the Parsi Marriage and Divorce Act, 1936, Section 41 and 42 of the Indian Divorce Act, 1869, Section 26 of the Hindu Marriage Act, 1955 and Section 38 of the Special Marriage Act, 1954 containing similar provisions and the he has strongly relied on the decision of this Court in *Rosy Facob v. Facob A Chakramakkal* ((1973) 3 SCR 918 : (1973) 1 SCC 840 : AIR 1973 SC 2090).

2. In the facts and circumstances of this case, the father cannot be considered to be a fit person to have the custody of the child and the custody of the child should be entrusted to the mother. In support of this submission that the father is not the fit person to be given the custody of the minor child, Mr Desai has referred to the various proceedings between the parties, the orders passed thereon and the observations made by learned Judges of the Bombay High Court from time to time. Mr Desai has argued that the father in his self-interest to have the minor child on his side and under his control, has been trying to poison the mind of the daughter against the mother for whom the daughter has a very great affection with the object of alienating the daughter from the mother without any regard to the daughter's sentiments and without appreciating the very great damage that he is doing to the daughter and this act of the father has caused a tremendous amount of psychological strain, resulting in a near nervous breakdown of the daughter. Mr Desai has argued that the minor being a daughter and now of the age of 11 years needs the company and guidance of her mother. It is the argument of Mr Desai that the mother has no particular self-interest in obtaining the custody of the child and her only concern is the welfare of her daughter, and she has spent and is prepared to spend whatever

amount is necessary for the welfare of the daughter and she is also in a position to do so. Mr Desai has commented that the main ground on which the learned Single Judge of the High Court and also the learned Judges of the Division Bench had not given the custody of the minor to the mother is that the mother is a working girl and she does not have time to devote to the daughter and it is his comment that this is really no ground. He further comments that the father in most cases has to work for a living and in the present case the father earns his living by plying a taxi at present. He argues that in modern times, particularly in view of the present economic condition, in very many cases, both the husband and the wife have to work for a proper living and the mere fact the father or the mother has got to attend to work, cannot disqualify the father or the mother. Mr Desai has submitted that apart from the fact that the mother is a working girl, there is nothing against the mother which would disentitle her to the custody of her daughter and in this connection Mr Desai has referred to the judgments of the learned Single Judge and also the Division Bench of the Bombay High Court. Mr Desai has further pointed out that the learned Single Judge gave the custody of the daughter to the father though the daughter had clearly expressed her desire to live with her mother.

3. The best interest of the minor in the peculiar facts and circumstances of this case will be served only if the minor is removed from the unhealthy atmosphere of home-life and is placed in a Boarding House where she will have healthy normal growth in the company of other children of her age under the care and supervision of competent teachers, unimpeded by the conspiratorial attitude of the father to destroy her feelings for the mother. In support of this submission, Mr Desai has referred to the various orders passed in which the learned Judges of the Bombay High Court have recorded their impressions after interviewing the girl; and Mr Desai has placed particular reliance on the report of the Social Welfare Expert, appointed by the Bombay High Court.

15. Mr Desai has further submitted that the minor who has been admitted to Panchgani Boarding School and has been there for some time, is gradually fitting in well and she has started feeling happy in the institution. In this connection Mr Desai has referred to a number of letters addressed by the minor to her mother and also to the report of the Principal of the institution.

16. Mr Bhandare learned counsel for the respondent (the father of the minor) has raised the following contentions.

1. In deciding the question of custody of a minor, the Court will no doubt be guided by the consideration of the minor's welfare, but in considering the question of the welfare of the minor, the Court should see the minor to ascertain the wishes of the minor before deciding the question of the welfare of the minor and the custody of the minor. It has been his argument that it is indeed the duty and obligation of the Court to see the minor to ascertain the wishes of the minor before coming to any decision on the question of custody of the minor. In support of this argument, Mr Bhandare has referred to Section 49 of the Parsi Marriage and Divorce Act, 1936, Section 7 to 17 of the Guardians and Wards Act, 1890 and also Section 26 of the Hindu Marriage Act, 1955. Mr Bhandare has strongly urged upon us to send for the minor and to talk to her either in Court or in chambers in the presence of the parents or alone in their absence at the discretion of the Court before deciding the question of custody of the

minor.

