

IN THE HIGH COURT OF KARNATAKA, BANGALORE

DATED THIS THE 13<sup>TH</sup> DAY OF SEPTEMBER 2013

PRESENT

THE HON'BLE MR.JUSTICE N.K.PATIL

AND

THE HON'BLE MR. JUSTICE B.MANOHAR

MFA.NO.1729/2011 (G & W)

BETWEEN:

K.M.VINAYA  
W/O. B.R.SRINIVAS,  
AGED ABOUT 32 YEARS,  
R/AT 142, 1<sup>ST</sup> FLOOR,  
15<sup>TH</sup> MAIN, 3<sup>RD</sup> STAGE,  
4<sup>TH</sup> BLOCK, BASAVESHWARANAGAR,  
BANGALORE – 560 079.

.....APPELLANT

(BY SMT.LAKSHMI IYENGAR & ASSOCIATES)

AND:

B.R.SRINIVAS,  
S/O.B.K.RAMANUJAM,  
AGED ABOUT 37 YEARS,  
R/AT NO.147, AKKIPET MAIN ROAD,  
BANGALORE – 560 053.

...RESPONDENT

(BY SMT.M.N.PRABHAMANI, ADVOCATE)

MFA FILED U/S 47(c) OF THE GUARDIANS AND WARDS ACT, AGAINST THE ORDER DT.01.02.2011 PASSED IN G & WC.NO.106/2004 ON THE FILE OF THE III ADDITIONAL PRINCIPAL JUDGE, FAMILY COURT, BANGALORE, ALLOWING THE PETITION FILED U/S 25 OF THE GUARDIAN AND WARDS ACT, FOR CUSTODY OF MINOR SON - VATHAN FROM THE RESPONDENT THEREIN.

THIS MFA HAVING BEEN HEARD AND RESERVED AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, B.MANOHAR J., DELIVERED THE FOLLOWING:

### J U D G M E N T

Appellant has filed this appeal challenging the legality and correctness of the order dated 01-02-2011 made in G & WC No.106/2004 passed by the III Additional Principal Judge, Family Court at Bangalore directing the appellant herein to hand over custody of the child to the respondent herein.

2. The facts of the case are as follows:

The respondent-husband had filed a petition under Section 25 of the Guardian and Wards Act, 1890 (hereinafter referred to as 'the Act' for short) seeking custody of his minor son, Vathan from the appellant-wife. It is the case of the respondent that the appellant and respondent are the legally wedded husband and wife and their marriage was solemnized on 10-12-1997 at Thirumala Thirupathi Devasthanam Choultry at Bangalore. She entered the matrimonial house on 10-4-1998 after completion of her final year B.Sc examination. She stayed in the matrimonial house up to 5<sup>th</sup> month of her pregnancy i.e. upto May 2001 and she left the matrimonial house much against the wishes of the respondent and his parents. She gave birth to a male child-Vathan on 13-08-2001. It is the further case of the respondent that during her stay in the matrimonial house, she was looked after very well by him, his parents and other members of the family. She was encouraged by the

respondent to prosecute her further studies in computers and to run computer classes and there was no reason for her to leave the matrimonial house during the 5<sup>th</sup> month of her pregnancy in order to put an end to the matrimonial life. After going to her maternal house, she started giving all pinpricks and treated him with mental and physical cruelty. The respondent was visiting his wife and son at her maternal house almost everyday. During her pregnancy also he was visiting and taking care of her. Four months after the birth of his son, he repeatedly requested her to return to the matrimonial house. However, she refused to come back to the marital house. He also requested his in-laws to advise and send her to the marital house. In spite of repeated requests made by him as well as his parents, the appellant bluntly refused to go back to his marital house. During his visit to her maternal house, he used to shower his love and affection upon his son. Neither the appellant nor her mother and sister tolerated the child coming close to him and getting

attached to him. His son had undergone a surgery and medical treatment when he was one year old, which was not disclosed to the respondent or his parents. As the respondent is the natural guardian of his son, he is legally entitled to claim custody of his son and he was deprived of love and affection of his son. The welfare and well-being of the minor son lies with the father. If the child is deprived of his parental love and affection, it will have adverse consequence upon the emotional and psychological development of the child. Before completion of eight months to her son, the appellant got an appointment and she is more interested in her job and to earn money. She has neglected to maintain her son; she leaves the child under the custody of her mother and she works 10 to 12 hours a day and return home late in the night. She also works in the night shifts. She does not have enough time to take care of his minor son. The minor son lost love and affection of mother as well as the father and not growing in a congenial atmosphere. Though the child was

