

## **CUSTODY OF A CHILD -ITS LEGAL ASPECTS**

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### **ABSTRACT**

In modern society divorce has become rampant and the bad effects of that is that where do the children go or with whom do the children live with. During any breakdown of marriage, the custody of children is an important question to be resolved. It is said “the child needs a mother the most, but it needs a father too”. The question that arises is does the Indian law believes this? Is it that the law believes that the child has a good future just with the mother? Is it possible that the mother can always be the right person in the life of the child? There are instances when both the parents want the custody of the children and also when none of the parents want the custody of the children. There have been cases where the Supreme Court has decided that even when mother is carrying on illicit, illegal profession the custody is given to her. Issues also arise when there are foreign jurisdictions and foreign Court judgements involved. Further, there are matters where the spouse is facing the criminal charges for the murder/ abetment of murder of the other, then who should be handed over the custody. The Courts have also look into the aspect of working mothers while deciding on the custody as they may not have time for the children. The Courts while granting the custody has to look into second marriages of one or both the partners. Many times the child prefers to alienate himself from both the parents as he is fed up of the fights. Then, there is a bigger issue of ego clashes between the parents and where they both are harming the child without realizing it.

This paper remaps the different legal aspects of custody of a child. The paper discusses the Indian laws regarding the child custody. The custody of the child affects the child emotionally and psychologically. The child is caught up in between the parents, its difficult for him/her to choose

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one over the other. In the quarrels the couple forgets that the child is suffering. The paper explores the legality of custody of a child in India. It brings out the hardships of the parents who have become slaves of the law and therefore research paper asks a simple question are we even able to give basic human rights or justice to the parents. Justice can be done to either the father or mother but not to both and hence justice can be done to just of them and other one is deprived of it. This paper looks into the laws regarding the custody of the child in India, the amendments required to remove the superiority of one parent over the other and the kind of impression that is left by the law on the child. And finally the paper discusses the factors considered by the Courts when granting custody. Children many times become very aggressive because of the fights of the parents over the custody issue and many criminals are born, they take into drugs and other vices and innocent children become criminals after facing the hardships. It becomes very difficult for such children to survive in the society. The children are also not accepted in the society easily.

## **INTRODUCTION**

In modern society divorce has become rampant and the bad effects of that is that where do the children go or with whom do the children live with. During any breakdown of marriage, the custody of children is an important question to be resolved. It is said “the child needs a mother the most, but it needs a father too”. The question that arises is does the Indian law believes this? Is it that the law believes that the child has a good future just with the mother? Is it possible that the mother can always be the right person in the life of the child? There are instances when both the parents want the custody of the children and also when none of the parents want the custody of the children. There have been cases where the Supreme Court has decided that even when mother is carrying on illicit, illegal profession the custody is given to her. Issues also arise when there are foreign jurisdictions and foreign Court judgements involved. Further, there are matters where the spouse is facing the criminal charges for the murder/ abetment of murder of the other, then who should be handed over the custody. The Courts have also look into the aspect of working mothers while deciding on the custody as they may not have time for the children. The Courts while granting the custody must look into second marriages of one or both the partners. Many times, the child prefers to alienate himself from both the parents as he is fed up of the fights. Then, there is a bigger issue of ego clashes between the parents and where they both are harming the child without realizing it.

## **LEGAL ASPECTS**

This paper remaps the different legal aspects of custody of a child. The paper discusses the Indian laws regarding the child custody. The custody of the child affects the child emotionally and psychologically. The child is caught up in between the parents, its difficult for him/her to choose one over the other. In the quarrels the couple forgets that the child is suffering. The paper explores the legality of custody of a child in India. It brings out the hardships of the parents who have become slaves of the law and therefore research paper asks a simple question are we even able to give basic human rights or justice to the parents. Justice can be done to either the father or mother but not to both and hence justice can be done to just of them and other one is deprived of it. This paper investigates the laws regarding the custody of the child in India, the amendments required to remove the superiority of one parent over the other and the kind of impression that is left by the law on the child. And finally, the paper discusses the factors considered by the Courts when granting custody. Children many times become very aggressive because of the fights of the parents over the custody issue and many criminals are born, they take into drugs and other vices and innocent children become criminals after facing the hardships. It becomes very difficult for such children to survive in the society. The children are also not accepted in the society easily.