2. The minor is a bright and sensitive girl and is deeply attached to the members of the family and to her brother in particular. Home influence has considerable importance to the minor in properly shaping her life and future. Removal of the minor from home and placing her in any Boarding School, however good and eminent the institution may be, will not enure to the benefit of the minor, as she will not fit in and the minor will not feel happy in the Boarding School. The absence of the company of the father, the brother and the other near relations will deeply affect the mind of the minor and cause a psychological depression in her mind and this will impede her normal healthy growth. Mr Bhandare has in this connection referred to a letter sent by the minor to her aunt (father's sister).

3. The order of custody of the minor daughter in favour of the father passed by the learned Single Judge of the Bombay High Court and affirmed by the Division Bench of the Bombay High Court should not be interfered with by this Court in this appeal. The mother has hardly any time to look after the welfare of the daughter as she has to remain constantly busy with her work. Mr Bhandare has also criticised the conduct of the mother and he has commented that the mother had walked out of the house without caring for the children and had no time to think of them for a number of months and during this period both the son and the daughter had lived happily with the father and the other relations. According to Mr Bhandare, the only object of the mother who is not in a position to look after the interests or the welfare of the daughter herself is to deprive the father of the company of his daughter by putting her in a Boarding House.

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.

18. In Halsbury's Laws of England, 3rd Edn., Vol. 21, the law is succinctly stated in para 428 at pp. 193-94 in the following terms :

428. Infant's welfare paramount. - In any proceedings before any court, concerning the custody or upbringing of an infant or the administration of any property belonging to or held on trust for an infant or the application of the income thereof, the court must regard the welfare of the infant as the first and paramount consideration, and must not take into consideration, whether from any other point of view, the claim of the father, or any right at common law possessed by the father in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father. This provision applies whether both parents are living or either or both is or are dead.

Even where the infant is a foreign national, the court, while giving weight to the views of the foreign court, is bound to treat the welfare of the infant as being of the first and paramount consideration whatever orders may have been made by the courts of any other country.

19. In the case of Rosy Jacob v. Jacob A. Chakramakkal ((1973) 3 SCR 918 : (1973) 1 SCC 840 : AIR 1973 SC 2090), this Court has observed at SCR pp. 934-35 : (SCC pp. 354-55, paras 15-17)

.....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 playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society 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 have erred in reversing him on grounds, which we are unable to appreciate.

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 decisions 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.

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 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.....

20. These observations were no doubt made by this Court, while dealing with a case of rival claims between the father and the mother over the custody of the minor children mainly under the Guardians and Wards Act, 1890. The aforesaid observations in our opinion, are applicable to the instant case.

21. We shall now proceed to examine the contention of Mr Bhandare that in deciding the question of custody of any minor, it becomes the duty and obligation of the Court to interview the minor for ascertaining the minor's wishes and to implement the same. Section 49 of the Parsi Marriage and Divorce Act, 1936 provides :

In any suit under this Act, the Court may from time to time pass such interim orders and make such

provisions in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children under the age of 16 years, the marriage of whose parents is the subject of such suit, and may, after the final decree upon application by petition for this purpose, make, revoke, suspend or vary 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 final decree or by interim orders in case the suit for obtaining such decree were still pending.

This section confers power upon the court to pass such orders as the court deems just and proper with respect to the custody, maintenance and education of the children under the age of 16 years in a case falling under the Parsi Marriage and Divorce Act, 1936. This section does not speak anything about a Judge interviewing a minor before passing any order in the matter of custody, maintenance and education of the minor and this section or any other section in this Act, does not cast upon the court any duty or obligation to see the minor and to ascertain the wishes of the minor.

22. The material portion of Section 7 of the Guardians and Wards Act, 1890 to which reference has been made by Mr Bhandare reads as follows :

7. (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made -

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian;

the Court may make an order accordingly

* * *##

This section empowers the court to appoint a guardian of the person or property of the minor where the court is satisfied that it is for the welfare of the minor to do so.