suffering from congenital scoliosis the appellant has not given timely treatment. In view of that, the child had to undergo major operation. Due to the negligence on the part of the appellant, the child had to suffer a lot. The respondent is employed in a private company, having his own income and he is in a position to take care of his son and his educational expenditure. He can take care of his son more affectionately, so that the child can grow physically, mentally and emotionally and can be a responsible citizen of the country. It is further alleged that in spite of issuance of legal notice on 9-2-2004 calling upon the appellant to return to the matrimonial house along with the child, she has given reply notice making unfounded allegations against the respondent and deprived him of the love and affection of his son. In view of that, a petition has been filed for custody of the minor child.

3. The appellant herein filed objection to the said petition denying the averments made in the petition, however,

admitted the relationship with the respondent and also admitted that the family of the respondent is a joint family. In view of the ill-treatment of the respondent and his family members, she had to leave the matrimonial house during 5<sup>th</sup> month of her pregnancy. The respondent failed to discharge his duties as a dutiful husband. After the marriage, the appellant learnt that the respondent was in the habit of stealing the household articles and jewels prior to the marriage and it was continued even after the marriage. The creditors of the respondent started harassing the appellant for repayment of loan by using the language undermining the dignity of the appellant. On account of which, the appellant has suffered a lot. After the birth of her son in the year 2001, the respondent remained irresponsible even towards the child and had never taken care of her or the child. In fact, after the birth of the child, the respondent had started doubting the character of the appellant and started ill-treating her both mentally and physically. He was also in the habit of

abandoning her and her son and absconding from the place without intimating any one in the family. Once, in the month of August 2002, he had been to Nepal and from there he sent a mail to the appellant requesting her to arrange money for his return journey to Bangalore. On account of intolerable ill-treatment, she started living separately from November 2003 and in order to maintain herself and her son, she got appointed in M.S. Ramaiah Institution. Subsequently she got a job in Progean for maintenance of herself and to up-bring the child since the respondent has failed to take care of them. The respondent is an irresponsible man and he has not generated enough confidence either for her to live with him or for entrusting the custody of the child to him. After Naming Ceremony, he had not visited her house even to see the appellant nor the child. Further, a petition under Section 25 of the Guardians and Wards Act is not maintainable. From the day of birth, the child is under the custody of the appellant and she has taken care of her son, good treatment



has been provided and her son is admitted to one of the prestigious schools and he is securing high percentage of marks. Apart from that, she has filed a petition under Section 13 of the Hindu Marriage Act seeking for divorce in M.C.No.1234/2004. The said matter is pending consideration before the II Additional Family Court. Hence, the respondent is not entitled for the custody of minor child and sought for dismissal of the petition.

4. On the basis of the pleadings of the parties, the Family Court framed the following points for its consideration:

- (i) *Whether the petitioner is entitled for the custody of the child – Vathan from the respondent/wife?*
- (ii) *What order?*

5. The respondent/petitioner in order to prove his case examined himself as P.W.1 and examined Dr.Mahesh B.H. as P.W.2 and got marked the documents as Ex.P1 to Ex.P56. The appellant/respondent examined herself as R.W.1 and got

marked the documents as Ex.R1 to Ex.R93 and also examined Dr.B.S.Shankar as R.W.2.

6. When the said petition is pending before the Family Court, an application for interim custody of the child was filed by the respondent-father. The Family Court had given interim custody of the minor son to the respondent on various dates i.e. on 20-4-2006, 25-4-2009, 7-5-2010, 7-12-2010. Further, on 16-07-2007, visitation right was also given on 1<sup>st</sup> and 4<sup>th</sup> Sunday between 3.00 p.m. to 4.00 p.m.

