

Arwa Taha Saifuddin vs Taha Mufaddal Saifuddin on 23 December, 2015

Author: M. S. Sonak

Bench: M. S. Sonak

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JUDGMENT-WP-8231-32

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8231 OF 2015

Arwa Taha Saifuddin .. Petitioner

vs.

Taha Mufaddal Saifuddin .. Respondent

WITH

CIVIL APPLICATION NO. 2578 OF 2015

Taha Mufaddal Saifuddin .. Applicant

In the matter between

Arwa Taha Saifuddin .. Petitioner

vs.

Taha Mufaddal Saifuddin ig .. Respondent

WITH

WRIT PETITION NO. 8232 OF 2015

Fatema Ibrahim Ezzuddin .. Petitioner

vs.

Ibrahim Qaidjoher Ezzuddin .. Respondent
WITH
CIVIL APPLICATION NO. 2579 OF 2015

Ibrahim Q. Ezzuddin .. Applicant

In the matter between
Fatema I. Ezzuddin .. Petitioner
vs.
Ibrahim Q. Ezzuddin .. Respondent

Mr. Haresh Jagtiani, Senior Advocate a/w. Ms Mitali Harish & Ms
Apurva Marwari for the Petitioners in both Petitions.
Mr. R.T. Lalwani i/b Mr. Jignesh Shah for the Respondents in both
Petitions and for the Applicants in both Civil Applications.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 11 December 2015
Date of Pronouncing the Judgment : 23 December 2015

COMMON JUDGMENT :

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1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is finally disposed of.

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2] Considering the nature of the order, which is proposed to be

made, as also the commonality of issues involved, it will be appropriate to dispose of these two petitions with a common order.

3] The Petitioners, Arwa and Fatema are sisters. Since last seventeen years, they have been married to Taha and Ibrahim, who are cousins inter se. Arwa and Taha have five children viz.

(i) Sakeenah (16), (ii) Mohammad (15), (iii) Tahir (12), (iv) Mustafa (10) and (v) Murtaza (7). Similarly, Fatema and Ibrahim have four children viz., (i) Khadija (17), (ii) Murtaza (14), (iii) Nisreen (11) and

(iv) Husain (7). The children, are great grandchildren of the 52nd Dai-ul-Mutlaq, Syedna Mohammed Burhanuddin, a religious leader of the Dawoodi Bohra Community (a Muslim Sect), who passed away in Mumbai on 17 January 2014. Upon his demise, a dispute has arisen with regard to the claim for the position of 53rd Dai-ul-

Mutlaq. Amongst other matters, a civil suit is pending on the Original Side of this Court between the rival claimants.

4] The rival claimants for the position of 53rd Dai ul-Mutlaq are Khuzaima Qutubuddin, the father of Arwa and Fatema (maternal grandfather of the children) on one hand and Mufaddal Saifuddin, Taha's father and Ibrahim's uncle (paternal grandfather of the children), on the other. This rift, has virtually split the marital ties dss JUDGMENT-WP-8231-32-15 between the parties, as Arwa and Fatema have aligned with Qutubuddin and Taha and Ibrahim have aligned with Saifuddin. The rift has split the Dawoodi Bohra Community, as well. In this mega rift, reminiscent of the strife for the Mogul Throne however, the children, all of them, find themselves in a predicament of having to choose between either of their parents, their tender and innocent age, notwithstanding.

5] Their parents have initiated proceedings against each other seeking various reliefs, including their custody and access. The orders impugned in these petitions arise out of Petition No. D-59 of 2014 instituted by Taha against Arwa and Petition No. D-58 of 2014 instituted by Ibrahim against Fatema in the Family Court at Bandra.

The impugned orders are apparently innocuous. The impugned orders defer any decision on the issue of interim custody and access, until the Counselors or Child Welfare Officers hold counseling sessions with the children and submit reports to the Family Court, which might assist the Family Court in making the difficult, but the necessary decision in the matter.

6] Considering the nature of the impugned orders, learned counsel for the parties were called upon to address me, inter alia, upon the scope and advisability of interference, at this stage. The dss JUDGMENT-WP-8231-32-15 learned counsel for the parties, together with all other issues, have made their submissions upon such issue, as well.