23. Section 17 of the Guardians and Wards Act, 1890 may in this connection also be noted :

17. (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

#* * * *##

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

This section provides for matters to be considered by the Court in appointing the guardian. Sub-section (1) provides that subject to the provisions of this section, the Court should consider the law to which the minor is subject and be guided by what appears in the circumstances to be for the welfare of the minor. Sub-section (2) stipulates that in considering what will be for the welfare of the minor, the Court shall have regard for 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. Sub-section (3) empowers the Court in the event the minor is old enough to form an intelligent preference, to consider the preference. Sub-section (5) prevents the Court from appointing or declaring any guardian against the will of the person. Sub-section (3) of this section undoubtedly enables the Court to consider the preference of any minor if the minor is old enough to form an intelligent preference.

24. In the present case we are not concerned with the question of appointment of a guardian either of the property or of the person of the minor under the Guardians and Wards Act, 1890.

25. We may, however, point out that there cannot be any manner of doubt as to the court's power of interviewing any minor for ascertaining the wishes of the minor, if the court considers it so necessary for its own satisfaction in dealing with the question relating to the custody of the minor.

26. In the facts and circumstances of this case we are however, not inclined to interview the minor daughter, as we are satisfied in the present case that the minor is not fit to form an intelligent preference which may be taken into consideration in deciding her welfare. We have earlier set out in extenso the various orders passed by the various learned Judges of the Bombay High Court after interviewing the minor and the learned Judges have recovered their impressions in their judgments and orders. The impressions as recorded by the learned Judges of the Bombay High Court, go to indicate that the minor has expressed different kinds of wishes at different times under different conditions. It also appears from the report of the Social Welfare Expert that these interviews cast a gloom on the sensitive mind of the tender girl and caused a lot of strain and depression on her. Torn between her love for both her parents and the acrimonious dispute between them resulting in the minor being dragged from court to court, we can well appreciate that the sensitive mind of the minor girl is bound to be sadly affected. Though the girl is quite bright and intelligent as recorded by the learned Judges of the Bombay High Court in their orders after their interviews with the girl who is of a tender age and is placed in a very delicate and embarrassing situation because of the unfortunate relationship and litigation between her parents for both of whom she has great deal of affection, she is not in a position to express any intelligent preference which will be conducive to her interest and welfare. Mature thinking is indeed necessary in such a situation to decide as to what will enure to her benefit and welfare. Any child who is placed in such an unfortunate position, can hardly have the capacity to express an intelligent preference which may require the court's consideration to decide what would be the course to be adopted for the child's welfare. The letters addressed by the daughter to her mother from Panchgani and also a letter addressed by her to her aunt (father's sister) also go to show that the minor cannot understand her own mind properly and cannot form any firm desire. We feel that sending for the minor and interviewing her in the present case will not only not serve any useful purpose but will have the effect of creating further depression and demoralisation in her mind.

27. We are, therefore, unable to accept the contention of Mr Bhandare that there is any duty or obligation on the part of the Court to interview the minor for ascertaining the wishes of the minor before deciding the question of her custody and that we should send for the minor in the present

case and interview her to ascertain her wishes before we proceed to decide the question of her custody.

28. Home influence plays a very important role in shaping the life of every child. Influence of a happy home where the children are brought up under the affectionate care and guidance of their parents and other relations, all concerned with the welfare of the children, no doubt, enables the children to lead a normal healthy life and materially contribute to their welfare. In a happy home the children are free from any kind of unhappy tension and psychological strain and they grow up in a healthy environment where their interests and welfare are properly looked after by their parents. In such a case, the court is naturally not called upon to interfere and to consider the welfare of the children and the welfare of the children is well taken care of by their parents whose primary concern is to see to their interest and welfare. It may, however, be mentioned that even in cases of happy homes where the children have a very congenial atmosphere for their healthy growth and are very well looked after by their parents, the parents, in many cases do send their children to Boarding Schools. The parents do so, as the parents feel that the interest and welfare of children will be better served, if they are sent to a good Boarding School where the children, on their own and in the company of their fellow students, will have a greater and better opportunity of developing their personality and shaping themselves properly under the supervision of competent teachers to enable them to fashion their lives properly and face bravely and squarely the hard realities of the world. A good Boarding School has very many advantages and is in a position to enforce proper discipline which is obviously necessary for healthy growth of every child. It is well-known that mainly because of such desire on the part of very many of the parents to send their children to a good Boarding School, seats are hardly available in a good Boarding Institution these days and seats have to be booked well in advance. Loving parents who send their children to Boarding Schools for education, have generally to do so against the wishes of the children. Children will naturally not be inclined to stay away from their affectionate parents and to leave their happy homes where they enjoy not only the affection and care of their parents but also all the homely comforts and they do not like to be subjected to the rigours of strict discipline enforced in a Boarding Institution. Children sent to a Boarding Institution from happy homes, also find it difficult to adjust themselves to the environment of a Boarding School and may not feel very happy. Fond parents bearing only in mind the interest and welfare of their children still send their loving children to Boarding Schools against the wishes of the children, sacrificing themselves the company of their children at home, and persuade their children to adjust themselves in the Boarding School and they go on encouraging their children to enable them to settle down in that institution. Parents do so at considerable sacrifice to themselves, only in the hope and expectation that the interest and welfare of the children will be best served. It is common experience that children who are sent from happy homes to Boarding Institutions and who do not feel easy and comfortable in the Boarding Institution when they join such institution, soon adjust themselves to the new environment and come to like the Boarding Institution where in the company of fellow students they lead a healthy and happy life under the guidance and care of competent teachers to the joy of their parents.