The law regarding custody finds its place in Sec 26 of the Hindu Marriage Act, Sec 38 of the Special Marriage Act, The Guardians & Wards Act 1890, Sec 6 (a) of Hindu Minority and Guardians Act 1956. The Christians and the Muslims also have their own laws for the custody of the child. Christian law per se does not have any provision for custody but the issues are well solved by the Indian Divorce Act which is applicable to all the religions of the country. The Indian Divorce Act, 1869 contains provisions relating to custody of children. Under Muslim Law, the first and foremost right to have the custody of children belongs to the mother and she cannot be deprived of her right so long as she is not found guilty of misconduct.

‘Child custody’ is a term used in family Law Courts to define legal guardianship of a child under the age of 18. During divorce or marriage annulment proceedings, the issue of ‘child custody’

often becomes a matter for the Court to determine. In most cases, both parents continue to share legal child custody but one parent gains physical child custody. Family Law Courts generally base decisions on the best interests of the child or children, not always on the best arguments of each parent.

Divorce has become very common in Indian society these days. When two people cannot get along maybe it's the right thing to do, to get separated and live their lives in peace. But the question arises about the future of children. The custody of the child is an important issue and needs greater attention by the parents, law and of course the society. According to me the will of the child should be taken into consideration and should be of paramount importance. Though the child always wants to stay with both and do not have preference for one parent over the other, the actual physical custody can be given to just one parent and is generally given to the mother though the natural guardian is considered as the father and after him the mother. The will of the child should be taken into consideration and is of paramount importance is mentioned in the Hindu Minority and Guardians Act, 1956.

In general, Courts tend to award physical child custody to the parent who demonstrates the most financial security, adequate parenting skills and the least disruption for the child. Both parents continue to share legal child custody until the minor has reached the age of 18 or becomes legally emancipated. Legal custody means that either parent can make decisions which affect the welfare of the child, such as education, career, religious practices, medical treatments, decision on marriage etc. Physical child custody means that one parent is held primarily responsible for the child's housing, educational needs and food apart from other basic needs. In most cases, the non-custodial parent still has visitation rights. But these are judicial statements of general nature and there is no hard and fast rule which is fair, as having a hard and fast rule may not be appropriate remedy for the child. As to the children of tender years it is now a firmly established practice that mother should have their custody since father cannot provide that maternal affection which is essential for their proper growth. It is also required and accepted for proper psychological development of children of tender years which makes the mother indispensable.

The laws governing child custody in India are mentioned in the Guardians and Wards Act 1890, the Hindu Minority and Guardians Act 1956, Sec 26 of Hindu Marriage Act, Section 38, of the

Special Marriage Act 1954, Section 41 of the Indian Divorce Act, 1869 contains provisions relating to custody of children and of course the custody of Muslim children are governed by their personal laws.

The Guardians & Wards Act (GWA) 1890 is a secular law for appointment and declaration of guardians and allied matters, irrespective of caste, community or religion, though in certain matters, the Court will give consideration to the personal law of the parties. The provisions of the HMGA (and other personal laws) and the GWA are complementary and not in derogation to each other, and the Courts are obliged to read them together in a harmonious way. In determining the question of custody and guardianship, the paramount consideration is the welfare of the minor. The word 'welfare' has to be taken in its widest sense, and must include the child's, moral as well as physical well-being, and also have regard to the ties of affection.

Let us look into what the Hindu Marriage Act says about the custody of the child, Sec 26 of Hindu Marriage Act says the Court may make provisions regarding the custody, maintenance and education of the minor child consistently with the wishes of the child whenever possible. So most of the times the Courts look into the wishes of child but it also takes into consideration the interest and well-being of the child and sometimes it may be contradictory and in such cases the Court gives more importance to the interest of the child. At times the mother may not be willing to keep the child as she may want to remarry or that the job of the mother may require lot of travelling and taking care of the child may not be possible or that the mother is involved in illicit trade, in such cases the custody of the child is given to the father.