7] Arwa and Fatema, through Mr. Haresh Jagtiani, learned senior advocate appearing for them, recalled the atrocities and domestic violence allegedly, perpetrated against them by their husbands, which forced them to flee to America with the children and to seek asylum as well as legal custody there. They point out that the California Court, even after ruling that the appropriate legal forum to resolve the dispute would be the Indian Courts and after directing restoration of custody of the

children to the fathers, had nevertheless, granted them several reliefs, including custody for seven days in each month as well as unlimited telephonic access.

They bitterly complain that their husbands, in disregard to the directions made by the California Court, have virtually cut off the access to the children. Some of the children have been sent away to Surat and others are kept in virtual seclusion at Mumbai. They point out that no access is being offered, whether telephonic or otherwise. They point out that there is a very serious form of tutoring of the children and it is apprehended that the sessions with Counselors for the interview with the children in this situation, would be merely a farce. They submit that the Family Court ought to have made the orders for restoration of custody at least to the extent of dss JUDGMENT-WP-8231-32-15 seven days each month, so as to achieve level playing field, before directions were issued to the Counselors, to have interview sessions with the children and make their reports to the Family Court.

8] In opposition, Taha and Ibrahim, through their learned counsel Mr. R.T. Lalwani, were at pains to criticise Arwa and Fatema for having abruptly destroyed marital ties of over seventeen years and their act of abducting the children to America, on the very night of demise of 52nd Dai-ul-Mutlaq , in a bid to defeat the jurisdiction of the Indian Courts. They point out that the action was both premeditated and malicious. The action was in furtherance of installing their father Khuzaima Qutbuddin, as 53 rd Dai-ul-Mutlaq, in preference to Mufaddal Saifuddin. The lives of children were put into peril. There was no regard to physical and emotional security of the children. Rather, the children were exploited by portraying upon social media network that they support the claim of their maternal grandfather, in preference to the claim of their paternal grandfather for the position of 53rd Dai-ul-Mutlaq.

9] Taha and Ibrahim point out that the elder children are admitted into an educational institution in Surat, which apart from offering high quality education is an institution founded by the family dss JUDGMENT-WP-8231-32-15 for religious instruction, which is extremely vital for all round development of the children. Similarly, the younger children school in Mumbai. They point out that the children are rightly embittered by the treachery of their mothers and they do not wish to return to their mothers. They rely upon the decision of the Hon'ble Apex Court in case of Gaytri Bajaj Vs. Jiten Bhalla 1, to submit that in matters of this nature, the wishes of children are paramount and based upon the same custody or access, even for a short duration of time cannot be granted to Arwa and Fatema. They submit that the very institution of these petitions is premature, as the Family Court is yet to make even an interim order on the issue of custody and access.

10] The record indeed indicates that Arwa and Fatema, on the night of demise of the 52nd Dai-ul-Mutlaq fled to America with the children. They eventually applied to the superior Court of California, Bakersfield C.A. for temporary restraining order pursuant to Domestic Violence Protection Act (DVPA) and for custody and visitation orders relating to the minor children. Taha and Ibrahim contested the proceedings, both, on grounds of jurisdiction and merits. A summary enquiry was held in the matter and finally, the California Court on 26 February 2015, made the following order:

Accordingly, the Court finds that the facts described necessitate the return of the children to the custody of the Respondent forthwith, subject to the stay granted below.

1 (2012) 12 SCC 471

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The Court has determined these orders are necessary to protect the minor children and are in the children's best interest. The Court awards joint legal custody to both parents, with sole physical custody to Respondent.

Petitioner shall have visitation with the minor children in India up to 48 hours' notice to Respondent. Visitation shall occur in the city of residence of the minor children and may be up to one week in length each thirty days.

Petitioner shall have reasonable telephone or other electronic contact with the minor children and the children shall have unlimited, unmonitored telephone or other electronic contact with the Petitioner.

Section 3424(b) provides that in the event there is no previous child custody order to be enforced under the UCCJEA and a child custody proceeding has not been commenced in a court of a state having original jurisdiction, this Court's child custody determination shall remain in effect until an order is obtained from a court of a state having jurisdiction under the relevant statutes. No evidence was presented that there is such an order. Consequently, the Court's order will remain in effect until a court of a state having jurisdiction under sections 3421 to 3423, inclusive makes orders regarding the minor children.

