



HIGH COURT OF CHHATTISGARH, BILASPUR

FA(MAT) No. 21 of 2019

1. Riyaz Mohammad S/o Ismail Sayed Mohd., Aged About 38 Years, Permanent Address - Medayl Veedu, M.C. Street, Balrampuram, Thiruvanthapuram Kerala At Present R/o Flat No. 410, Azizi Feiroz Jabalali 1 Dubai (U.A.E.).

---- Appellant

Versus

1. Smt. Sofia Khan W/o Riyaz Mohammad, Aged About 29 Years, R/o House Of Gani Khanji Noorani Chowk, Raipur (Chhattisgarh).
2. Ku. Abru Riyaz D/o Riyaz Mohammad, Aged About 5 Years, Minor, R/o House Of Gani Khanji Noorani Chowk, Raipur (Chhattisgarh).

--- Respondents

For Appellant : Mr. Tanmay Thomas, Advocate appears
alongwith Mr. Keshav Dewangan, Advocate.

For Respondents : Mr. P. Acharya, Advocate.

Hon'ble Shri Justice Goutam Bhaduri

Hon'ble Shri Justice Sanjay S. Agrawal

Judgment on Board

Per Goutam Bhaduri J.

06/02/2024

- 1) This appeal by the appellant/father under Section 19(1) of the Family Courts Act, 1984 read with Section 47 of the Guardians and Wards Act, 1890 arises out of an order passed on 14/08/2019 by the First Additional Principal Judge, Family Court, Raipur (C.G.) in a proceeding bearing CMC No. 95/2017 wherein the application filed by the appellant/father for custody of the minor girl was dismissed.
- 2) Brief facts of the case leading to filing of an application under Section 25 of the Guardians and Wards Act by the appellant for the custody of his daughter Ku. Abru from the respondent/Sofia



Khan-the mother, are that the parties were got married on 10/08/2009, thereafter the appellant went to Dubai and came back to India in 2013. Again the wife alongwith the husband went back to Dubai in 2013. The child was born on 19/02/2014 and thereafter in 2016 the mother came back with the child because of certain matrimonial dispute. Later on, the parties landed into a dispute regarding custody of the minor child. Once the husband forcibly took back the custody of the child which led to filing of a habeas corpus petition by the mother. By the order of this Court on 07/11/2016 the child was handed back to the mother. Thereafter an application under Section 25 of the Guardians and Wards Act was filed. The averments in the application seeking custody would show that the parties entered into a matrimonial dispute as they could not get along and allegations have been attributed to the wife on different issues.

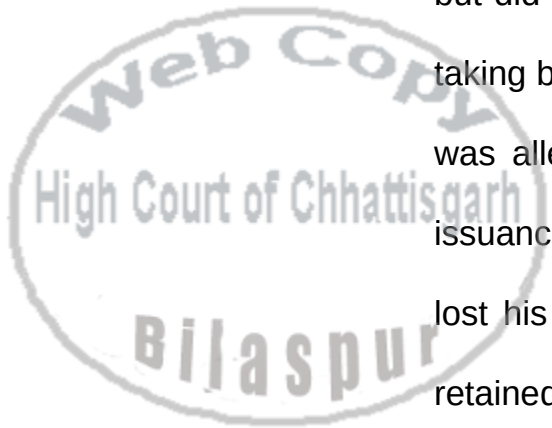
3) The husband alleges that he was not allowed to meet the child and the primary averment was made that after the birth of child it was discovered that she was suffering with a kidney disease which the mother was unable to treat. The husband further stated that since he wanted the child to grow up as a healthy child, as such the custody of the child would be necessary in the hands of the father which would be in her best interest alongwith the other ancillary benefits to provide her the best education and other amenities. It was further stated that since the wife teaches in a Kindergarten she goes for the job at 08:00 AM and roams around alongwith her male friends, therefore, she will not be able to take care of her child. Further, certain allegation assassinating the character of the





wife was also made. It was stated that the interest of the child would be better in the hands of the father, therefore, the custody may be handed over to him.

