

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: 12.8.2008

Date of Order: 25th September, 2008

CM(M) No. 752/2000 25.09.2008

Ram Murti Chopra and Anr. ... Petitioner

Through: Mr. P.Gautam, Advocate

Versus

Nagesh Tyagi ... Respondent

Through: Mr. Vikram Nandrajog, Advocate

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

1. The petitioners are aggrieved by an order dated 15.11.2000 passed by the learned Guardian Judge whereby she allowed an application of the respondent under Section 12 of Guardians and Wards Act and directed the petitioners to handover the custody of the child to the respondent till disposal of the petition filed by the respondent for guardianship.
2. The brief facts relevant for the purpose of deciding this petition are that the respondent/husband got married to the daughter (Ms. Anupama) of the petitioners on 13.12.1994. This was a love marriage and the parents of the respondent were not agreeable to this marriage. The parents of Ms. Anupama though it seems were not happy with this love marriage, but had participated in the marriage. The parents of husband had not participated in the marriage and only some of his relatives had come in the marriage ceremony. After marriage, husband and wife started living together and a son Master Sarthak was born from this wedlock on 25.11.1996. Ms. Anupama committed suicide when Sarthak was 13 months old. The facts reveal that both husband and wife were working, the parents of the husband were not happy with this marriage and they were not communicating with husband and wife; only parents of wife were in communication with the couple and the couple was visiting the parents of the wife i.e. petitioners. After birth of son Sarthak, due to the fact that the couple was a working couple, they seem to have problem about looking after the child, petitioners came forward to take care of the grandson and grandson was being kept with them. While the respondent's contention is that the child was being left with the grandparents before going to office and was being picked up in the evening. The contention of the petitioners is that son Sarthak was being brought up by them and the couple used to stay with them at weekends and during this period they used to take care of the child. The petitioners have pleaded that distance between the house of the petitioners and that of respondent was about 30 kms so, first coming to their house and leave the son in the morning then going to job and picking the son in the evening and going back home was practically impossible as this would have meant travelling about 120 kms a day. After the wife committed suicide, the husband gave an affidavit which reads as under:

1. That I was married to Anupma daughter of Shri Ram Murti Chopra and Shrimati Brij Rani Chopra on 13th December, 1994. She, my wife, has died on 24.12.1997.

2. Ever since I came in contact with Anupma she has been in employment. At the time of her death (24.12.1997), she was working as Secretarial Executive in Unitech Limited, Saket, New Delhi and drawing a monthly salary of about Rs.5,000/- per month.
3. That on coming in contact with Anupma, we decided to marry and approached our parents. The marriage took place in accordance with Hindu Customs and traditions. My parents did not participate in the marriage and after marriage never came to live with us. Anupma's parents arranged the marriage in cooperation with my relations other than the parents. We, though having our separate residence often lived with Anupma's parents and got their love and affection.
4. That on 25.11.1996 I and Anupma were blessed with a son. The son has been named Sarthak Tyagi alia Nanu. There is no other issue.
5. That I and my wife Anupma decided that the son should live under the custodial care and guardianship of Anupma's parents at their residence KD/5A, Phase-I, Ashok Vihar, Delhi-110052. This arrangement was put into practice and has continued all along right from the birth of my son Sarthak Tyagi alias Nanu.
6. That my wife Anupma Tyagi has died on 24.12.1997, her last rites have been performed according to Hindu customs and traditions by myself and Anupma's parents without any participation of my parents.
7. That I now declare and express my wish through this affidavit that my son Sarthak Tyagi alian Nanu should be under the legal guardianship of late Anupma's parents, namely, Shri Ram Murti Chopra and Shrimati Brij Rani Chopra, till Sarthak Tyagi alian nanu becomes major and capable of taking his own decision whether his guardianship with late Anupma's parents should continue.
8. That I will bear the maintenance and educational expenses of my son Sarthak Tyagi alian Nanu while he lives with late Anupma's parents. To this effect I shall pay to Shri Ram Murti Chopra and / or his wife Brij Rani Chopra a sum of Rs.700/- (Rupees Seven Hundred only) per month as maintenance expenses. This amount will vary as per the cost of living index. As and when my son is sent to school I shall pay additionally the actual expenses on education of my son including expenses on going and coming from school.
9. That I will visit the residence of late Anupma's parents once a month, make payments referred to in para (8) above and stay with my son for about three hours.
10. That I shall not change or revoke this affidavit till my son Sarthak Tyagi alian Nanu becomes major.
11. I have sworn in this affidavit out of my own free will and volition without pressure from anybody in my full awareness and consciousness.
3. However, the relations between the petitioners and the respondent/husband got sour. Subsequently, an FIR was registered against the husband under Section 498A/306 IPC and the husband moved a petition before this Court for quashing of FIR on the basis of a suicide note left behind by Ms. Anupama. The FIR was quashed on a petition made by the husband under Section 482 Cr.P.C. Against that order, an SLP was preferred before the Supreme Court and the order of this Court was set aside and directions were given for the trial Court to proceed with the trial in accordance with law.
4. The husband had filed a petition on 05.10.1998 under Section 6 of Hindu Minority and Guardianship Act and Sections 7 and 25 of The Guardian and Wards Act claiming custody of the child. This petition was contested tooth and nail by the petitioners and the learned Guardian Judge gave direction for production of the child on 16.9.2000 in the Court and had interaction