11] The California Court has held that the California is not the "Home State" of the minor children and the Court's jurisdiction is limited to exercise of temporary, emergency powers under Section 3424 of the Family Code. Arwa's and Fatema's request for DVPA restraining order was denied. However, joint legal custody was awarded to both the parents, with sole physical custody to Taha and Ibrahim. Arwa and Fatema were granted visitation rights in the city of residence of the minor children in India upto one week in length each thirty days. Arwa and Fatema were also granted reasonable telephone or other electronic contacts with the children. The California Court clarified that its order was to remain effective until dss JUDGMENT-WP-8231-32-15 the Court of the State having jurisdiction under Sections 3421 to 3423, inclusive of the Family Code makes orders regarding the minor children. The parties, upon their return to India, have instituted proceedings in the Family Court at Bandra, which would be the Court of the State, having jurisdiction in the matter. As noted earlier, it is in these proceedings that the impugned orders came to be made.

12] In terms of the California Court's order, Taha and Ibrahim presently have the sole physical custody of the children. However, even though the California Court had awarded joint legal custody to both the parents as well as issued directions in the matter of visitation rights and electronic access, at least presently, the same has been denied by Taha and Ibrahim to Arwa and Fatema. Only in pursuance of orders made by this Court, on about two occasions, Arwa and Fatema could meet the children at the designated venue for couple of hours, in the presence of Counselors.

13] On 3 September 2015, taking note of the circumstance that the counseling process in terms of the impugned order has already commenced, certain directions were issued in furtherance of the same. The venue of session scheduled for 4 September 2015 at the counseling center at Family Court, Bandra was shifted to a more conducive venue suggested by the parties, where the children could be more comfortable and responsive. Directions were issued to Taha and Ibrahim to escort the children to the venue lobby and leave the children to spend about three hours with their mothers, in presence of the Counselors. The Counselors were also requested to submit their reports of the sessions. Similar exercise was directed by the order dated 16 September 2015.

14] Although, visitation and access was not as smooth as it should have been, at least some beginning was made in the matter.

The Counselors reports bear this position out. At this stage, it will not appropriate to make any comments upon the reports, since the Family Court is yet to consider the same. Suffice to indicate that the Counselors have noted that though circumstances and events have affected and influenced the children's views and feelings towards their mothers, bonds exist and therefore, access to the mother should be considered favourably. They have opined that counseling, both, of the children as well as the parents should continue in the interest of paramount welfare of the children. They have opined that though access may not have been smooth, modalities can be worked out to ensure that the access is smooth and meaningful.

They have opined that the access may be at the homes of the parties or at some other conducive venue. If there is no agreed conducive venue, as a last resort, access at children's complex of the Family Court, Bandra may be considered. In the reports, the Counselors Ms Freny Italia, Muskaan Project of Tata Institute of Social Service Sciences, Ms V.S. Athavale and Ms S.B. Jagtap attached to the Family Court, Bandra, have made fairly objective assessment of the interaction and the situation. The Family Court, will no doubt, take into consideration the reports of the Counselors.

15] At the request of Taha and Ibrahim, as contained in Civil Application Nos. 2578 and 2579 of 2015, and at the urging of Mr.Lalwani, the learned counsel for Taha and Ibrahim, I interacted with the children for a couple of hours at the Chambers. The interaction with the children was extremely meaningful and illuminating. They are wonderful children, innocent, loving and at the same time resilient, sensitive and quite understanding. The children were absolutely courteous and made sincere and concerted efforts at teaching me to write Arabic. The children are widely traveled and enthralled me with the tales of their journeys. The elder children explained to me some basic tenets

of their religious faith and their pilgrimage to Mecca. The elder boys did create an impression that they were comfortable with the present custodial position, but were, by no means hostile, when the topics swerved to their mothers. The elder boys did appear to be under the influence of their fathers, dss JUDGMENT-WP-8231-32-15 paternal family members, family customs and the position of the family in the community. They were conscious of the rift between the paternal and maternal families for succession to the position of 53rd Dai-ul-Mutlaq. The smaller children, though reeling under similar influence, were however more receptive to the prospect of interactions with their mothers. Overall, the interactions with the wonderful children, left me with the impression that these children, like perhaps any other children, seem to wonder, as to why they have been placed in such a predicament and why they cannot have a normal childhood, a normal family life, abounding in love and care from both their parents.