29. It is also no doubt true that children who stay at home with their parents and do not go to Boarding Schools may also be very well disciplined in life and may have a very healthy, happy and normal growth while staying at home. Indeed, the majority of children in our country are brought up in their homes, as very many of the parents are not in a position to bear the expenses of a Boarding School for their children. The children grow well and happily in homes under the affectionate care and guidance of their parents, so long as they continue to enjoy the blessings of a happy home. A broken home, however, has a different tale to tell for the children. When parents fall out and start fighting, the peace and happiness of home life are gone and the children become the worst sufferers.

It is indeed sad and unfortunate that parents do not realise the incalculable harm they may do to their children by fighting amongst themselves. The husband and the wife are the persons primarily responsible for bringing the children into this world and the innocent children become the worst victims of any dispute between their father and the mother. Human beings with frailties common to human nature, may not be in a position to rise above passion, prejudice and weakness. Mind is, indeed, a peculiar place and the working of human mind is often inscrutable. For very many reasons it may unfortunately be not possible for the husband and wife to live together and they may be forced to part company. Any husband and wife who have irreconcilable differences, forcing them to part company, should, however, have sense enough to understand and appreciate that they have their duties towards their children. In the interest of the children whom they have brought into existence and who are innocent, every husband and wife should try to compose their differences. Even when any husband and wife are not in a position to reconcile their differences and are compelled to part, they should part in a way as will cause least possible mischief to the children.

30. Hard facts of life, however, go to show that when near relations fall out, the passions and sentiments are so worked up in them that they lose the right perspective and are not in a position to consider and judge what will ultimately be for their good. In the instant case, the disputes between the parties who had been married for years and are responsible for the birth of two children, have now become so bitter that a number of proceedings including contempt proceedings by either of them have been initiated and the unfortunate children have been paraded from court to court. The learned Judges of the High Court have done their best to compose the differences and have from time to time passed appropriate orders which, if implemented in the true spirit would have enured to the benefit of all concerned. It, however, appears that mainly because of the attitude of the father, the various orders directing the children to stay with their father for five working days in the week and with the mother during the week-ends and also apportioning the period of their stay with the parents during the vacations passed by the learned Judges of the Bombay High Court from time to time in the best interests of all parties concerned including the children, have failed to achieve any useful purpose and have only resulted in further litigation. The facts and circumstances of the case establish that the father out of spite against the mother is not willing to allow the children to stay with their mother. Obsessed with the idea of having exclusive control of the children, he has been trying to poison the minds of the children against the mother with the only object of completely alienating them from their mother, and in his spiteful obsession, the father fails to appreciate the very great harm done to the children. It appears that the father has succeeded in his attempt in alienating the son who, as the records show, was once deeply attached to the mother and had great affection for her; and the son has now become hostile to the mother.

31. The respondent-husband in view of his better feelings against the appellant, may feel elated and satisfied in having succeeded in making the son hostile to the mother. He, however, does not appreciate the very great stress and strain the son must have undergone in the process of losing his love for the mother and he also does not understand how unfortunate it is for any son to be deprived of the affection of his mother and to lose his own love the mother. The mother still appears to have a very great affection for the son. The situation is unfortunate but in this appeal, we are not concerned with the son who is now well over 16 years of age. We only hope that all concerned will try to restore good relationship amongst themselves, as we feel that though the husband and wife have now parted for good, restoration of friendly relationship amongst all of them will enable them to live in peace and happiness and allowing the bitterness to continue will only add to their miseries and troubles.