with the child, when the child was 3 years 9 months old. The child during his interaction with the Court told that he was studying in LKG. He told his father's and mother's names as that R.M.Chopra and Brij Rani (his maternal grandparents). The child stated that he did not know Nagesh (his real father). On this, the Court called the father of the child inside the Chamber, on seeing him, the child recognized him as Nagesh but stated that he did not know him and had not seen him before. He said that while he was at the house of 'Summi aunty' Nagesh had called up and wanted to talk to him but 'Summi aunty' told him to go back home. The Child also told the Court that he had once talked to Nagesh and at that time he had told his name to Nagesh. The child stated that he would not go to Nagesh as his mummy (grandmother) and 'Richu Mamu' (maternal uncle) had told him not to go to bad persons and Nagesh was a bad man. His mammu (maternal uncle) had told him not to meet Nagesh. The child told that Nagesh had never stated anything to him but he would never meet Nagesh as has been told so by his maternal uncle that Nagesh would give him poisoned cake. The child further told the Court that he would never meet Nagesh since his 'mammu' would beat him.

5. The trial court observed that on 27.11.1999 the child was brought to the court by the petitioners to meet the respondent for celebration of the birthday and it was in this context that child was told that he would be given poisoned cake by his real father. The Trial court had observed in the order sheet dated 27.11.1999 that grandparents were very adamant in allowing the child to meet the respondent and told that they would not allow the respondent to meet the minor. The trial court came to the conclusion that from the statement of child it was clear that he was being tutored and poisoned by the family of his grandparents against his real father and the child himself had nothing against the father. There was no misconduct on the part of real father to disentitle him from the custody of child. The trial Court found that since the child, as on date, was of tender age, the custody of the child could easily be handed over to the father. The Trial Court further observed that it may be highly disturbing for the grandparents to handover the custody of child to the father but it would be in the welfare and interest of the child if his interim custody was granted to the father. The cruel hands of destiny had deprived the child from the tender love, care and affection of his mother, but the human factors and emotions of grandparents could not be allowed to deprive the child of his father's love as well. The trial Court therefore found that the welfare of the child was in living with the father at this tender age so that, he gets love and care of the father.
6. The order passed by the trial Court for handing over custody of the child was stayed by this Court when this petition was filed in November, 2000. The child at that time was 04 years of age. This petition is pending for around 8 years, now the child is aged more than 11 years and shall be 12 years in November, 2008. During pendency of this petition different judges of this Court communicated with the child. The child was called to Court on 21.12.2000 and this Court observed that effort to communicate with the child failed as it would take some time before he opens up. The Court requested Counsel for the parties to make efforts for amicable settlement for the custody of the child and to give realistic proposal about maintenance, education and welfare of the child. Both the sides gave their proposals but the proposals of both the sides contained one thing - while grandparents were not ready to part with the custody of the child, father wanted to have the custody of the child. Father in his proposal stated that he was in a position not only to bring up the child but to look after the child in a better manner and would spend half of his income on child. Grandparents stated that income of the father was very meager while they were very well off and in a better position to bring up the child and the child had all along been living with them. Finding that there was no meeting point between the