16] At this stage, there is obviously no question of going into the rival claims of the parents in the matters of their allegations and contentions against each other. Whatever the merits or otherwise of such rival claims or allegations, the real question is whether and to what extent they ought to impact (at least legally) the immediate issues of custody and access to the children. There is no doubt that the events, as have unfolded themselves, have had a tremendous impact upon the children, who are but innocent, sensitive and intelligent children. Obviously, the children's domestic lives have been shattered by the events. Howsoever, resilient picture they may portray, they obviously yearn for the love, care and emotional dss JUDGMENT-WP-8231-32-15 security from both their parents. Howsoever bold face or cheerful countenance they may present, they are obviously distraught by the unfortunate events, which are neither of their creation nor over which, they have any control whatsoever.

17] Rigid formality not being the mandate of proceedings under the Family Courts Act, in the course of my interaction with the parents, I did make an earnest plea to the parents and their counsel to attempt to arrive at some settlement, at least upon the limited issues of shared custody and access for the sake and welfare of their children. The parents were called upon to consider whether some common ground could be arrived at, either by themselves or through mediation of some elders from the community, so that the children are spared of all this strife, so that the children are not made to choose between either of their parents. The parents were called upon to consider whether there can be some temporary cessation of hostilities, at least upon issues of shared custody and access to the children. From the facts and circumstances, presented up to now, it is quite doubtful whether either of the parents will be 'winners' in the real sense, in this unfortunate cause, though, quite certainly, the children will surely be the 'losers' in the ultimate run if the parents do not arrive at some workable arrangements on emergent basis. Looking to the age of the dss JUDGMENT-WP-8231-32-15 children, their predicament, their trauma, not too much of their childhood remains. Both, the parents as well as the children, will never be in a position to retrieve this squandered time, this precious childhood, which is ticking away. There is emergent necessity to distinguish between the personal disputes of the parents and the welfare of the children. There is emergent necessity to distinguish between the disputes to the position of Dai-ul-Mutlaq and the welfare of the children. The linkage of the two issues, is obviously not in the interests of the children. Whatever the unfortunate past, at least for the future, neither of the parents should even attempt to use the children as pawns upon the Chess Board they have chosen to spread out for themselves.

18] To the credit of the parents, as well as the learned counsel appearing for them, it must be noted that they did make attempts, insufficient though, they may appear at the present. They have however, assured me that such attempts will continue. The difficulty mainly lay in the inability on the part of Taha and Ibrahim to let bygones be bygones. The difficulty also lay in the inability of either parties to disassociate the issue of custody and the issue of succession to the position of Dai-ul-Mutlaq. To the parties, succession seemed to be the paramount consideration. In the jurisdiction with which we are concerned, however, the paramount consideration is the welfare of the children. Howsoever difficult this may presently appear, the welfare of the children requires that they are spared of such issues. The children require the unconditional love and security of both their parents, if possible together, and if not possible, separately. Such unconditional love and security, is in fact, their right, which is presently being denied to them. Lord Hausworth in *Re, O'Hara*² has quoted what Fitz Gibbon L.J. has said in *Re, Thain*³ :

" The welfare of the child is no doubt the first and paramount consideration, but it is one amongst several other considerations the most important of which, it seems to me, is that the child should have opportunity of winning the affection of its parent and be brought for that purpose into intimate relation with the parent"

19] The impugned orders have worked themselves out to some extent. At least some sessions with the Counselors have taken place. The Counselors report are on record. At least some ice has broken in the form of some limited access to Arwa and Fatema. The Counselors have unanimously opined that such access should continue. Such access is in the interest of the children. The access, presently, might not have been smooth. But modalities need to be worked out. Confidence building measures are necessary. Above all, genuine cooperation from both the parents is vital. If any compromise on the issue of succession is not feasible, at least ² (1990) 2 IR 232 ³ (1926) Ch 676 ^{dss} JUDGMENT-WP-8231-32-15 some working arrangement, some common ground, upon the issue of access and custody of the children, is necessary. For this, there should be no linkage between the issue of succession and the issue of access and custody. Neither parties, in short, should make use of the children as a bargaining point. This is certainly not in the interests of the children. This is in fact, contrary to the interest of the children.

20] The 'welfare of the children' or the 'welfare principle' remains the paramount consideration in this jurisdiction. This will not be achieved by over emphasizing upon allegations and counter allegations leveled by the parents against each other. The Hon'ble Apex Court in the case of *Mousami Moitra Ganguli Vs. Jayant Ganguli*⁴, has held that it is the welfare and interests of the child and not the rights of the parents which is the determining factor for deciding the question of custody and the question of welfare of the child has to be considered in the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. To the same effect, are the observations in paragraph 30 of *Sheila B. Das Vs. P.R. Sugaree*⁵.