- 4) Per contra, the mother denied all the allegations. It was stated that when she was found to be pregnant at Dubai she was subjected to sonography test and having found that the child in womb is a girl child, all force were exerted on her to abort the child. She further stated that because the husband and wife could not get along after the birth of child, she came back to India from Dubai. Narrating an incident of 26/09/2016 she states that the husband took the child but did not return and having inquired it was informed that he was taking back the child namely Abru with him. When it led to inquiry it was alleged that the husband wanted to take back the child by issuance of a duplicate passport after lodging an FIR that he has lost his passport. Further, the custody of child was sought to be retained on the basis of an ex-parte order for custody of the child which has obtained from Dubai Court. This led to filing of a habeas corpus petition before the High Court by mother. The High Court is after adjudication directed to return the custody of the child and handed over it to the wife. It was further stated that the ground on which the husband wanted to take back the child projecting the ailment of the child is only a method to get the custody of child as the treatment of the child is very much available/possible in India. She stated that the welfare of the child is better in the hands of the mother, therefore, the petition for custody may be rejected.
- 5) The Court framed the issues and on behalf of the appellant, he led his evidence and the wife examined herself. The learned Family

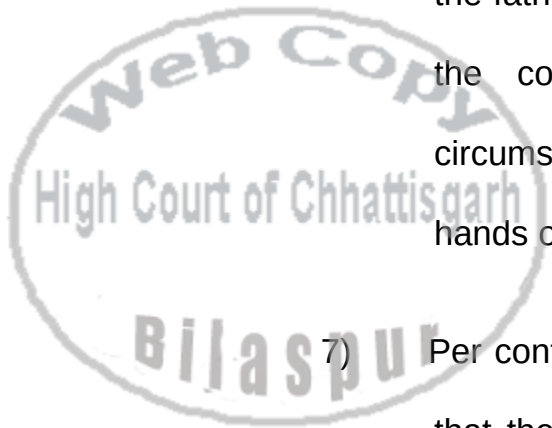




Court has dismissed the petition of the father seeking custody of the girl child. Hence, this appeal.

6) Learned Counsel for the appellant would submit that the evidence is ample on the record to show that wife was not caring and even was not able to take care of her matrimonial home. He would further submit that the evidence led by the husband remained unrebutted to the issue that the child was suffering with a serious disease and with all bonafide, the husband-father wanted to treat her. He further submits that he has sufficient means to support her, therefore, the custody of the child would be better in the hands of the father. He went through the statement of the husband to show the conduct of the wife and submits that under these circumstances, the custody of the child would be better in the hands of the father.

7) Per contra, learned Counsel for the respondent wife would submit that the conduct of the appellant would demonstrate the state of affair. He would submit that after the child was born at Dubai and wife came back to India, on a particular date the husband tried to abduct the child by saying that he wanted the company of the child for a while. But he did not come back. It shows that it was on the basis of the ex-parte order obtained at Dubai to give the custody of the child to the husband. He would further submit that during the pendency of this appeal, pursuant to the order dated 06/03/2020 of this Court the child was subjected to examination by AIIMS by the top medical expert and according to them, the treatment of the child is very much possible in India and it is not so complicated for which predominantly the husband wanted the custody. He submits





that the paramount interest of the child would be better in the hands of the mother who takes care of the child and till date no sign has been shown by the husband to take care of the child by monetary support or otherwise. Therefore, in these circumstances, the order of the learned Family Court is well merited which does not call for any interference.

8) We have heard learned Counsel for the parties and gone through the averments made in the application under Section 25 of the Guardians and Wards Act as well as pleadings of the parties.

9) After going through the pleading in its entirety, it shows that the primary projection was that of assassination of the character of the wife to show the conduct. The primary ground which is shown for custody was further lamented showing medical treatment and for the ensuing expenses could be incurred therein. It was further stated that the respondent-wife and their family members run after the money and use the abusive language and the husband would be in a better position to take care of the child for her upbringing. The statement of father/appellant is also verbatim the similar. The pleading and the evidence led show that the script has many flaws as the effort was to assassinate the character of wife and the family members of wife, as collective rituals are not followed by wife. What was necessary to consider was the paramount interest of the child. Though the different averments have been made but it was for the medical treatment of the child which was highlighted. In a child custody dispute, the acquisitive expectation of a parent and gulf of paramount consideration of child stand on different consideration.





- 10) The Bench of this Court in a child custody matter i.e. **FAM No. 185 of 2019, Lalit Kumar Jatwar Vs. Smt. Sushma Jatwar**, at paras 6 and 7 in its judgment dated 03/02/2022 held as under:-

"6. In cases of custody of child, the society values are riddled with contradiction. The courts have however never missed the finer point of paramount issue of welfare of the child. The Hon'ble Supreme Court has reiterated time and again, that the welfare of the child would be of paramount consideration. In a judgment **Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and Others reported in (2019) 7 SCC 42**, it has been held that the court while deciding custody cases of the child, it is not bound by the mere legal right of the parents or guardians. It held that though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning the custody of the minor child. Therefore, the paramount consideration should be the interest and welfare of the child. The Hon'ble Supreme court in the aforesaid judgment reiterated the view taken in **Nil Ratan Kundu Vs. Abhijit Kundu reported in (2008) 9 SCC 413** wherein the court held that paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favorable surroundings.