parties, this Court vide order dated 15.2.2001 directed that the child should be allowed to meet the father on an experimental basis. Parties were directed to arrange meetings at restaurants, temples or at places like Qutub Minar, Lotus Temple, Birla Mandir, etc. at least twice a month, however, they could meet more frequently if they so agreed. Grandparents of the child from the husband's side were also allowed to meet the child once a month and parties were asked to inform the Court about the result of the meetings. The parties were told to shed their adamant attitude. In June, 2001 father of the child made a prayer that the child should be allowed to stay with him during summer vacations for some time. The Court called the child to the chamber and found that acquaintance of the child with the father was not sufficient enough for child to remain with the father in the weekends. The child told that he would not go to any place without his grandmother, whom he called 'mummy'. Therefore, this Court considered that it would be necessary for the father to develop more intimacy with the child and win over the affection. The Court directed that the frequency of the meetings be increased and child be left to the father exclusively for an hour or two on such meetings. The Court also directed the father to start paying schools fees of the child, to which the father readily agreed.

7. In February, 2002 this Court observed that the time for meeting with the father of the child be increased from one hour to two hours by consent of the parties. Father wanted to increase the frequency of the meeting with the child and also wanted that he should be allowed to keep the child overnight. But this Court thought that it would not be appropriate to pass a hasty order and this aspect be considered after 02-03 months depending upon the rapport developed between father and the child. The situation remained same till May, 2002 when father was given liberty to meet the child on weekends at the residence of the grandparents by fixing time of the meeting over telephone. This Court on 14.3.2005 observed as under: Without prejudice to the pleas of the parties, I am of the view that the welfare of the child demands that at least access be permitted to the respondent/father so as to become acquainted with the child. The most important consideration in custody matters is the welfare of the child. The Trial Court has also noticed that the child has been living with the grandparents since his infancy. The child has his rights too and access to his father for a period of half a day would cause no harm. Accordingly the child, Master Sarthak will be picked by the respondent/father on Sunday i.e. 20th March, 2005 at 9.00 AM from the residence of the petitioners and shall be returned to his grandparents not later than 6.00 PM on the same day.
8. A perusal of orders would show that all along, father had been given liberty to go to petitioners house and meet the child there or that the father was allowed to meet the child at some common agreed place and have company of the child for an hour or two. This Court again called the child for interaction on 02.02.2006 and after interaction this Court observed as under: Pursuant to orders dated 18.1.2006, Master Sarthak @ Nanu is present in Court. I have spoken to him and he has conveyed his willingness to meet and interact with his biological father, the respondent herein. In that view of the matter, the father is permitted to interact with the child as and when and as frequently as he would prefer. He is allowed to take out the child for the day on a holiday but shall ensure that the child is brought back to the house of maternal grandparents in the evening on that day when he is taken out. The father shall also pay the school fees, the bus fare and all extracurricular expenses of the child in the school directly to the school. He can also interact with the school teachers and enquire about the progress and welfare of the child in the school. He shall also pay a sum of Rs.1500/- per month to the maternal grandparents of the child towards child's expenses towards clothing, food etc. This arrangement shall continue till the next date of hearing.

9. On 18.4.2006 this Court further directed as under: It is contended by counsel for the parties that in order to further facilitate the relationship between father and son, it is advisable that the child Master Sarthak Tyagi be permitted to spend alternative Saturdays and Sundays with the father. In view of what has been stated before me by counsel for the parties, I direct that the child Master Sarthak Tyagi be handed over on every alternative Saturday after school hours to the father-respondent herein, who will take care of the child during the intervening night and bring him back to the petitioners' house in the evening on Sunday. It is also pointed out that the child's parentage in the school has been wrongly mentioned. Petitioners to move the necessary application in the school to have the child's parentage correctly recorded.

