



ROLE PLAYED BY CHILDREN IN CUSTODY PROCEEDINGS

By *Abhigyan Bhattacharya*
From *Jindal Global Law School*

INTRODUCTION

Under Section 26 of the Hindu Marriage Act of 1955, the court can pass any interim orders or make provisions “in the decree as it may deem just and proper” in matters relating to the custody, the maintenance and the education of children.¹ Mulla on Hindu Law elaborates on this concept by stating that the most significant requirement of the court in passing any decree pertaining to custody should be the welfare of the minor.²

This paper aims to delve into and analyze the role played and the weightage held by children in custody proceedings during a divorce. It will be doing so by referring to and analyzing various judgements passed by the Indian judiciary on this topic and attempting to determine the factors that go into the decision making of the court.

COURTS ON THE WELFARE OF THE CHILD

A prominent case discussing the importance given to the welfare of the child is that of *Gaurav Nagpal vs Sumedha Nagpal* (2009)³, the Supreme Court of India held that, “*The principles in relation to the custody of a minor child are well settled. The paramount*

consideration of the court in determining the questions as to who should be given custody of a minor child, is the "welfare of the child" and not rights of the parents under a statute for the time being in force or what the parties say. The court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and over physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others”⁴

The judgement further goes on to state that in custodial cases, mature thought on the part of the court is undoubtedly important. The court must consider such issues from more than just a legal point of view. The human perspective is vital in such cases when deciding the concerns of both the parties. The 1890 Act's goal and objective is to protect the minor's legal rights to health, maintenance, and education, not just their physical custody. The welfare of the minor is the court's responsibility and power under the Act.⁵

Another prominent case in discussing similar notions is *Vivek Singh v Romani Singh*⁶, a case decided in 2017 by the Supreme Court of India. The case tries to elaborate on the question of welfare of the child during the custody proceedings. The case revolves around the custody battle over a very young child, Saesha, the custody battle for whom started when she was barely two years of age. During the initial proceedings, the Family Court held that the “appellant is a fit person to retain the custody of the child”⁷ whereas after appeal, the High Court deemed it fit to

¹ Hindu Marriage Act 1955, s 26.

² Dinshaw Fardunji Mulla, *Hindu Law* 964 (21st ed. 2010).

³ *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Vivek Singh v. Romani Singh*, (2017) 4 SCC 573h.

⁷ *Ibid.*



transfer the custody over to the mother, that is the respondent, opining that the respondent “being mother of a girl child who was even less than five years’ of age at the relevant time, was better suited to take care of the child and this course of action is in the best interest of the child”.⁸ Owing to the appellant not following the instructions he was charged with a contempt petition by the respondent against him. However, while the issue of the notice, the Court halted the contempt proceedings. As a consequence of this decision by the High Court the custody of the child remained with the appellant.

During the final stage of appeal at the Supreme Court, the minor child was 8 years of age. During deciding the case, the court refers to various cases which discuss and elaborate on the points of view taken up by courts previously. It refers to *Bandhua Mukti Morchai v Union of India & Ors*⁹, where it refers to the fact that “the child of today cannot develop to be a responsible and productive member of tomorrow’s society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity.”¹⁰ Similarly, the judgment also refers to the case of *Rosy Jacob v Jacob A. Chakramakkal*¹¹ where it refers how “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”.¹²

Finally, the court held that it was necessary for the child to be in the company of her mother. The mother deserved a chance to have custody of the child and the child deserved a chance to grow up with the mother with a presence in her life which was more than simply visitation rights. This case is a very important judgement in the field of custody as it deals with the important topics of welfare and parental alienation syndrome.

RECOMMENDATIONS OF THE LAW COMMISSION OF INDIA

Report No. 257 of the Law Commission of India, titled “Reforms in Guardianship and Custody Laws in India”,¹³ discusses some of the criteria which are used by courts while deliberating upon child custody cases.¹⁴ It highlights factors which need to be considered by Indian courts as it compares Indian jurisdiction to the rule of law followed in the USA which include the physical and mental conditions of the child, the physical and mental conditions of the parents and the requirements of a child with respect to other important people in their lives. They also look into the role each individual parent has played and is willing to play in the child’s life and the parents’ ability in general to ensure the holistic development of the children with

⁸ Ibid.

⁹ *Bandhua Mukti Morcha v. Union of India*, (1997) 10 SCC 549.

¹⁰ Ibid.

¹¹ *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840.

¹² Ibid.

¹³ Law Commission of India, *Reforms in Guardianship and Custody Laws in India* (Report No 257, 2015).