4 2008 (7) SCC 673

5 2006(3) SCC 62

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21] In paragraph 12 of Gaytri Bajaj (supra), the Hon'ble Apex

Court has made reference to the exhaustive consideration of the law relating to custody of minors. The same reads thus:

12. The law relating to custody of minors has received an exhaustive consideration of this Court in a series of pronouncements. In Gaurav Nagpal v. Sumedha Nagpal 2009 1 SCC 42 the principles of English and American law in this regard were considered by this Court to hold that the legal position in India is not in any way different.

Noticing the judgment of the Bombay High Court in Saraswati Bai Shripad Ved v. Shripad VasANJI Ved- 1941 AIR (Bom) 103; Rosy Jacob v. Jacob A Chakramakkal- 1973 1 SCC 840 and Thirty Hoshie Dolikuka v. Hoshiam Shavdaksha Dolikuka - 1982 2 SCC 544 this Court eventually concluded in paragraph 50 and 51 that:

"50. That when the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousmi Moitra Ganguli's case the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word "welfare" used in section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases."

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22] In Re McGrath (Infants)6, Lindley L.J. , in 1893 observed

thus :

"... the welfare of the child is not to be measured by money alone nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

23] Similarly, in Walker Vs. Walker and Harrison - noted in (1981) NZ Recent Law 257, Hardy Boys J. observed thus ' "Welfare" is an all-encompassing word. It includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place, they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents.' 24] Whilst there is no ambiguity at all that the welfare principle remains the paramount consideration, the real difficulty arises in its application to a given fact situation. There are several parameters that go into the decision making process for determining where the welfare of the children lies. Parental conduct, material well being of the children, blood ties and kinship, age of the children, their sex, re-marriage of the parents, continuity of care and wishes of the children are some of the relevant parameters. The list is obviously not exhaustive. A balancing exercise has to be undertaken by the Court in an attempt to reach a decision which might best serve the children's welfare. But as pointed out by Megarry J. in *Re F (An Infant)*, *F vs. F*, the problem cannot be solved arithmetically or quantitatively by using some sort of 'points system'.

25] Mr. Lalwani has emphasized upon 'wishes of the children'.

His submissions almost suggested that this parameter is paramount in resolution of disputes of custody and access. He relied upon *Gaytri Bajaj (supra)*, as an authority for the proposition that custody and access to the mother, even for a short duration, ought not to be granted, if the children wish otherwise.

26] The circumstances in the case of *Gaytri Bajaj (supra)*, were slightly different. The children, in the said case, were aged 17 and 11 years. For considerable period, they had lived away from their mother. The mother had filed terms, in the matter of divorce by mutual consent and had given up custody but retained only visitation rights. After period of three years, the mother instituted a suit for setting aside the consent decree and demanding custody of the children. Even the Hon'ble Apex Court, did not outright reject the claim for custody. As is recorded in paragraph '9' of the judgment and order, the Hon'ble Apex Court, keeping in mind the position of 7 (1969) 2 ALL E.R. 766

JUDGMENT-WP-8231-32-15 the mother allowed her to make initial contact with the children and gradually built up a relationship, if possible, so as to arrive at a satisfactory solution to the impasse. Interim arrangements were directed, which included overnight custody with the children. Even the Hon'ble Apex Court, by means of personal interaction with the children, made attempts to bring the issue with regard to custody and visitation rights to the satisfactory conclusion. Only after due consideration of the results of all this, the Hon'ble Apex Court, on the basis of materials on record, came to the conclusion that the children one of whom was on the verge of attaining majority did not want to go with the mother. It is in these circumstances that the Hon'ble Apex Court observed that the children having expressed their reluctance to go with the mother, even for a short duration of time, there is no option left but to hold that any visitation rights to the mother would be adverse to the interests of the children.

Therefore, Gaytri Bajaj (supra), is not an authority for the proposition that 'wishes of the children' is the only consideration or the paramount consideration. The paramount consideration, in terms of the statute as well as numerous authorities of the Hon'ble Apex Court, including Gaytri Bajaj (supra) remains 'welfare of the children'.