32. The effect on the little girl of the embittered relationship between her parents and the attempt of

the father to poison the mind of the daughter against her mother and to alienate her from the mother has been simply disastrous. The intelligent and sensible girl, distressed at the acrimony between her parents, who wanted to spend her time with each of her parents as she is deeply attached to both, as recorded by Lentin, J. in his order dated June 28, 1979, was on the verge of near nervous breakdown as noted by the Division Bench in its judgment dated July 31, 1981. The various orders passed in between, which we have set out at length also, indicate what great mental strain and agony the little girl had suffered because of the acrimonious dispute between her parents. During this period of two years, the girl had been under home influence, as she had been staying with her quarrelling parents in terms of the various orders of the High Court. The little girl also had been compelled to make her appearances in court from time to time. The facts and circumstances clearly establish that the effect of home influence on the minor in the present case has been to reduce a bright, happy and sensible child to a state of complete misery; and, the extreme psychological strain on the sensible mind of the little girl has caused almost a near nervous breakdown. When the atmosphere in a house, vitiated and rendered surcharged with tension as a result of better squabbles between husband and wife, causes misery and unhappiness to a child, who has to live in constant psychological strain in such a broken home in view of the bitter relationship between her parents for each of whom she has great affection, the healthy and normal growth of the child is bound to be seriously affected. In the interest and for the welfare of the child in such a case, the child is necessarily to be removed from such unhealthy environment of a broken home surcharged with tension. In such a case, the proper and best way of serving the interest and welfare of the child will be to remove the child from such atmosphere of acrimony and tension and to put the child in a place where the embittered relationship between her parents does not easily and constantly affect her tender mind.

33. In the facts and circumstances of the present case the best way to serve the welfare and interest of the child will be to remove the child from the unhealthy atmosphere at home which has caused a very great strain on her nerves and has certainly affected her healthy growth, to a place where she can live a normal healthy life and will have a good opportunity of proper education and healthy growth. We note with satisfaction that the view that we have taken is fully supported by the report of the Social Welfare Expert. The report of the Social Welfare Expert, though not binding on the Court is entitled to weighty consideration. In the instant case, the Expert has made a very careful study of the entire matter and has given a well-reasoned report.

34. Pursuant to the order passed by Division Bench of the Bombay High Court the mother got the child admitted into Kimmins Boarding School at Panchgani. By an interim order passed by this Court in the stay application in this appeal, the child was directed to continue her stay in the said Boarding Institution. By the interim order passed by us on the conclusion of the hearing we directed that the child should continue her study in the Boarding School.

35. On a consideration of all the facts and circumstances of this case and bearing in mind the paramount consideration of the welfare of the child, we are of the opinion that the child's interest and welfare will be best served by removing her from the influence of home life and by directing that she should continue to remain in the Boarding School. It is not in dispute that Kimmins Boarding School at Panchgani to which the child has been admitted is a good institution.

36. The question of custody of the child must necessarily be considered from the only viewpoint of the welfare of the child. In view of our finding that in the instant case the best interest of the child shall be served by keeping her in a Boarding School away from the unhealthy atmosphere of strain and tension which she had been undergoing at home, the question of custody has to be judged in this background. In that view of the matter it does not really become necessary for us to go into the