¹⁴ Ibid.



regards to their health, safety and welfare.¹⁵ Furthermore if the child is deemed to be “sufficiently intelligent and mature”, his opinion will be considered while considering the problem of custody provided that the reasoning behind the preference is reasonable. In some cases, a guardian can be appointed to represent the child’s interest during court proceedings.¹⁶ Another factor was established in the case of *Prabhat Kumar v Himalini*¹⁷ where the welfare of a child would also be affected by the care and affection he would receive from the individual parent’s family. Stating all this, the Law Commission of India made recommendations which were highlighted in the Hindu Minority and Guardianship Amendment Bill of 2015 and the Indian Guardians and Wards Amendment Bill of 2015. Based on all this, the Law Commission of India made the recommendation that the language of Section 6(a) of the Hindu Minority and Guardianship Act of 1956 be amended in order to accommodate the flexibility which would be granted by courts in the events of joint custody. Furthermore, it also recommended that the age limit of custodial support to a child be extended from 18 years to 25 years of age, taking into consideration the child’s academic and health needs.¹⁸

FACTORS INFLUENCING THE COURTS’ DECISION

1) AGE OF THE CHILD

According to Section 6(a) of the Hindu Minority and Guardianship Act of 1956, “in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother”.¹⁹ The ambit of Section 6 of this act includes both legitimate children and those children who are deemed to be legitimate under Section 16 of the Hindu Marriage Act.²⁰ Under this rule of law, typically the custody of all children who are under the age of five years goes to their mother. Furthermore, the Indian judicial system typically starts considering the opinions and preferences of children during custody proceedings around the time they turn nine years old and beyond.

An important case dealing with age is of *Aakansha Roy Rasmussen vs Adwait Anil Dixit*,²¹ a case that was decided in 2015 in the High Court of Bombay. This case primarily deals with the custody proceedings over a minor child, who is 13 years old.²² The High Court describes the case to be such where the child was rendered “a victim of a bitter custody battle between the parents”.²³ In this case, after divorce proceedings occurred between the parents, the mother or the appellant moved away and left the country while the minor child remained in the custody of her father or the respondent, who got remarried and continued to live in Maharashtra. One of the clauses of the divorce agreement included the fact that the mother would be granted visitation every time she would be in the country. In 2013, the

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ *Prabhat Kumar v. Himalini*, 2010 SCC OnLine Del 85.

¹⁸ (n 13).

¹⁹ Hindu Minority and Guardianship Act 1956, s 6.

²⁰ (n 2).

²¹ *Aakansha Roy Rasmussen v. Adwait Anil Dixit*, 2015 SCC OnLine Bom 558.

²² Ibid.

²³ Ibid.



mother received an email from the minor child, expressing her desire to reside with her. Pursuant to this, she returned to India and starting the judicial process to gain custody of her child. During the ensuing court proceedings, the child was produced in front of a marriage counselor where she reiterated her desire to stay with her mother despite having no complaint against her father, stepmother or stepsister. Furthermore, during the pendency of the petition, the mother received a phone call from the school her daughter attended, stating that the child was not well. After this, she took her daughter to a psychiatrist where the child was diagnosed with anxiety. After a myriad of arguments made by the counsels of both parties which made compelling arguments both for and against the case, the judges took the opinion of the minor child as well. After listening to the nature of her arguments, the courts came to the conclusion that she was old and mature enough to make a tough decision where she was able to choose between two parents who according to the court, she loved “immensely and equally”.²⁴ Finally the court held that the appeal was going to be allowed and that the custody of the child was going to be given over to the mother and she would move to Denmark to stay with her mother.

In this case, the court considered the opinion of the minor child a lot while deciding the case. They understood and accepted the fact that she was not trying to show that she was having problems living with her father and that she just wanted to spend some time with her mother as well. They make points stating that she is brilliant in academics and owing to the bitter custody battle and the ensuing court proceedings, her academics were suffering

which is why it was imperative that a solution is attained to this case, which in the court’s opinion involved giving the child what she wanted and allowing her custody to be shifted over to the mother, thus enabling her to move to Denmark to stay with her mother. However, the court also allowed for two mandatory visits to India during the holidays so that her relationship with her father does not deteriorate either. Thus, contrary to the original judgement, which was passed by the lower court, the High court of Bombay fully acknowledges and addresses the best interests and welfare of the child while deciding on this judgement.²⁵

2) THE PLACE OF UPBRINGING AND THE PRIMACY TOWARDS MATRIMONIAL AFFECTION

The case of *Dhanwanti Joshi v Madhav Unde* (1998)²⁶ is a case which closely deals with a factor played by a child during custody proceedings which is to ensure that a child is able to maintain his life as closely as he was leading it before the custody battle started. In this case, Madhav Unde, the appellant, married Dhanwanti Joshi while he was living in the USA. After approximately 10 months of marriage, a son was born to them and while he was 36 days old, the respondent had taken him and moved back to India. Following this, the appellant and the respondent did not live with each other and the appellant initiated divorce proceedings in the USA against the respondent while seeking full custody of his son. Following this claim, the US court had passed an order granting the appellant full custody of the child. However, following this, the respondent initiated proceedings against the appellant in India. At the time of

²⁴ Ibid.

²⁵ Ibid.