7. Further the Supreme court in the case of **M.K. Hari Govindan Vs. A.R. Rajaram reported in 36 2003 onLine Mad 48 : AIR Mad 315** reiterated the view taken that custody cases of child cannot be decided on documents, oral evidence or precedents without reference to "human touch". It held that "human touch" is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience. Further in the case of **Gaurav Nagpal Vs. Sumedha Nagpal reported in (2009) 1 SCC 42** at paras 30, 32, 36, 37, 40, 50 and 51 the supreme court has held as under:-

"30. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is 'welfare of the child'.





32. In *Mc Grath, Re*, (1893) 1 Ch 143 : 62 LJ Ch 208, Lindley, L.J. observed;

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded.

36. The Guardians Act, consolidates and amends the law relating to guardians and wards. Section 4 of the said Act defines "minor" as a person who has not attained the age of majority. "Guardian" means a person having the care of the person of a minor or of his property, or of both his person and property. "Ward" is defined as a minor for whose person or property or both, there is a guardian. Chapter II (Sections 5 to 19 of Guardians Act) relates to appointment and declaration of guardians. Section 7 thereof deals with 'power of the Court to make order as to guardianship' and reads as under:

" 7. Power of the Court to make order as to guardianship.- (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made--

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian,

the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.





37. Section 8 of the Guardians Act enumerates persons entitled to apply for an order as to guardianship. Section 9 empowers the Court having jurisdiction to entertain an application for guardianship. Sections 10 to 16 deal with procedure and powers of Court. Section 17 is another material provision and may be reproduced;

"17. Matters to be considered by the Court in appointing guardian.- (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

* * * * *

(5) The Court shall not appoint or declare any person to be a guardian against his will. "

40. Section 6 enacts as to who can be said to be a natural guardian. It reads thus;

"6. Natural guardians of a Hindu Minor.-- The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother;

Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;





(b) in the case of an illegitimate boy or an illegitimate unmarried girl--the mother, and after her, the father.

(c) in the case of a married girl--the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section –

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.--In this section, the expressions "father" and "mother" do not include a step-father and a step-mother. "



50. 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 Mousami Moitra Ganguli's case (supra), 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 govern the rights of the parents or 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. "

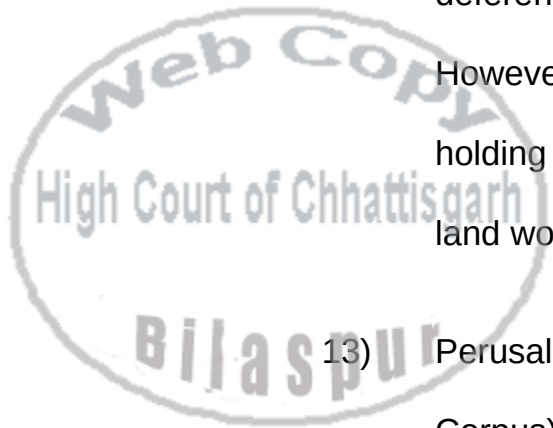
Therefore it is only the paramount consideration of the child that would be the deciding factor."



- 11) The evidence on record would show that after the mother came back to India, the father while exerting his visitation right tried to take away the child from mother. That led to filing of a Writ Petition (Habeas Corpus) No. 16/2016 by mother which is on record, wherein orders were passed on 07/11/2016 in favour of the mother.

- 12) Perusal of the order would show that the husband tried to justify the custody of the child on the basis of an ex-parte order passed by the Dubai Court at UAE in favour of the father/appellant. The Court in its order observed that each country must give due deference to the order passed by the Courts of different countries. However, since the appellant father and the respondent wife were holding the Indian citizenship, therefore, it was held the law of this land would prevail.