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27] Besides, in the matter of custody and access, fact situation is

what matters the most and consequently, reliance upon precedents can be mainly for culling out the principles involved. To that extent, the utility of precedents in such jurisdiction is quite limited. Much depends upon the facts and assessment, having regard to a host of parameters in determining where the welfare of the children lies. In Gaytri Bajaj (supra) itself, the Hon'ble Apex Court after taking special notice of its earlier decisions in the cases of Mousami Ganguli (supra) and Shiela Das (supra) has held that cases of custody have to be considered in the facts of each case and the decided cases on the issue may not be appropriate to be considered as binding precedents.

28] The House of Lords in the case of Gillick Vs. West Norfolk and Wisbech Area Health Authority⁸, has held that wishes of the children who are nearing majority or who can be shown to understand the issues involved should be allowed to determine the question where and in what manner they may live. The Gillick principle (supra), finds statutory expression in Section 17(3) of the Guardian and Wards Act, 1890, which provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference.

8 1985 (3) ALL E.R. 402 (H.L.)

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29] The 'wishes of the children' is no doubt, one of the relevant

parameters to be taken into consideration. However, this is neither the only parameter nor the paramount consideration. Besides, 'wishes of the children' are not to be confused with some pre-

prepared statements of the children, as a result of tutoring or perhaps even indoctrination. The 'wishes of the children' are not statements made in the din of battle, under tremendous stress or strain. Before a decision based upon 'wishes of the children' is arrived at, regard must be had to the age and maturity levels of the children, the circumstances in which the children are placed, the children's perception as to their own welfare, possibility of tutoring and indoctrination, dominant position of the custodial parent and other such considerations. Further, it is necessary to create, as far as possible, circumstances conducive to the exercise of intelligent preference by the children.

30] The 'wishes of the children' have to be ascertained in the proper manner and by the proper authority before any decision is based upon them. One of the appropriate ways of ascertaining the 'wishes of the children' will be by means of interviews and interactions with skilled Welfare Officers or Counselors. The traditional view is, however, that the decision must be seen to be taken by parents or the Court, so that the responsibility for the decision does not rest with the children. In the case of *Adams Vs. Adams*, Dunn L.J. observed thus:

The children should not be allowed "to feel that they have to take the decision as between the father and the mother, with which of them they shall live. The pressures on children are quite sufficient when the marriage has broken down and one of the parents has left home without putting on them the additional burden of being made to feel that they have to decide their own future".

31] In matters of custody and access, the Family Court should be conscious that it is not merely enforcing parental rights or determining the rights of the parents. In such proceedings, there are not two parties - the husband and the wife - but also a third party -

the children. That third party is the most important party in such proceedings. Rigid formal procedures, which invariably inhere in civil proceedings before Courts of law, need not come in the way of the Family Courts determining the welfare of the children. In *re, K*, Lord Delvin, very aptly observed thus:

"In the jurisdiction *parens patriae* there are unquestionably some principles of judicial inquiry which are not observed:

It is now realised that proceedings in respect to custody, access etc., of children in a court of law are more administrative in nature than, strictly speaking, judicial. The

procedure cannot, and should not, be that of adversary litigation between two litigants. They are (and should be) no-contentious proceedings. The first step in this direction was taken by the English law in 1958 when the law provided for court welfare officers, who are entrusted with the duty of investigating and reporting in cases concerning children whenever they were required to do so by the court. Thus, the courts in dealing with

9 (1984) FLR 768 10 1963(3) WLR 435 dss JUDGMENT-WP-8231-32-15 questions of welfare of children no longer depend wholly on the contentious evidence produced by the parties, but can rely on the report of the trained and independent investigators with opportunities of investigating in the natural and real surroundings of the parties. By relying on the report of court's own investigation - the court's investigating officer - rather on the evidence of parties which is more often than not motivated by the idea of serving the interests of the parties, the court acts a real *parens patriae* and is in a position to find out precisely what is in the welfare of the child in a given case. In this the court remains essentially a judicial court, though the procedure followed is essentially administrative.

32] Therefore, ig upon cumulative consideration of various parameters and the record the Court is required to act in the children's best interests. In the exercise of such delicate jurisdiction, the Court cannot abdicate judicial discretion, either to the wishes of the children or even the reports of Counselors or Welfare Officers.