²⁶ *Dhanwanti Joshi v. Madhav Unde*, (1998) 1 SCC 112.



the case reaching the Supreme Court, the child was studying in the eighth grade and while being interviewed by the judge bench in chambers, had expressed his reluctance in going to live with his father in the USA. He stated that he wished to remain in the custody of his mother and that he wished to continue his residence in India at least until the completion of his school life if not graduation. In this case, the court referenced *Rosy Jacob v Jacob a. Chakramakkal* (1973)²⁷ and stated that any change in custody of a child should only be done in the absolute best interests of the child and that orders pertaining to the custody of children cannot be considered to be final. They are rather simply given provisionally during legal procedure and are subject to change. Keeping this in mind, the Supreme Court of India held that in this case, pursuant to the provisions laid down in the Guardians and Wards Act, it was in the best interest of the child to continue living with his mother owing to the fact that he had already spent a significant amount of his life living with her in India rather than move to an alien environment in the USA. The Supreme Court of India gave a very similar judgment in the case of *Mausami Moitra Ganguli v Jayanti Ganguli* (2008)²⁸ where, using a similar process of reasoning, the custody of the child was retained by the father in order to prevent the child from having to move away from an environment he had grown accustomed to.

3) CLAIMS OF OTHER FAMILY MEMBERS AND FINANCIAL CAPACITY

A prominent factor which leads to a lot of debate regarding custody, especially in India, is the presence of a joint family. A case dealing with the same is that of *Tejaswini Gaud v Shekhar Jagdish Prasad Tiwari*²⁹ (2019). In this case, the mother of the child was diagnosed with breast cancer in 2017, while she was five months pregnant following which while her daughter was in the care of the respondent, he was diagnosed with tuberculosis and required to be hospitalized. During the process of her cancer treatment, she was shifted around to Mumbai and Pune where she and her daughter resided with relatives. Following her death in 2018, the child remained in custody of the appellants while the father was denied his custody at every turn. Following this, the father approached the High Court with a writ petition, trying to reclaim the custody of his daughter. The appellants argued that the respondent, owing to his sickness, was not fit to have custody of the child and they refused to give up custody of the child despite the father being the natural guardian under Section 6 of the Hindu Minority and Guardianship Act. Keeping in mind the paramount welfare of the child, the Supreme Court stated that cases dealing with custody cannot be solely determined through provisions of the law but also depended on the contact the child had had with both parties and the capacity of both parties to take care of the child. Considering the provisions laid down by *Rosy Jacob v Jacob a. Chakramakkal* (1973)³⁰ in determining the father's capacity to have custody over his daughter, the court determined that the father was a "highly educated person and is working in a reputed position. His economic

²⁷ (n 11).

²⁸ *Mausami Moitra Ganguli v. Jayant Ganguli*, (2008) 7 SCC 673.

²⁹ *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari*, (2019) 7 SCC 42.

³⁰ (n 11).



*condition is stable.*³¹ Based on this, the court held that if no custody was granted to the father, the judgment would be depriving both the father and the daughter of their mutual love and affection. Owing to the fact that the daughter was only a one and a half years old at the point of the judgement, it was too soon to determine her choice in the matter. Potentially custody could be shifted later down the line if the child wanted such to happen. Finally, it was held that it was in the absolute best interest of the child to hand over the custody to the father. In addition to discussing custody battles involving multiple family members, this case also delves into the financial capacity of one partner as it determines that the position the father works in, and his annual income would both greatly benefit the child.

Another important case which also deals with custody in the presence of a joint family is that of *Nil Ratan Kundu & Anr v Abhijit Kundu* (2008)³². In this case, after the death of the mother at the hands of domestic violence and assault at the hands of the father, the child's maternal grandparents were looking after him. The father tried to gain custody of his son, arguing that it was his legal right. However, the courts stated that the Indian statutes such as the Guardians and Wards Act (1890)³³ and the Hindu Minority and Guardianship Act (1956)³⁴ typically give custody of the child to the father owing to factors such as the father typically being the working member of the family and at the best financial capacity to care for the child. However, it is not a template, and the court must decide cases based on the individual,

unique facts. In this case, the child vehemently refused to go stay with his father and based on the testimonies given by both parties, the court determined that it was not in the best interest of the child to be transferred to the custody of the father owing to the exist criminal proceedings against him and thus, custody of the child was retained by the maternal grandparents.

CONCLUSION

In conclusion, various factors are considered by courts while determining the custody of a child. While various aspects such as financial capacity, capacity to care for the child, presence of familial love and affection can play a part to influence the court's decision, the child's opinion, his age and the atmosphere and area he has grown up in have a very impactful role in the court's decision. The amendments brought about in both the Hindu Minority and Guardianship Act³⁵ and the Guardians and Wards Act³⁶ by Report 257 of the Law Commission of India³⁷ have been essential in engraving some key elements dealing with the welfare of children into both these statutes. Furthermore, as we can see, most judgements emerging from the Supreme Court of India give primary consideration to the welfare of the child in all custody proceedings. Thus, we can conclusively say that children play a very significant role in influencing the court's decision during custody proceedings.

³¹ (n 29).

³² *Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413.

³³ Guardians and Wards Act 1890.

³⁴ (n 19)

³⁵ (n 19).

³⁶ (n 33).

³⁷ (n 13).