question of the merits of the respective competence of either of the parents. The person to whom the custody of the child has to be entrusted will necessarily be answerable to the school for payment of all charges and expenses of the child and also in relation to any matter concerning the child in her school life. It is clear that the father is not inclined to allow the child to remain in a Boarding Institution. If the custody be left to him, the father in view of the disinclination to allow the child to remain in the Boarding Institution, may be in a position to create difficulties for the child for her remaining in the institution by non-payment of fees or otherwise. As we have earlier noticed, the father is obsessed with the idea of obtaining exclusive control of the daughter and keeping the daughter with him in his house. It is not in dispute and it cannot be disputed that the mother has a great deal of affection for her daughter and the daughter is also very fond of the mother. The mother has the welfare of the daughter in her heart and to serve the best interest of the daughter the mother is prepared to make any necessary sacrifice. For the welfare of the daughter the mother at considerable expense had put her in Kimmins Boarding School, Panchgani which is recognised to be a good institution. She has been paying for all the expenses of the daughter at the school. She has a steady income out of which she is in a position to meet all the expenses of her daughter at the school. The mother also does not suffer from any obsession regarding possession of the girl and she wants her daughter to lead a healthy normal life essential for her proper growth and development. The mother is very anxious that the child should continue to remain in the Boarding School. The girl now aged about 11 years, is reaching an age when she will need the guidance of her mother. We are, therefore, of the opinion that the custody of the girl should be given to the mother. The argument of Mr Desai that the Bombay High Court went wrong in refusing the custody of the daughter to the mother mainly on the ground that the mother is a working girl, is not without force. It also appears that the High Court failed to properly appreciate that home influence in the present case had been doing very great damage to the healthy growth of the child and had brought about a near nervous breakdown of the girl. The argument of Mr Bhandare that the girl needs in any event the company of her brother to whom she is deeply attached, has not impressed us. The girl had been staying with her father at home and had been enjoying the company of her brother. It does not, however, appear that the home influence including influence of the brother, has done her any good. The influence at home, as we have earlier noticed, has more or less made her a nervous wreck. The further fact also remains that the brother is now grown up and he may not be there at the house to give her company. At the time of hearing of the appeal we were given to understand that the brother was away at Ceylon as a Sea Cadet and was likely to return soon. We may also add that by the directions already given by this Court, all necessary and proper opportunities have been given to the brother to meet the minor.

37. In the result the appeal succeeds. We set aside the judgment and order passed by the Bombay High Court allowing the custody of the child to the father. We pass the following order :

The appeal is allowed. The custody of the child is given to the mother, the appellant before us. The mother will have the custody of her minor daughter Gospi till Gospi reaches the age of 16 years.

38. We also give the following further directions :

1. The child Gospi, the daughter of the appellant and the respondent shall be allowed to continue her education in the Kimmins High School at Panchgani.
2. The parents will be at liberty to meet the daughter alternately in accordance with the rules and regulations of the school, the first opportunity of so meeting the daughter being afforded to the father.

3. While the girl is in the school at Panchgani she will be at liberty to write letters to both her parents and also to her brother and other relations and friends.

4. When the school closes for any vacation the girl will live with the father for the first half of the vacation and thereafter will live with the mother during the second half of the vacation. The father will arrange to bring the girl from school to his place.

5. Under no circumstances the father will be entitled to keep the girl Gospi with him beyond the period of the first half of the vacation without obtaining any prior order from this Court on notice to the appellant. The father will positively and punctually hand over the child to the mother on the expiry of the period of the first half of the vacation at the mother's place of residence.

6. On the expiry of the vacation the mother is directed to take the child back to the school at Panchgani and entrust her to the custody of the Principal of the school.

39. These directions will remain in force, unless otherwise ordered by this Court, as long as the minor Gospi does not reach the age of 16 years.

40. It may be placed on record that after the judgment had been prepared and made ready, I received a letter purported to have been written by the minor Gospi. It is indeed a curious letter which has been written in an inland letter card. It appears from the inland letter card that the inland letter card contains the photostat copy of a letter dated May 15, 1982 by her to the Chief Justice of India and the inland letter card also bears a photostat copy of the Supreme Court address of the Chief Justice of India. In the very same letter a few lines have been addressed to me in the space left after the photostat copy of the letter dated May 15, 1982 to the Chief Justice of India has been completed. The letter addressed to me in this very inland air letter card is dated June 13, 1982. This inland letter card which contains the photostat copy of the letter dated May 15, 1982 and the letter dated June 13, 1982 has been put in an envelope sent to me under registered post with acknowledgment due. An identical letter written by the girl in the very same manner in another inland air letter card containing the photostat copy of her letter dated May 15, 1982 to the Chief Justice of India has also been sent to my learned brother Pathak, J. The letter to my learned brother is also dated June 13, 1982 and is word for word the same as the letter to me. The inland letter card in which the exactly similar letter has been addressed to my learned brother was also put in an envelope and sent to my brother under registered post. The registered envelopes of both these two letters addressed to us indicate that the letters were sent from the address of her father.