7. The Family Court on considering the oral and documentary evidence let in by the parties and after perusal of the evidence of the doctor who has treated the minor child and also appreciating the opinion of Dr.B.H.Mahesh by an order dated 01-02-2011 allowed the said petition on the ground that the appellant has failed to implement the order dated 15-12-2006 made on I.A.No.19 and she has neglected in taking care of the health of the child. Further the conduct

of the appellant clearly shows that she is trying to alienate the child from the father and declared that the respondent/father is entitled for custody of the child-Vathan and directed the appellant/mother to hand over the child to the custody of the respondent within one month. Being aggrieved by the order dated 01-02-2011, the appellant has preferred this appeal.

8. Smt.Lakshmi Iyengar, learned counsel appearing for the appellant contended that the order passed by the family court is contrary to law and evidence on record. The finding recorded by the family court on certain issues is perverse. The family court has proceeded with an erroneous view and came to the wrong conclusion with regard to the custody of the minor child. One of the essential and mandatory ingredients to maintain a petition under Section 25 of the Guardians and Wards Act is that, the person seeking custody of a minor should have had the custody of minor and as such a minor should have been removed from his custody and in

the opinion of the Court it must be in the welfare of the minor that the minor should be returned to the custody of the person seeking so. In the present case, the above ingredients have not been satisfied. The family court ought to have dismissed the petition filed seeking for custody of the minor son. It is the contention of the appellant that from the day of birth, her child is under her custody and she has taken care of his health and education. Within one year of the birth of her son, he has undergone an operation in the year 2002. Though the doctor noticed that the child was suffering from congenital lumbar scoliosis, she was informed that there is no problem in his health. Since the child is too young, the said deformity will not grow along with the child. Hence, the doctor did not advise for any operation. In year 2006, the percentage of curvature was only 24% and it was advised by the doctors that by conservative treatment it can be cured. Only in the year 2008, there was substantial increase in the curvature. Then the doctor advised for surgery. The child

was examined by more than 12 doctors who are Experts in Spine. Some of the doctors have not suggested for surgery and some had suggested for surgery though it has no adverse effect on the health of the child. After consulting many expert doctors, since the curvature was increased from 24 degrees to 46 degrees, after completion of his examinations in the year 2009, the child underwent operation on 31-3-2010. All necessary care and precautions have been taken with regard to the health of her son. The appellant is more concerned about her son than the respondent. Apart from that, in the year 2009 her son underwent abdominal surgery for Gangrenous Meckel's Diverticulum with peritonitis in Panacea Hospital. The respondent is an irresponsible man and he has not taken care of his wife and son. In order to take care of her son and herself and for their sustenance, she got appointed in Ramaiah Institute, thereafter she got appointed in Progeon and her working hours is between 1.30 p.m. to 10.30. p.m. The school timings of her son is from

8.30 a.m. to 4.30 p.m. She is taking care of her son in the morning hours and prepare him mentally and physically to go to the school. The School records clearly disclose that her son has scored excellent marks and he was participating in extra curricular activities. In spite of the same, the finding of the family court that the appellant has not taken care of the health of the minor child and she does not have sufficient time to take care of her son is erroneous in law. The finding of the family court with regard to parental alienation is contrary to law. From the day of birth, the son is under her care and custody and he is not inclined to go along with his father though she had advised him to go with him. When the appellant's son was under the custody of respondent, he got fractured his leg. The respondent has not taken care of her son from the day of birth of the child in the year 2001 till the year 2004. Only in the year 2004, a legal notice was issued and present petition was filed for custody of the minor son. Since the minor son is not willing to go to the respondent, as

per the law laid down by the Hon'ble Supreme Court, the welfare of the minor must be the paramount consideration of the court and not the wishes of the parents who seeks custody or the guardianship of the minor, the court should be concerned with over-all development and healthy environment and physical, emotional, financial support for development, the doctrine of best interest of the child has to be prevailed. Hence the order passed by the family court ignoring the law laid down by the Hon'ble Supreme Court is not sustainable and sought for allowing the appeal.

9. Learned counsel appearing for the appellant, to substantiate her case placed reliance on the judgments reported in *AIR 2013 SC 102 (Gaytri Bajaj v/s Jiten Bhalla)*; *2010 AIR SCW 597 (Athar Hussain v/s Syed Siraj Ahmed and Others)*; *AIR (1973) 1 SCC 840 (Rosy Jacob v/s Jacob A Chakramukkal)*; and *AIR(29) 1942 CALCUTTA 215 (Jwala Prasad Saha v/s Bachu Lal Gupta)*.