10. Further, it was observed by the Court on 31.5.2006 that despite direction of the Court that the child be handed over to the father for overnight stay, these directions were not complied with and this Court had to observe as under:

The orders passed on the last date of hearing have not been complied with. It has been made clear to the counsel for the petitioners that if the petitioners do not assist in furtherance and implementation of the directions passed by this Court for the benefit of the child taking into consideration that the father is the natural guardian, this Court will be left with no option but to vacate the interim orders since the Guardian Court has already found that the petitioners were poisoning the mind of the child against the respondent (father). Learned Counsel for the petitioner assured this Court that the petitioners will cooperate in implementing the order. Taking into consideration the matter involves, the interest of the child, I consider it appropriate to appoint Ms. Sadhna Ramchandra as a Mediator/Facilitator for the purposes of monitoring and seeing how the directions of the Court can be implemented.

11. A perusal of this order would show that so long as the father was given liberty to meet the child under care and protection of the grandparents, the arrangement worked. The Court's directions that the child be given for overnight stay to the father at least for one day, were not complied by the petitioners and their effort has been to see that the father did not get the custody of the child. The matter was sent to mediation and the Mediator was requested to resolve the dispute between the parties. Despite sincere efforts, the Mediator could not resolve the dispute. Even the name of the child in the school was appearing as 'Sarthak Chopra' instead of 'Sarthak Tyagi', ultimately this Court had to issue following directions on 23.11.2006: On perusal of the report, I consider if appropriate to issue the following directions to Hans Vatika Day Boarding School, Ashok Vihar, New Delhi-110052, a unit of Kulachi Hansraj School:

i. The name of the child Sarthak earlier recorded as Sarthak Chopra be now recorded by the school as Sarthak Tyagi s/o Shri Nagesh Tyagi.

ii. The school should permit Shri Nagesh Tyagi also to interact with the teachers of the child for the progress and development of the child. The present arrangement for meeting of the child would continue to operate in terms of the report of the Mediator/Facilitator.

12. On 30.1.2008 this Court again had interaction with the child and passed following order:

I have had a meeting in chamber with the child 'SARTHAK'. Petitioner shall inform the respondent in writing the dates when the child would have vacations in school after the annual examination to be held sometime in March 2008 and the duration thereof. It is agreed by the petitioner also that the child could be permitted to spend up to 5 days with the respondent to enable the respondent to spend continuous time with the child and to take him out from Delhi

to some nearby place. Once the schedule of the child's school is communicated, either party may move an application to obtain specific orders.

13. It was argued against the father that the child was in the custody of grandparents from the very beginning, who were taking care and looking after the welfare of the child. The child was being left to their care and custody even during lifetime of their daughter. The parents of the husband had not accepted this marriage and had never invited husband and wife to their house nor did they visit the house of the husband. Even on the death of grandfather of the husband, the wife (Anupama) was not allowed to join in the last rites. She was not permitted to attend the marriage of her real sister-in-law. The parents of husband thus, had no love and affection for the child. The husband was in private job and had no time for the child and for this reason he had given up the custody of the child after death of her wife and had agreed that custody of the child should remain with the petitioners. The husband never came to visit the child after February, 1998. He was also facing criminal trial. He had shown cruelty to Anupama. Anupama in her suicide note had expressed a desire that after her death, the child should be brought up by her brother and therefore the custody should not be given to father of the child. The husband had explained that the affidavit was executed by him under duress and coercion. It was threatened that if he did not give the custody and execute affidavit, he shall be got imprisoned. He filed the petition for custody soon after giving of affidavit in February, 1998 itself since, he was made to sign this affidavit under pressure. The child was taken away by the grandparents when the husband was in disturbed state of mind due to death of his wife.