Section 38, of the Special Marriage Act 1954; speak of almost the same thing as mentioned in the Hindu Marriage Act. It says the Court may make provisions regarding the custody, maintenance and education of the minor child consistently with the wishes of the child whenever possible. The decision of the Courts is based on the term "Just and proper" with respect to the custody of the child. What may be just and proper in one case may not be just and proper in another case and hence the decision of the Court differs from case to case.

The laws governing child custody in India are mentioned in the Guardians and Wards Act 1890 and the Hindu Minority and Guardians Act 1956. Coming to Section 6 (a) of the Hindu Minority

and Guardians Act, <sup>2</sup> which says the natural guardian of a Hindu minor in case of a boy and an unmarried girl is father and after him the mother, but it also says the custody of the minor who has not completed 5 years shall be ordinarily be with the mother. The Act differentiates between legitimate child and illegitimate child, it says the guardian will be father in case of legitimate child but natural guardian will be mother in case of illegitimate child. So the Act does not thrust on primary responsibility on the father in case of an illegitimate child. In case of a married girl again the Act differs, it says the natural guardian is the husband. The right which was there before marriage ceases on her marriage and husband naturally becomes her guardian. Again there is a difference of natural guardianship and custody in case of step father and step mother. The Act also says that the person ceases to be a natural guardian of a minor if he ceases to be a Hindu and if he has completely and finally renounced the world. The natural guardianship of an adopted son, who is a minor, passes to adoptive father and after him the adoptive mother on adoption.

The Act also specifies that the natural guardian of a Hindu minor has power to do all such acts which are necessary or reasonable and proper for the benefit of the minor for the realization, protection or benefit of the minor's estate, but the guardian cannot bind the minor by a personal covenant. The guardian cannot transfer any property without the previous permission of the Court.

The Act clarifies that the interest of the child will be of paramount consideration. Section 13 of the Act says in deciding a natural guardian and in custody of the child the welfare of the child will be of prime consideration and importance.

There are another set of laws in Muslim law for the Custody of the children. Under Muslim Law, the first and foremost right to have the custody of children belongs to the mother and she cannot be deprived of her right so long as she is not found guilty of misconduct. Mother has the right of custody so long as she is not disqualified. This right is known as right of *hizanat* and it can be enforced against the father or any other person. The mother's right of '*hizanat*' was solely recognized in the interest of the children and in no sense it is an absolute right. Son among the Hanafis, it is an established rule that mother's right of '*hizanat*' over her son terminates on the latter's completing the age of 7 years. The Shias hold the view that the mother is entitled to the

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<sup>2</sup> Hindu Minority and Guardians Act, 1956, Sec 6(a) the natural guardian of a Hindu minor in respect of his person or his property, in case of a boy and an unmarried girl is father and after him the mother,

custody of her son till he is weaned. Among the Malikis the mother's right of 'hizanat' over her son continues till the child has attained the age of puberty. The rule among the Shafiis and the Hanabalis remains the same. The mother is entitled to the custody of her daughters, among the hanafis, till the age of puberty and among the Malilikis, Shafiis and the Hanabalis the mother's right of custody over her daughters continues till they are married. Under the Ithna Ashari law the mother is entitled to the custody of her daughters till they attain the age of 7. The mother has the right of custody of her children up to the ages specified in each school, irrespective of the fact whether the child is legitimate or illegitimate. Mother cannot surrender her right to any person including her husband, the father of the child. Under the Shia school after the mother the right of 'hizanat' belongs to the father. In the absence of both the parents or on their being disqualified the grandfather is entitled to custody. Among the Malikis the custody of the child, in the absence of mother goes to the maternal grandmother, maternal great grandmother, maternal aunt and great aunt, full sister, uterine sister, consanguine sister, paternal aunt i.e. Father's sister. All the schools of Muslim law recognize father's right of 'hizanat' under two conditions that are on the completion of the age by the child up to which mother or other females are entitled to custody. In the absence of mother or other females who have the right to 'hizanat' of minor children. Father undoubtedly has the power of appointing a testamentary guardian and entrusting him with the custody of his children. Other male relations entitled to right to 'hizanat' are nearest paternal grandfather, full brother, consanguine brother, full brother's son, consanguine brother's father, full brother of the father, consanguine brother of the father, father's full brother's son father's consanguine brother's son Among the Shias hizanat belongs to the grandfather in the absence of the father.