10. On the other hand, Smt.M.N.Prabhamani, learned counsel appearing for the respondent argued in support of the order passed by the family court and contended that under Section 6 of the Hindu Minority and Guardianship Act, 1956, father is the natural guardian of a minor, however the mother is entitled to custody of the minor who has not completed the age of 5 years. In the instant case, the son of the respondent is aged about more than 12 years. Hence the appellant is not entitled for custody of the minor son. The father is in the constructive custody of the child even though the child is in the actual custody of the mother. In view of that, the petition under Section 25 of the Guardians and Wards Act is maintainable. She further contended that the appellant went to her maternal house for confinement when she was pregnant of 5 months. After the birth of the child, she refused to return back to the marital house. She has deprived her son the love and affection of his father. The respondent being the natural father of the child is entitled to



claim custody of his son. As on today, the son has the capacity to understand things and exercise intelligent preference. However, the appellant intentionally alienates the son from the love and affection of his father. She has intentionally not allowed the son to accept the birthday gifts and dresses provided by the respondent and developed hatred in the mind of the son towards his father. The appellant is more interested in her job, earning more money and she has no time to look after the child. She works late in the night and return home only in the midnight. In order to avoid contact of his son, intentionally the son was got admitted to Kumaran's School which is about 20 Kms away from her residence. The child has to leave the school at about 6.45 a.m. The appellant absolutely has no time to take care of the child. Admittedly, the child was suffering spinal deformity from the day of his birth. The radiology report dated 10-7-2002 issued by M.S.Ramaiah Hospital, Bangalore clearly disclose that the child was suffering from Scoliosis of lumbar

spine, but no treatment was provided. In the year 2006, the curvature was more than 24 degrees. In the year 2009, it had grown upto 46 degrees. In view of that the child has to undergo major surgery of spine. If the child were to be operated in the year 2004 or 2006 itself by minor operation, the said deformity could have been cured. The congenital scoliosis affects the growth of the child. Against the advice of the doctor, conservative treatment was given to the child for the deformity of spine. The appellant is fond of earning money and she has not taken care of the health and well-being of the child. The family court, on the application I.A.No.19 filed by the respondent, directed the appellant to take the minor child to the Consultant Ortho and Spine Surgeon once in three months for periodical check-up and to submit a report to the court, to show whether there is any change or growth of curvature. In spite of the court direction, she has not submitted the periodical report to the court. Report of the doctors in the year 2006 clearly discloses that

Master Vathan is suffering from scoliosis and blocked vertebra. By conservative treatment, the deformity cannot be cured. The report submitted by the doctors was not produced before the court. When the son was under the custody of the respondent, he had taken him to Dr. Mahesh who is an expert surgeon in Spine, wherein the said doctor has opined that the child has to undergo minor operation for deformity of the spine, since there is substantial growth in the curvature and it will hamper the growth of the child. In spite of the opinion of the said doctor, the treatment has not been given to the minor child. After getting the opinion of Dr. Mahesh, many doctors who have seen the MRI scan of the child opined that by conservative treatment, deformity of the spine cannot be cured and recommended for surgery. The doctors at Hosmat Hospital recommended for surgery in the year 2007 itself. The medical certificate issued by Dr. Prakash on the basis of the scanning report of Raghava Diagnostic Center advising for immediate operation was also not taken serious note by the

appellant. Many expert doctors who have seen the medical report of the minor son advised to undergo operation. There was significant increase in the throno lumber typhocic from 24 degrees to 40 degrees. Only on 31-3-2010 without informing the respondent she got operated her son in Sparsha Hospital. In the hospital records and also in the school records, the father's name was not mentioned. No information has been given with regard to the major operation of the child. Further she also informed the School authorities not to furnish necessary particulars nor allow the son to meet his father in the school. Intentionally the school has been changed from Venkat International, Rajajinagar to Kumaran's school which is situated more than 20 Kms away from the City to deny the father's love and affection towards his son. Financially also, father is in a position to take care of the son and also his educational expenditure. The respondent is living in the joint family and his sisters' children are also staying along with him. In view of that, the son is having more