14. The Counsel for the petitioners has relied upon a recent judgment of Supreme Court in Civil Appeal No. 4960/2008 Nil Ratan Kundu and Anr. V. Abhijit Kundu delivered on 08.08.2008 wherein Supreme Court observed 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, 1980 (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 background 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.

15. It is submitted by the counsel for the petitioners that up till the time of death of Anupama, the child had been living with the petitioners, since the couple was not able to look after the child and used to visit the house of the petitioners and the child only at weekends. Thus, the order of the learned Guardian Judge giving custody of the child on the ground that the child was not

averse to living with the father was bad. The Trial Court failed to appreciate that the respondent and his family had abandoned the child and the father had executed an affidavit to this effect and did not care to meet the child thereafter.

16. The father in his petition has explained the circumstances under which, he had to execute the affidavit in favour of the grandparents. The circumstances shown by the father show that immediately after the death of the wife, he was threatened that he would be implicated in a case of suicide of his wife, if he would not give in writing that the custody of minor would remain with the petitioners/grandparents and he would continue to pay maintenance for the child to the grandparents. He stated that he became frightened of this threat and under this coercion and influence, he signed papers/affidavit in January, 1998 in favour of grandparents. He was also forced to sign certain other papers, which allowed parents of Anupma to have provident fund, balance salary, saving bank account etc. The child was in the custody of the grandparents. The respondent had been going to the petitioners' place and visiting the child and paying maintenance. When the grandparents of the child again started blackmailing him, he filed a complaint to the Police at Pushp Vihar on 28.2.1998. He was not allowed to meet the child and the grandparents also lodged an FIR against him in June, 1998 falsely implicating him in a criminal case regarding suicide of Anupama and he was denied total access to the child. He was told that the child would not be given to him therefore, he filed this petition on 5.10.1998 seeking custody of his son.

17. It is a fact that the respondent faced trial under Section 498A/306 IPC and was acquitted of the charges. The State had filed a Criminal Revision being Cr.L.P.No. 55/2004 against the order of the Trial Court.

18. It is undisputed that the Court has to keep in mind the welfare of the child as a paramount consideration while deciding the custody matters, this is what the Trial Court did while passing the order on 15.11.2000. The Trial Court categorically observed:

13. x x x x x. Merely because the petitioner's father was against the marriage in itself cannot be a ground to hold that even now they would not accept the grandchild. Much time has flown by since then and it cannot be said that the petitioner is not capable of having the custody of the child. The petitioner is earning Rs.7,000/- per month and suffers from no disqualification. Even though the respondents may be having a flat of their own and respondent no.1 may have retired from the Senior position in the Government, but that in itself cannot be a ground to decline the custody of the child to the petitioner. It has been consistently held that it is not the economic affluence of a party which is the sole ground to determine the custody, but it is the welfare of the child which is of paramount consideration. The above discussion clearly shows that the petitioner is the natural father of the child and there is now circumstances what to talk of exceptional circumstances which justifies the deprivation of the custody of the child to the petitioner. The child is about 4 years of age as on date, his date of birth being 25.11.1996 and at this tender age, he requires the tender love, care, affection and guidance of his father.

14. In this regard, it is pertinent to refer to the statement of the child which was recorded in the Court on 16.9.2000. In his statement, the child has stated that he is studying in Lower K.G. and is living with his mother Brij Rani, father R.M.Chopra (who are the respondent/grandparents), Mama Ravi and Mama Richi. The child has further stated that he does not know Nagesh, but when the petitioner was called inside the chamber, the child recognized that he is Nagesh, but did not know him and stated that he has seen him before. He has further stated that he was at the house of Summi, Nagesh had called him up on