Christian law per se does not have any provision for custody but the issues are well solved by the Indian Divorce Act which is applicable to all of the religions of the country. The Indian Divorce Act contains provisions relating to custody of children. Section 41 of the said Act provides with the powers to make orders as to custody of children in suit for separation. -In any suit for obtaining a judicial separation the Court may from time to time, before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the said Court.

There are numerous connotations this can take, some of these are that the law reflects our patriarchal social structure and that small children are always better off with the mother. Matters are also complicated by a legal process that does not view legal guardianship to be coterminous with physical custody of a child. The Supreme Court of India has consistently held that in deciding the cases of child custody the first and paramount consideration is the welfare and interest of the child and not the rights of the parents. The Supreme Court has several times has held that no statute on the subject can ignore or obliterate the vital factor of the welfare of the child. In a landmark judgment<sup>3</sup>, the petitioner, Ms Githa Hariharan and Dr Mohan Ram were married in Bangalore in 1982 and had a son in July 1984. In December 1984 the petitioner applied to the Reserve Bank of India (RBI) for 9% Relief Bond to be held in the name of the son indicating that she, the mother, would act as the natural guardian for the purposes of investments. RBI returned the application advising the petitioner either to produce an application signed by the father or a certificate of guardianship from a competent authority in her favour to enable the bank to issue bonds as requested. This petition was related to a petition for custody of the child stemming from a divorce proceeding pending in the District Court of Delhi. The husband petitioned for custody in the proceedings. The petitioner filed an application for maintenance for herself and the minor son, arguing that the father had shown total apathy towards the child and was not interested in the welfare of the child. He was only claiming the right to be the natural guardian without discharging any corresponding obligation. On these facts, the petitioner asks for a declaration that the provisions of S. 6(a) of the Hindu Minority and Guardianship Act of 1956 along with S. 19(b) of the Guardian Constitution and Wards Act violated Articles 14 and 15 of the Constitution of India. The Supreme Court brings to fact the equality of the mother to fulfil the role of a guardian held that gender equality is one of the basic principles of our Constitution and therefore the father by reason of dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category. It was like saying gender was not a consideration in deciding matters of child custody and guardianship interest of the child was more important.

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<sup>3</sup> Ms. Githa Hariharan & Anr v. Reserve Bank Of India & Anr, 1999



In *Re Kamal Rudra Das J.*<sup>4</sup> expressed the same view vividly that the mother's lap is God's own cradle for a child of this age, and that as between father and mother, other things being equal, a child of such tender age should remain with mother. But he also said that a mother who neglects the infant child as she does not want to sacrifice the type of life she is leading can be deprived of custody. In respect of older children, the Courts take the view that the male children above the age of sixteen years and female children above the age of fourteen years, should not ordinarily be compelled to live in the custody to which they object. However, even the wishes of the mature children will be given consideration only if they are consistent with their welfare. **In the case of *Rukmangathan v J. Dhanalakshmi***<sup>5</sup> it was laid down that the male above 16 years and female child above 14 years cannot be compelled to live in the custody where they do not wish to live. In *Venkataramma v. Tulsi*,<sup>6</sup> the Court disregarded the wishes of the children as it found that it was done wholesale persuasion and were even tortured. Ordinarily, custody to third persons should not be given except to either of the parents. But where welfare so requires, custody may be given to a third person. In *Baby Sarojam v. S. Vijayakrishnan Nair*<sup>7</sup> granting custody of two minor children to maternal grandfather, the Court observed that even if the father was not found unfit, custody might be given to a third person in the welfare of the child.

In the case of *Rosy Jacob v. Jacob A. Chakramakkal*<sup>8</sup> the Court held that all Orders relating to the custody of the minor wards from their very nature must be considered to be temporary Orders made in the existing circumstances. With the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such Orders if such variation is considered to be in the interest of the welfare of the wards. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation. The Court after a decree of judicial separation, may upon application (by petition) for this purpose make, from time to time, all such Orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of either of the parents is the subject of the

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<sup>4</sup> 1949 2 I.L.R. 374

<sup>5</sup> 16 December, 1997, (1998) 1 MLJ 628], Madras High Court

<sup>6</sup> (1949) 2 MLJ 802

<sup>7</sup> AIR 1992 Ker 277, I (1994) DMC 79

<sup>8</sup> 1973 AIR 2090, 1973 SCR (3) 918

decree, or for placing such children under the protection of the Court. The Court may from time to time, before making its decree absolute or its decree make such interim Orders.