No doubt, all these are very relevant parameters. But the ultimate decision has to be made by the Court, in exercise of its judicial discretion. This, no doubt puts a very great responsibility upon the Courts. Therefore, it should be appreciated that it is not possible for the Court, in all situations to deal with what may be ideal for the children, but simply what best can be done in the circumstances presented. The typical dilemma faced by the Courts, in such matters is described by Cumming-Bruce L.J. in the case of *Clarke-Hunt Vs. Newcombe*¹¹, in the following words:

"There was not really a right solution; there were two alternative wrong solutions. The problem for the judge was

11 (1983) 4 FLR 482 dss JUDGMENT-WP-8231-32-15 to appreciate the factors in each direction and to decide which of the two bad solutions was the least dangerous, having regard to the long-term interests of the children.....' 33] Applying the aforesaid principles and upon cumulative consideration of the aforesaid facts and circumstances, I am of the opinion that the impugned orders need not be set aside. Rather, they need to be supplemented, so that the counseling as directed, proceeds in a better manner and the entire process is rendered more meaningful. Besides, upon *prima-facie* consideration of the material on record, *inter alia*, in the form of Counselors' reports, interaction with the children and their parents, the decision of the California Court, though custody for seven days out of each thirty days to the mothers cannot be considered at this stage, some reasonable directions in the matter of access and visitation are warranted. Whilst the present circumstances do not appear to be appropriate for grant of custody for seven days, there is need to restore and strengthen ties between the children and their mothers.

This process has to be gradual and confidence building measures are therefore, appropriate. Any attempts to sever the maternal ties would not be in the interests of the welfare of the children. After all, the ties of motherhood are too strong for any natural destruction, even if the contentions of Taha and Ibrahim as to the conduct of Arwa and Fatema are to be accepted. The complete denial of access and visitation rights to Arwa and Fatema, in the facts and dss JUDGMENT-WP-8231-32-15 circumstances of the present case, will not be in the interests of the welfare of the children and their all round development, which, in this jurisdiction remains the paramount consideration.

34] These petitions are therefore, disposed of with the following orders:

A] Between 25 December 2015 and 31 March 2016, the Respondents, in each of these petitions, are directed to grant to the Petitioners access and visitation rights to the children on at least four occasions. The first of such occasion shall be between 25 December 2015 and 31 December 2015. The precise date during this period may be decided by the parties themselves depending upon the academic or other schedules of the children. In case of any difficulty, the Family Court which is seisin of the matters, may make appropriate orders in this regard;

B] The access, as aforesaid, shall be for the entire day, i.e., between 10.00 a.m. and 5.00 p.m., at the Petitioners' apartment at Malbar Hill or any other suitable venue other than the place where the children presently reside alongwith the Respondents. The access shall be under the supervision of at least one Counselor agreed to by the parties and failing such agreement, deputed by the Family Court, which is seisin of the matters;

C] The Respondents to make arrangements to reach the children at the venue of access by 10.00 a.m. and pick up the children by 5.00 p.m. on the same day. However, neither dss JUDGMENT-WP-8231-32-15 the Respondents nor any persons on their behalf shall remain present at the venue of access during the access/visitation and further they shall not obstruct such access/visitation;

D] The Counselors to file reports of the supervised access before the Family Court, as far as possible within seven days from respective access dates. The Family Court shall be at liberty to furnish copies of such reports to the parties;

E] Upon receipt of four reports from the Counselors by 7 April 2016, the Family Court after afford of opportunity of hearing to the parties and if deemed necessary by interviewing the children, dispose of the motion for interim custody, access and visitation rights, in accordance with law, latest by 30 April 2016;

F] In order to facilitate access/visitation as granted by th

order, the Family Court is empowered to

orders/directions from time to time particularly, in the matters of venue, dates etc. The Family Court, will no doubt take into consideration the academic and other schedules of the children, so that they are affected in the minimum. The parties shall be at liberty to apply to the Family Court, in this regard;

G] The observations in this order are prima-facie and the same are not be construed as reflection upon the conduct of the either parties. The Family Court, which is seizin of the matters, is therefore directed to dispose of the motions for dss JUDGMENT-WP-8231-32-15 interim custody, access and visitation rights based upon the material which may be placed before it and in accordance with law;

H] Rule is disposed of in the aforesaid terms, in both the petitions.

I] The Civil Applications are also disposed of in the aforesaid terms.

J] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.) dinesh