41. We do not propose to set out the contents of the letter as we feel that the same will not serve any useful purpose and may only create unnecessary embarrassment and avoidable unpleasantness for the parties. It has been our earnest endeavour to try to create a situation of amity and goodwill as far as possible under the circumstances amongst the parties in the larger interest of the minor girl and to try to avoid to say or do anything which may create any unpleasantness or bitterness amongst them. Suffice it to say that the main purport of these letters is that Gospi does not want to continue her studies in the Boarding School and she wants that we should interview her and allow her to stay with her father.

42. We have no manner of doubt that these letters have been written by Gospi at the instance of her father. Even if we accept that Gospi wrote a letter to the Chief Justice of India on May 15, 1982 it is inconceivable that a girl of Gospi's age could ever think of keeping photostat copies of the letter and

it would also not not be possible for a girl of her age to prepare photostat copies. It is obvious that the letter dated May 15, 1982 addressed to the Chief Justice of India, if the letter had been sent at all, must have been written by Gospi under the direction of the father who must have prepared photostat copies. It is interesting to note that when the hearing of the matter had been concluded and we reserved judgment after passing the interim order on the conclusion of the hearing these two letters absolutely identical in every word and detail should be addressed to us. It was indeed not possible for Gospi to know which particular Bench of this Court was hearing these matters. The registered envelopes in which the letters have been sent also indicate that the letters have been sent from the address of the father. These letters have been written in inland air letter cards containing the photostat copy of the letter to the Chief Justice of India with the obvious object of showing that Gospi had earlier written to the Chief Justice about this matter. We have no doubt that these letters have been addressed to us after the conclusion of the hearing with the object of lending support to the submission made on behalf of the father in course of the hearing and creating an impression in our mind that we should see Gospi before we deliver our judgment and we should not place Gospi in the Boarding Institution and should allow Gospi to stay with her father. We feel that the father has caused these letters to be addressed to us by his daughter, while the daughter had been staying with him, particularly in view of the interim order passed by us on the conclusion of the hearing pending judgment so that we may reconsider our order, while delivering our judgment and disposing of the matter finally.

43. We cannot help observing that these letters go to show that the view that we have taken is clearly right and we can place no reliance on any kind of wish of Gospi who is not in a position to form any independent volition of her own and she expresses different kind of wishes in different situations under the influence and domination of others. As we have earlier discussed at length in the judgment, it is not possible for the girl in the situation now prevailing to express any preferential wish which may require consideration by us to decide her welfare. These letters have the effect of strengthening the impression in our minds that Gospi's real welfare will be best served by keeping her in the Boarding Institution and cannot be served by allowing her to stay with her father.

44. Now that the matter is finally over, we ask the father once again not to persist in his present attitude, as it will do a lot of harm to his daughter whose sensitive mind, disturbed as it is, is likely to get destabilised. The father who has his love and affection for the daughter should appreciate that his daughter is indeed fortunate in being in a position to receive her education from an institution of repute and that the education of his daughter at the Boarding Institution will conduce to her healthy and happy growth and to her welfare. The father should encourage Gospi to settle down properly in the Boarding Institution and to make the best of it. If we, however, find that the father is still persisting in his present attitude and is seeking to upset the mind of the girl in properly settling down at the institution, we may reluctantly have to take appropriate steps in the interest and for the welfare of the minor girl for whom the Court has now a special responsibility. We do hope that no such occasion will arise.

45. We hope that Gospi will realise that she is having her education in a good Boarding Institution in an environment which is otherwise free from unhealthy atmosphere of stress and strain from which she had been suffering for the last few years. She should also appreciate that her upbringing and education in this reputed institution in the company of children of her age and under the guidance of competent teachers will be for her good and should try to make the best possible use of her study in the institution and devote herself to her studies.

46. We direct that the two letters should be kept in the records of the proceedings of this appeal.

47. After we had received the letters from the girl, a letter dated July 5, 1982 addressed by the Principal of the School to the Assistant Registrar of this Court has been placed before us. In this letter the Principal has informed the Court that on the expiry of the holidays the mother brought the girl back to the School and the girl was happy in School and in the first monthly report for the months of May and June, the girl has done very well in her studies and secured 65 per cent marks with 7th position. We direct that this letter of this Principal also to be kept in the records of the proceedings of this appeal.

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