In a habeas corpus, in Punjab and Haryana High Court<sup>9</sup>, case regarding custody of the child the Bench of Anupinder Singh Grewal, J. refused to consider extra-marital affair as a ground to deny custody of child to the mother. The Bench was of the opinion that extra marital affair cannot be the reason to deny custody to the mother. The court emphasized that the mother is the natural guardian of the child till the age of five years in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956, and that the child would require love, care and affection of the mother for her development in the formative years. Similarly, the support and guidance of the mother would also be imperative during adolescence. The Bench remarked that it is common to make allegations on the moral character of a woman. Therefore, allegations against the petitioner being wholly unsubstantiated were not considered relevant to adjudicate the issue of custody of the minor child. Furthermore, the petitioner had permanent residency in Australia. She was earning Rs 70,000/- Australian dollars per annum and a handsome sum would be payable to her for the maintenance of child as well by the Australian authorities. The father was also an Australian citizen but right now had come to India and so the child would be doing better with mother.

In the facts of the case the mother/wife had sought the issuance of a writ in the nature of habeas corpus for the release of her minor daughter who was alleged to be in the custody of her husband. The husband was an Australian citizen and the petitioner later joined him in Australia. Out of the wedlock, a girl was born. Later on, the couple developed matrimonial differences which led to their separation. The parties arrived in India and by a foul play the child was taken away by husband/father when the petitioner had gone to her parental village. It was further contended by the petitioner that the husband, instead of acceding to the request of the petitioner to handover the child, started threatening her and the petitioner fearing her safety, fled back to Australia. She filed a petition for the custody of the minor child in the Federal Circuit Court, Australia and the court had passed an interim order directing the husband /father to return the minor child to Australia. On the other hand, the husband submitted that the petitioner was involved in a relationship with

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<sup>9</sup> Mandeep Kaur v. State of Punjab, 2021 SCC OnLine P&H 1060, decided on 10-05-2021

his brother-in-law which had led to marital discord between the parties. The local Panchayat intervened, and it was agreed that as the petitioner had permanent residency in Australia, the custody of the child would be handed over to the husband. He further submitted that after her return to Australia, the petitioner had preferred an application for the custody of the child and in the application, the Australian address of the husband had been mentioned although she knew that he along with their child was in India. Relying on the judgment *Ranbir Singh v. Satinder Kaur Mann*<sup>10</sup>, the husband submitted that a decree, which had been obtained from a foreign court on the basis of a fraud would not be enforceable in India.

**According to the Bench** the principle of comity of courts had been followed by the Courts in India to honour and to show due respect to the judgments obtained by the Courts abroad. However, the judgment of a foreign court could not be the only factor while considering the issue of custody of a child to a parent. The Court referred on the decision of Supreme Court in *Yashita Sahu v. State of Rajasthan*, wherein the bench had held that *in the fast changing world where adults marry and shift from one jurisdiction to another there are increasing issues of jurisdiction as to which country's courts will have jurisdiction. In many cases the jurisdiction may vest in two countries, though here also the interest of the child is extremely important and is, in fact, of paramount importance, the courts of one jurisdiction should respect the orders of a court of competent jurisdiction even if it is beyond its territories. When a child is removed by one parent from one country to another, especially in violation of the orders passed by a court, the country to which the child is removed must consider the question of custody and decide whether the court should conduct an elaborate enquiry on the question of child's custody or deal with the matter summarily, ordering the parent to return the custody of the child to the jurisdiction from which the child was removed, and all aspects relating to the child's welfare be investigated in a court in his/her own country.*

Accordingly, the custody of the girl child was handed over to the petitioner. However, the petitioner was directed to arrange interaction of the child with the father regularly through video conferencing and the parties were directed to abide by the orders of the Federal/Family Court in

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<sup>10</sup> 2006(3) RCR (Civil) 628

Australia. The statute indicates a preference for the mother, so far as a child below five years is concerned.