telephone and wanted to talk to him, but Summi Anti hold him to go back to his house. The child has further stated that he had also talked to Nagesh and given his name to him. The child has stated that he will not go to Nagesh as his 'Mummy' and Richi Mamu had told him not to go to bad people and that Nagesh is a bad man. His Mamu had told him not to meet Nagesh. The child has further stated that Nagesh has never stated anything to him and that he will never meet Nagesh as he has been told by his Mama that Nagesh gave him poisoned cake. He has further stated that he will not meet Nagesh as Mumu will beat him. He cannot go as Mumu will have tell him to go to Nagesh. It is not in dispute that since February, 98, the petitioner has not been able to meet the child. The present petition has been filed on 5.10.98 itself. The statement of the child shows that Nagesh had tried to contact the child, but had not been able to meet him. In these circumstances, it is not surprising that the child has not been able to recognize the petitioner. However, from the statement of the child, it is abundantly clear that the child is being tutored and poisoned against the petitioner by his grandmother/respondent no.2 and maternal uncle, so much so that the child is not willing to go to the petitioner for the sole reason that he has been threatened by his Mamu in case he meets Nagesh. The child has also stated that his Mamu told him that Nagesh gave him poisoned cake. On 27.11.99, the child had been brought to the Court by the respondents to meet the petitioner for the celebration of the birthday of the child. It is in this context that the child has been told that it was poisoned cake which was brought by the petitioner for the child. In the said Order Sheet dated 27.11.99 it has been observed that respondent no.2 has stated that respondent no.1 has replied the specific Court query that he will not let the petitioner meet the minor. From the statement of the child, it is clear that he is being tutored and poisoned by the respondents and the family members against the petitioner and that the child has nothing against the petitioner. The child as on date is of tender age of 4 years and there is no misconduct or circumstances against the petitioner to disentitle him from the custody of the child. No doubt, the child has been living with the respondents since his infancy, but the child is still 4 years of age and can easily be handed over to the petitioner-father. It may be highly disturbing for the respondents-grandparents to hand over the custody of the child to the petitioner-father, but in the facts and circumstances of this case, it is in the welfare and interest of the child if his interim custody is granted to the petitioner-father. The cruel hands of destiny have deprived the child from the tender love, care and affection of his mother, but the human- factors and emotions of grandparents cannot be allowed to deprive the child of his father as well.

19. The concept of welfare of a child may differ from person to person and from judge to judge but there is no doubt that the sole consideration, which the trial Court took into account was the welfare of the child. The child at that time was of tender years of age. His statement recorded by the trial Court showed that the child was being poisoned by his grandparents against his natural father, he was not even told that he had a natural father. He referred to natural father by his name 'Nagesh'. The grandparents were not allowing him to talk with his natural father on telephone even and they were telling him that the natural father/respondent was a bad person. The age of the child at that time was hardly 04 years. The Trial Court rightly came to the conclusion that if at that tender age the child was given in custody of the father, he would adopt to his new custody and environment soon. He should not be deprived of love of his natural father. It cannot be said that all these considerations taken into account by the Trial Court were alien to the welfare of the child. When a child is of tender years of age, he may not be knowing difference between parents and grandparents but as he grows and looks around, watches the



world and finds in the neighbourhood and in the school that there is difference between parents and grandparents, between maternal uncles and parents, many questions are bound to agitate the mind of this tender age child. Looking into the fact that grandparents had not even informed the child that he had a father and that they were his grandparents, would naturally bring into the mind of the judge that the development of the child was not on the right course and he was being deliberately poisoned against the father.