congenial atmosphere in his residence, whereas the child will be alone along with his maternal grand parents, which would adversely affect the substantial growth of the child. The appellant is purposefully keeping the child away from the father, though the father has equal love and affection towards the child. During the pendency of the petition in the family court, the interim custody was given to the respondent from 2-5-2006 to 8-5-2006, 4-5-2009 to 11-5-2009, 18-5-2010 to 23-05-2010, 16-12-2010 to 12-10-2010. Further visitation right has also been given to the respondent on every second Saturday from 11.00 a.m. to 6.00 p.m. The child has developed love and affection with the father and mingling with the children of respondent's sister. The family court taking note of all these aspects of the matter, held that the child can be developed mentally and physically under the custody of the respondent and on the other hand, the appellant has neglected to take care of the health of the child and her attitude shows that she is trying to alienate the child from his

father and passed the order. There is no infirmity or irregularity in the said order. She also relied upon the judgments reported in (2009) 1 SCC 42 (*Gaurav Nagpal v/s Sumedha Nagpal*), 2004(3) KLJ 458 (*Smt.Radha alias Parimala v/s N.Rangappa*); 2007(4) CTC 566 (*J.Selvan v/s N.Punidha*) ; AIR 1996 RAJ 162 (*Prakash Chandra Jain v/s Smt.Chandrawati Jain*) and sought for dismissal of the appeal.

11. We have carefully considered the arguments addressed by the learned counsel for the parties and perused the orders passed by the family court and also the oral and documentary evidence adduced by the parties.

12. The records clearly disclose that the appellant and respondent are legally wedded wife and husband. The son was born on 13-8-2001 due to their wedlock. The allegation of the husband is that the wife has left the marital house against the wishes of the respondent and his parents and she

has not taken care of the health and education of his son. She is trying to alienate the child from his father. She has deprived the love and affection of his son, he being the natural father of the child is entitled to claim custody of his son. The wife has not taken care of the health of the child and she is very much interested in her job. The working hours of the appellant is from 1.30 p.m. to 10.30 p.m., hence she is not in a position to take care of the child. On the other hand, the wife has contended that the husband was in the habit of stealing the household articles and jewels prior to the marriage and the same attitude was continued even after the marriage. He was an irresponsible man and he is in the habit of absconding from the place without intimating anybody and taking loans for his bad habits. After the birth of the child, he has never taken care of his wife and child and he has started doubting her character and ill-treating her both mentally and physically. Hence, the husband is not in a position to take care of the child.

13. The respondent/husband in order to prove his case, examined himself as P.W.1 and reiterated the averments made in the petition. In his evidence he deposed that, against the wishes of the husband and other members of his family, the appellant left the marital house when she was five months' pregnant. After the birth of his child, everyday he was visiting his wife and child; however, the appellant, her sister and mother were not tolerating the child coming close to him or getting attached to his father. She bluntly refused to come back to the marital house. The first operation undergone by the child when he was only one year old was not made known to him. The gift articles and cycle given by the father to his child were returned back by the appellant. All the time she is trying to alienate the child from her father. Though the appellant is aware that the child is suffering from congenital scoliosis in the year 2002 itself, no timely treatment was given. Due to that, growth of the child was hampered. In the year 2006 Dr.M.S.Shivaprasad, who has



seen the X-ray and scanning reports of the child has given his opinion that the child has to undergo surgery during the summer vacation itself. However, the appellant has not yielded to the advice of the said doctor with regard to the health of the child. She has no time to take care of the health of his son. In view of negligence on the part of the appellant, the child had to undergo major operation in the year 2010. The appellant has not informed anything about the major operation of his son in the year 2010 to the respondent/father. The father being the natural guardian is entitled for custody of his son and he is financially capable of maintaining the educational and other expenditures of his son. There is suitable atmosphere to his son in his house for his sustainable growth.

14. In the cross-examination, he has admitted that till 2004, he was living along with his wife and child. He also deposed that the appellant is trying to alienate the child from him. He has examined Dr.Mahesh B.H, to show that in spite

of the advice of the doctor, the timely treatment was not given to the minor child and the deformity in the spine cannot be treated by the conservative treatment and the child has to undergo operation. In support of his case, he got marked the X-ray report, MRI report and opinion of the doctors as Ex.P9 to Ex.P13.