In another case<sup>11</sup> a petition was filed for a writ of habeas corpus, instituted by Master Anav's mother, the first petitioner, asking the Court to liberate the minor from his father's custody by entrusting the minor into hers, is about a young child's devastating world. Petitioner 1 states that during her stay with her husband, she was tortured physically and mentally, both. Her mother even gave dowry. Later, petitioner 1 realised that her husband had an amorous relationship with her sister-in-law and another girl from the village to which she objected in vain. She was even forced to abandon the marriage and go back to her mother's home. The discord between parties was mediated and finally ended in mutual divorce. Further, it was stated that the 1<sup>st</sup> petitioner after the above settlement went back to her mother's home along with her young son. After some time petitioner 1 claimed that there was an unholy alliance between her brother and her estranged husband to oust her minor son from her mother's home. The 1<sup>st</sup> petitioner was beaten up and son was taken away because he thought that she may claim a share for her son in her ancestral property.

The court decided that since the child was of tender years, he is not capable of expressing an intelligent preference between his parents, in whose custody, he would most like to be. Also, the Court noticed is the fact that the father is not, particularly, interested in raising the minor. The above-stated discloses the disinclination of the father to bear a whole-time responsibility for the minor's custody and the complementary inclination of the mother to take that responsibility.

The Supreme Court Decision in *Ratan Kundu v. Abhijit Kundu*,<sup>12</sup> wherein it was held that A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. But the general rule about custody of a child, below the age of five years, is not to be given a go-by. If the mother is to be denied custody of a child, below five years, something exceptional derogating from the child's welfare

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<sup>11</sup> Meenakshi v. State of U.P., 2020 SCC OnLine All 1475, decided on 02-12-2020

<sup>12</sup> (2008) 9 SCC 413

is to be shown. It was noted that nothing on record was placed where it could be stated that the mother was unsuitable to raise the minor. But since the child needs both the parents, he must have his father's company too, as much as can be, under the circumstances. The Court must, therefore, devise a suitable arrangement, where the minor can meet his father and have sufficient visitation while the minor stays with his mother.

In an Allahabad High Court judgment<sup>13</sup>, it was decided that the minors not be given into the father's custody who has instituted the instant petition. Even if the father is a natural guardian but faces criminal charges relating to death of spouse, the custody of children or visitation rights cannot be granted to the natural guardian. In the present matter, Court stated that the custody which is given currently cannot be termed as unlawful. The custody is with the grandmother of the minors' who has been given custody in the presence of the Station House Officer. The father of the minors' could say that being the natural guardian of the two minors' he has the right to seek their custody from the grandmother.

It is precisely this right which the father asserts, by virtue of Section 6 (a) of the Hindu Minority and Guardianship Act, 1956. He says he is the sole natural surviving guardian, and therefore, entitled to the minors' custody. It is, no doubt, true that the father is the minors' natural guardian under Section 6 (a) of Act, 1956, but the issue about the minors' custody is not so much about the right of one who claims it, as it is about the minors' welfare.

The issue of welfare of the child cannot be mechanically determined. It is to be sensitively approached, taking into consideration both broad and subtle factors that would ensure it best. The totality of the circumstances on record shows that unless acquitted, it would not be appropriate to place the two minor children in their father's custody.

Bench held that the father is not entitled to the minors' custody when he is facing criminal charges. Once he is acquitted, it would be open to him to make an appropriate application seeking their custody to the Court of competent jurisdiction under the Guardians and Wards Act, 1890. In the

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<sup>13</sup> Shaurya Gautam v. State of U.P., 2020 SCC OnLine All 1372, decided on 10-11-2020.

totality of the circumstances obtaining for the present, this Court did not find it appropriate to grant any visitation rights to the father.

In *Sashanka v. Prakash* case<sup>14</sup> it was decided by Bombay High Court that Welfare of child as paramount consideration and the custody given to father of minor for mother not being able to take care of the child.

In an another case, the Court decided in *Faisal Khan v. Humera*<sup>15</sup> that Second marriage of a mother is by itself not sufficient to deprive her of custody of her biological child.

In *S.K. Rout v. Ministry of Health and Family Welfare, Union of India*,<sup>16</sup> the SC in this case has coined a new term ‘mirror Order’<sup>17</sup> which stresses on interjurisdictional child custody matters.