20. The child at that time was 04 years of age and now he is around 12 years of age, his custody had all along been with the grandparents due to stay granted by this Court. It is not known what the child has been tutored about the father, but the attitude of the child even during his visits in this Court has not been very receptive to the father. It seems that the child has been told to be cautious while uttering words in the Court and not to speak in the Court much and that is the reason when the child was first called for interaction with the Court he did not open up, although he was at that time around 06 years of age.
21. The grandparents saw to it that the child did not identify himself with the father. The name of the child in the school was kept as 'Sarthak Chopra' as if he was sired by some 'Chopra' and not by the respondent. This Court ultimately had to issue directions to the school to change the name of the child to 'Sarthak Tyagi' from 'Sarthak Chopra'. It is only after years of litigation that under the directions of this Court, father could have custody of the child for 04 days so far. The entire proceedings of this Court till now show that the attitude of the grandparents had been to deprive the respondent of the custody of his son and in this process to deprive the child of love and affection of the father. The petitioners, it seem had all along been nurturing the feeling that it was respondent, who was responsible for the death of their daughter. The suicide note was also referred to during arguments. This impression of respondent being a killer is being nurtured despite the fact that respondent was acquitted of the charges of 498A/306 IPC by the Court of competent jurisdiction. The petitioners seem to use the child as a tool against the respondent. Had it not been so, the petitioners would have encouraged the child to have interaction with the father and the aim of the petitioners would have been that ultimately the child should be in the custody of his father after some time, but the aim of the petitioners seems to be that the child should remain in the clan of 'Chopra' as a 'Chopra' and not as a 'Tyagi'.
22. Every Court, while deciding the custody matters, has to consider the welfare of the child as a prime factor. While considering the welfare of the child, the Court has to give due weightage to all the circumstances such as the child's ordinary comfort and contentment, his intellectual, moral and physical development, his health, education, general maintenance etc. Apart from that the Court has also to give due weightage to the emotional considerations, social set-up, care, attention, career build-up and bringing up of a child as a good human being. The Court has to ensure that the child must live in an atmosphere which is congenial and healthy for his growth and inculcates values of life in his. He gets proper love and affection necessary for his development, the guardians provide him necessary moral boosting etc. Where the child is under constant strain and his mind is full of questions which are not answered properly and he is only shown one side of the picture, his development is bound to be affected.
23. There can be no substitute for parents of a child. Where a father dies, the child is brought up by the mother and where a mother dies the child is normally brought up by the father. Grandparents cannot substitute the love and affection which is given by a father or mother and the anxiety which a natural father would have to see that his son rises in life and chooses a career of his own choice. A father would do overtime/part-time job to earn some extra money so that his son/daughter may study in a better school. Poor parents normally see to it even if they have to

go hungry their children get proper food even at the cost of their own health. They see to it that their children get milk even if they can hardly afford it. A father would do all extra effort to see that his son/daughter does better in life than he himself has done. This normally cannot be expected from any other person howsoever affluent he may be, howsoever rich he may be and howsoever related he may be with the child. There may be exceptions but exceptions do not make rule. I, therefore, consider that the decision of the Trial Court was not bad and was a right decision to handover the custody of the child at the tender age to the father. The emotional disturbances of the child would have been for a short period and the child would have adopted to the new circumstances.

24. However, since this Court had stayed the decision of the Trial Court and the child had all along now been living with the grandparents; he is now aged 12 years he has become somewhat mature from the age of 04 years; his attitude also have somewhat hardened; he must have developed emotional attachments and giving of exclusive custody of the child at this age to the father may create emotional problem and disturbances to the child. Since the child has already lived for few days with the father, I consider that it would be appropriate that an interim arrangement is directed so that the ego of grandparents does not stand in the way of child's growth and he is not deprived altogether of love and affection of a father.
25. It is, therefore, directed that during Dusshera holidays and winter vacations, the custody of the child be given to the father for a period of one week each spell of holidays and during summer vacations the custody of child be given to father for a period of one month. The father will continue to bear the education expenses etc. as he already had been doing. The child is presently in day care school. His grandparents are ageing. After the annual examination, which may take place in February/March, 2009, the custody of the child be handed over to the father for a period of 15 days and thereafter the child be again interviewed by the Trial Court. If the child is agreeable, the father would be at liberty to change the school of the child near his home and have the custody of the child with him. If the child is not agreeable to change of the school, the custody of the child shall be given to the father during vacations as directed above. This arrangement shall continue for all vacations till the case is settled finally till there is any change in circumstances. The grandparents shall inform the father one week before start of the vacations, the schedule of vacations and the date of handing over custody. The father shall take the child from house of the grandparents and after interim custody every time leave the child back at grandparents' house.

With these directions, this petition is disposed of.

September 25, 2008

SHIV NARAYAN DHINGRA, J.

CM(M) No. 752/2000 Ram Murti Chopra and Anr. v. Nagesh Tyagi