15. The appellant in her evidence reiterated her defense and deposed that due to the harassment by the husband and his family members, she has to leave the matrimonial house and was under the mercy of her father, who is a retired government employee. She has admitted that her husband is residing in the joint family along with his aunts. In the cross-examination she has deposed that she has given best treatment to her son who was suffering from congenital scoliosis. Dr.Shankar, who has treated her son stated that the deformity can be cured by conservative treatment and immediate operation is not required since the curvature is only 24 degrees. There is no progress in the curvature and it

will not come in the way of growth of the child. In the year 2006, she got done the scanning and X-ray of spine of her son and there was no much progress in the curvature and as per the advice of the doctors, she has given treatment to her son. Her son was examined by the doctors at Hosmat Hospital, Manipal Hospital, Mallige Medical Center and other doctors who are experts in the field. Only in the year 2009, there was progress in the curvature. Dr.C.B.Prabhu, who has seen the X-ray and Scanning reports of her son advised for operation. Accordingly, her son had undergone operation on 31-3-2010. All possible care has been taken to treat her son and there is no negligence on her part. From the day of birth, the child is under the custody of the appellant and no attachment has been developed with the respondent and her son has refused to go with the respondent/father. She has denied the allegations with regard to the alienation of the child from the father.

16. In support of her case, she examined Dr.B.S.Shankar, who is an orthopedic surgeon. In his evidence he deposed that the deformity in the spine will not affect the day to day activities and the growth of the child. There is no progress of curvature from 2002 to 2008. Accordingly, he had advised for conservative treatment. Since the child was too young, he did not suggest for surgery at that young age.

17. The evidence on record clearly discloses that the appellant has taken due care of her minor son. She has given all possible treatment as per the advice of the doctors. Initially, she had given treatment to her son in M.S. Ramaiah Hospital, thereafter, her son was taken for periodical scanning and X-rays at Padmashree and Raghav Diagnostic Centers. Dr.Shankar who has treated her son has advised for the conservative treatment since there was no progress in the curvature. During the year 2006, the curvature was only 24 degrees and there was some increase in the curvature from 24 to 26 degrees in the year 2007. Dr.C.B.Prabhu, after

examining the X-Ray and Scanning reports, opined that the child has multiple lumbar vertebra, 1, 2, 3 and 4 are the hemi vertebra. The doctor advised that the child requires surgery. The other doctors at Manipal Hospital who have treated the minor child opined that immediate surgery is not required. The deformity in the spine has not come in the way of natural growth except that the child does not have any other complaint, either of back or leg pain. Only in the year 2009, the percentage of development of curvature was increased from 26 degrees to 40 degrees. As per the advice of the doctor, treatment was given in the best hospitals in the State. After the operation, her son is doing well and he is participating in extra-curricular activities. The respondent has also not disputed with regard to the treatment given. The only allegation is that the operation ought to have been conducted in the year 2006 itself. It is difficult to appreciate the contention of the respondent. The mother also has the very same concern about her son. The records clearly disclose

that she has given best treatment to her son and periodical check up is also made. However, she has failed to report the same to the Court as per the order on 15-12-2006. The family court, while passing the order on I.A No.19 clearly directed the appellant to submit the report once in three months, to state whether there is any change or growth in the curve. Since there was no change in the curve, she has not submitted the report. The child has undergone operation in the year 2002 and 2009 and also major operation of the spine on 31-3-2010. The Scanning reports clearly disclose that sufficient care has been taken by the appellant. It is difficult to accept the finding of the family court that the appellant is negligent in taking care of the health of her child.

18. The records produced by the appellant clearly disclose that she has taken sufficient care in respect of education of her son. For the purpose of better education, the child was admitted in Kumaran's School which was situated near Silk Board and now it has been shifted to the new Campus. The

progress reports clearly disclose that the child has secured excellent marks and also participating in extra curricular activities.