Mirror orders are passed to safeguard the interest of the child who is in transit from one jurisdiction to another. The primary jurisdiction is exercised by the court where the child has been ordinarily residing for a substantial period of time and has conducted an elaborate enquiry on the issue of custody. The court may direct the parties to obtain a “mirror order” from the court where the custody of the child is being shifted. Such an order is ancillary or auxiliary in character, and supportive of the order passed by the court which has exercised primary jurisdiction over the custody of the child. In international family law, it is necessary that jurisdiction is exercised by only one court at a time. These orders are passed keeping in mind the principle of comity of courts and public policy.

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<sup>14</sup> 2020 SCC OnLine Bom 3497, decided on 27-11-2020.

<sup>15</sup> 2020 SCC OnLine Del 572, decided on 1-5-2020.

<sup>16</sup> 2020 SCC OnLine Del 575, 05-05-2020

<sup>17</sup> “The mirror order is passed to ensure that the courts of the country where the child is being shifted are aware of the arrangements which were made in the country where he had ordinarily been residing. Such an order would also safeguard the interest of the parent who is losing custody, so that the rights of visitation and temporary custody are not impaired.”

### **Factors Considered by the Courts when Granting Custody.**

The welfare of the minor is very broadly defined and includes many diverse factors, notably:

1. Apart from the age, sex and religion of the minor, Courts consider the personal law of the father. The welfare of younger children is generally regarded as being in the mother's custody.
2. The character and capacity of the proposed guardian, Courts usually reject baseless allegations against mothers. The wishes, if any, of a deceased parent, for example specified in a will is taken into consideration.
3. Any existing or previous relations of the proposed guardian with the minor's property, Courts do not look kindly on guardians seeking custody just in order to have control over the minor's property. But if, for example, the minor's property is shared with the mother and she is otherwise a suitable guardian, the Court will regard the property relationship as an additional factor in the mother's favor.
4. The minor's preference if she/he is old enough to form an intelligent preference, usually accepted as about 9 years old. Courts prefer to keep children united and award custody of both to either the mother or the father.
5. Whether either/both parents have remarried and there are step-children, Although the mother's remarriage to someone who is not the children's close blood-relative often means the Court will not grant her custody, this rule is not strictly followed. Although the father's remarriage usually denies him custody, sometimes the Courts agree to grant him custody especially when the children's step-mother cannot or will not have her own children.
6. Whether the parents live far apart, Courts sometimes do not give the mother custody because she lives very far away from the father who is the natural guardian. But in 1994 an Uzbek woman living in Uzbekistan was given custody; the judge said modern transport had shortened distances and meant that the father could depart from his home in the morning and return by evening.
7. The child's comfort, health, material, intellectual, moral and spiritual welfare this very broad category includes the adequate and undisturbed education of the child.

8. However, the mere fact that the mother is economically less secure than the father, or that she suffers from ill-health or a disability is not usually reason enough to deny her custody because maintenance is the father's responsibility irrespective of who holds custody.
9. The mental and psychological development of the minor should not be disturbed and the parents and the courts must maintain status quo; Courts will take into account the likely impact of a change in guardians and the child's reaction to this change.

## **Conclusion**

The legislation has not changed much when considering the 'custody of children' provisions. but its good that the Supreme Court has given new dimensions to the child custody matters. It is righteous that the mothers are not looked by the Courts from the lens of character, financial stability, distance, career-oriented mothers, we have come a long way from Geeta Hariharan case. The supreme is expanding its arenas and delving into new facets and incorporating the new socio and legal changes happening in the society. The custody is given to mothers inspite of issues relating to extramarital affairs, issues of long distance or mothers with financial stability. The fathers have also been given custody inspite of what law says<sup>18</sup>. The only consideration now stands is 'interest of child' and not much law has been looked into.

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<sup>18</sup> Sec 6 (a) Hindu Minority and Guardians Act, 1956.



**References:**

1. The Hindu Marriage Act 1955
2. The Special marriage Act 1956
3. The Guardians & Wards Act 1890
4. The Hindu Minority and Guardians act 1956.
5. The Indian Divorce Act, 2001 ( amended)

**Websites:**

1. <http://www.legalserviceindia.com/article/l134-Custody-Laws.html#sthash.4d9CTUr0.dpuf>