19. Both the appellant as well as the respondent are financially capable of taking care of their child. The appellant is working in Progeon Company and the working hours is from 1.30 p.m. to 10.30 p.m. One hour is required for travelling from the office to her residence. Her office is having holidays on Saturdays and Sundays. The specific case of the appellant is that, in the morning hours as well as on Saturdays and Sundays, she is taking care of her son. During her absence, her son will be with her parents and they are also educated and can take care of her son. The respondent is also working in a Private Company and his working hours is from 5.30 a.m. to 2.30 p.m. He also claims that he can devote more time towards his son and he is in a position to take care of medical and educational expenditure of his son. Further, on an application filed by the appellant

seeking for educational and medical expenditures, the respondent has paid sum of Rs.1,72,000/- towards the medical and educational expenditures. He claims that he is staying in a joint family, his brother and sister's children are also staying with him. There is congenial atmosphere for sustainable growth of his son. On the other hand, the child has to stay alone, along with the appellant's age old parents which would affect the over-all development of the child.

20. With regard to the parental alienation is concerned, admittedly the appellant has filed M.C.No.1234/2004 seeking for divorce against her husband. From the day of birth of her son, he is under the custody of the appellant. She has taken care of the medical and educational expenditure. The respondent has not spent any money towards his son till the court passed the order directing him to pay medical and educational expenditures of his son on 25-4-2009. In view of that, she has refused to accept the birthday gifts given to her son by the respondent. That itself cannot be treated as



parental alienation. Apart from that the interim custody of the minor son was also given to the respondent as per various orders passed by the family court on 20-4-2006, 25-4-2009, 7-5-2010, 15-12-2010. The visitation right was also given. During the pendency of this appeal, interim custody has been given as per the orders dated 21-4-2011, 25-11-2011, 25-12-2011, 16-04-2012 and 11-12-2012. Further the visitation right was also given as per the order dated 28-07-2011. Hence, the finding of the family court that the appellant is trying to alienate the child from his father cannot be acceptable.

21. The records clearly disclose that the respondent is also having utmost love and affection towards his son. From the last eight years, he is litigating for his son, which shows that he has great love and affection for him. The child is aged about 12 years as on today. The child is not capable of expressing any intelligent preference. In view of the interim custody of the child, the child has acquaintance with both the

family. He can stay along with the family members of the father as well as the mother. The respondent has paid more than Rs.1,72,000/- towards medical and educational expenditure of his son. Hence, the respondent can also take care of his son as the appellant is taking. Under Section 6 of the Hindu Minority and Guardianship Act, 1956, father is the natural guardian, however, the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. Thereafter, the father is also entitled for custody of the child.

22. The Hon'ble Supreme Court in various judgments held the welfare of the child as paramount consideration while determining the issues relating to the custody of the child. There should be a proper balance between the rights of the respective parents and the welfare of the child. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. The child requires love and affection of both father and mother. The Hon'ble

Supreme Court further held that the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surrounding, but over and above physical comforts. When the court is confronted with the conflicting demands made by the parents, the court has not only to look at the issue on legalistic basis, but human angles are also relevant for deciding such issues. The object and purpose of the Act is not merely physical custody of the minor, but due protection of the right of the Ward, health, maintenance and education.

23. The Hon'ble Supreme Court in the judgment reported in AIR 2013 SC 102 (supra) has observed that an order of custody of minor children is required to be made by the Court treating the interest and welfare of the minor to be the paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment

for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of the minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is crucial and ultimate consideration that must guide the determination required to be made by the court.

24. In order to ascertain the desire of the child, personal interaction was made in our Chamber. The child expressed his desire to go along with his mother which may be due to the pressure of the mother or that the child is all along with the mother and also that the child is only 12 years old. The evidence of the parties clearly discloses that both the appellant as well as the respondent are in a position to take care of the minor child. Admittedly, the respondent is residing in the joint family along with his parents, brother and sister's

children. The child can grow in the warmth atmosphere of the joint family. It will help in the sustainable growth of the child, whereas the minor has to stay alone with his maternal grand parents in the appellant's house. The father is a friend, philosopher and guide to the child. The overall development of the child can be possible with the love and affection of the father. No allegation has been made regarding ill-treatment of the child in the father's house and congenial atmosphere is available in the house of the respondent for the sustainable growth and grooming of the child.

25. The Hon'ble Supreme Court in a judgment reported in 2008 AIR SCW 4043 in the case of *Mausami Moitra Ganguli V/S Jayant Ganguli* held as under:

*“The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child*

*and not the rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as predominant consideration. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. The question of welfare of the minor child has again to be considered in the back ground of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining*

*factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.”*

26. The Hon'ble Supreme Court had an occasion to consider the legal position regarding the father's right for the custody of the child vis-à-vis the welfare of the minor in : Rosy Jacob V/S A.Chakramukkal case reported in AIR 1973 SC 2090 and it has been held as under:

*“In our opinion, the dominant consideration for making orders under Section 25 is the welfare of the minor children and in considering this question, due regard, of course, has to be paid to the right of the father to be the guardian and, also, to all other relevant factors having a bearing on the minor's welfare..... The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot*

*promote their welfare equally or better than the custody of the mother then, he cannot claim indefeasible right to their custody under Section 25 merely because there is no defect in his personal character and he has attachment for the children – which every normal parent has ..... The father’s fitness from the point of view just mentioned cannot override consideration of the welfare of the minor children. No doubt, the father has been presumed by the statute generally to be better fitted to look after the children - - being normally the earning member and head of the family - - but the Court has, in each case, to see primarily to the welfare of the children in determining the question of their custody, in the background of all the relevant facts having a bearing on their health, maintenance and education.”*

27. The appellant has produced the latest report from Dr.Gowrishankar of BGS Hospital which clearly discloses that the minor son is maintaining very good health and he is taking participation in the extra curricular activities, sports and games. He is also one of the participants of the Football



team in the school. As on today, he is aged about 12½ years and reaching the age of adolescence. At this stage, the guidance and friendliness of the father is also required. The minor child is living with the appellant from the day of his birth and she has taken care of the well-being of the child with love and affection that by itself would not entitle her the custody of child. Father's care and love has a powerful and positive impact upon the development and health of a child. In addition, numerous studies have found that children who live with their father are more likely to have good physical and emotional health to achieve academically and more likely to exhibit self control and pro-social behaviour. It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life. Nor can the role of the father in his upbringing and grooming to face the realities of life be undermined. It is in that view father's care is important for the child's healthy growth. Parental touch and influence of other parent will enable the two to stay in

touch and share moments of joy, learning and happiness with each other. Hence, we are of the opinion that both the appellant and respondent are entitled for custody of the child for the sustainable growth of the minor child. We are of the view that the minor son shall be given under the custody of the respondent from 1<sup>st</sup> January to 30<sup>th</sup> June and under the custody of the appellant from 01<sup>st</sup> July to 31<sup>st</sup> December every year and they shall take care of the well-being and education of the minor son till he attains the age of majority. The education and other expenditure have to be shared equally by the appellant and respondent. Both will have visitation right on every Saturday and Sunday. When the minor is under the custody of the appellant she shall not prevent telephonic contact between the father and the son or video conferencing between the two if it is possible. She should not induce hatred towards father in the mind of minor child, though there are differences between the husband and wife. After the minor son attaining majority, it is open for him to take his

own decision. This arrangement will not affect the interest of the child, since the child is acquainted with the family members of his father due to interim custody, during the pendency of the petition before the family court as well as the appeal before this court. Apart from that on the basis of the joint memo filed by the parties, the custody of the child was given to the respondent/father during Deepavali festival. Some of the judgments relied upon by both the parties is not applicable to the facts of the present case. Hence, the order passed by the family court is required to be modified. Accordingly, we pass the following:

#### ORDER

The appeal is allowed in part. The order dated 1-2-2011 made in G & WC 106/2004 passed by the III Additional Principal Judge Family Court, Bangalore is modified. The respondent/father is entitled to the custody of the minor child from 01<sup>st</sup> January to 30<sup>th</sup> June and the appellant/mother is entitled to custody of the child from 01<sup>st</sup> July to 31<sup>st</sup>

December of every year, till the minor son attains the age of majority.

The appellant and respondent are directed to maintain education and other expenditures of their son in equal proportion and both will have visitation rights during Saturdays and Sundays. The minor child shall be allowed to use the telephone or video conference with father or mother, as the case may be.

Sd/-  
Judge

Sd/-  
Judge

mpk/-\*