- 13) Perusal of the order dated 07/11/2016 in a Writ Petition (Habeas Corpus) No. 16/2016 would further show that during the proceedings, this Court directed the child to be examined in a reputed medical hospital namely MMI Narayana Hospital, Raipur and directed to obtain the opinion in respect of the condition of the child as she was suffering with a kidney problem. The order further reflects that the medical opinion which was obtained was that the ailment was not such a serious one which requires immediate treatment and the doctors advised for some tests which cant be conducted in India. The habeas corpus petition was allowed in favour of the wife wherein the custody of the child was handed over to the mother. It would be pertinent to note that the wife filed the petition of habeas corpus as the husband tried to take



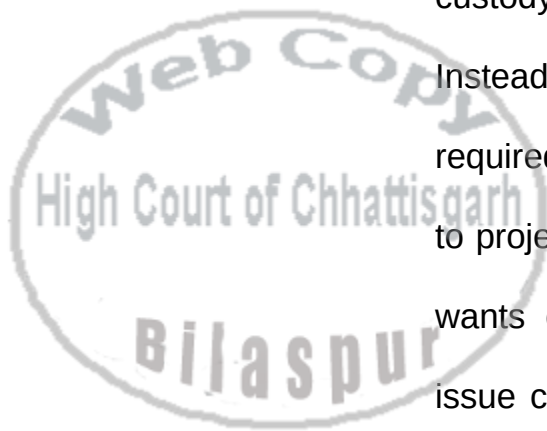


away the child on some false assurance for an intermittent period which was allowed but after taking the custody, the husband changed his stand to bank upon the order passed by the Dubai Court.

- 14) In the petition for custody, the appellant husband has mainly alleged to assassinate the character of the wife to highlight that the welfare of the child, would be better if she is given in custody to father. The nature of pleading and evidence by husband only shows misogyny runs deep into society. It is like a particular ideological school of thought battling for supremacy. In child custody case these pleadings and proof would be of little help. Instead of hectic parley and back room discussion the courts are required to consider, what is best for child. Though the father tried to project that the ailment cannot be treated in India, therefore, he wants custody, but in earlier habeas corpus petition when the issue came to the fore, the Court observed that according to the doctors opinion, the treatment was very much available in India even at Raipur.

- 15) During the pendency of this appeal on 06/03/2020 this Court directed the minor child to be examined by AIIMS Raipur for necessary test and clinical diagnosis and directed to submit the report. The report was submitted before this Court and following opinion was given :-

- “1. Diagnosis : Left Hydronephrosis due to Pelvic Uretic Junction Obstruction with delayed drainage and preserved cortical function with Hyptovitaminosis D.
2. Plan of Management : She will require CT Urography to evaluate urinary tract followed by Laproscopic Pyeloplasty.





3. She will need supplementation of Vitamin D in form of Vitamin D Sachet 60000 unit weekly for 10 weeks and tablet Calcium/vit D (500 mg/ 400 IU unit) OD.
 4. She will need regular follow up in Pediatric, Nephrology, Pediatric Surgery and Urology OPD.”
- 16) The submission of the respondent mother is that at present, the daughter is doing well, however, her treatment is being continued as immediate surgery is not required. The father though claimed custody of the child on medical ground but during the long pendency of the litigation between the parties, we do not find any positive effort made by the father by way of remittance of any amount or otherwise which could show that he really wants to take care of the child. The substance addition to evaluate the betterment of child in lap of father are required to be displayed by setting narratives. To evaluate the welfare of child, the positive acts done towards the child are interwoven.
- 17) The narrative put forth by the father about the medical care is not fortified by the action of father except oral testimonies. If the father was really concerned with the welfare of the child by providing her medical treatment, then he should have brought such circumstances before the Court to evaluate his conduct instead the character of wife was assassinated, therefore, it would be important to set a red line. The facts and circumstances of the case show that the father stays at Dubai alone whereas the mother’s family consists of their father the entire family is situated in India. Therefore, as per Indian tradition and culture, it can be presumed that the custody of the child would be better in the hands of her mother for her overall development as being a girl child she has to undergo certain biological changes with her





growing age. So in our considered opinion we do not find any circumstances justifying the custody of the child to be given to her father and we are in agreement with the finding recorded by the learned Family Court that the welfare of the child would be better in the hands of her mother.

- 18) In the result, the appeal being without any substance is liable to be dismissed and is, accordingly dismissed.
- 19) A decree be drawn up accordingly.

-Sd/-
(Goutam Bhaduri)
Judge

-Sd/-
(Sanjay S. Agrawal)
Judge





CASE NOTE

To claim custody of minor child, by the father can't be based on pleading which only shows misogyny runs deep into society like a particular ideological school of thought battling for supremacy.

अव्यस्क बच्चे की संरक्षकता का दावा पिता के अभिवचनों के आधार पर नहीं हो सकता, जो केवल समाज में पुरुषों द्वारा स्त्री जाति के विरुद्ध चले आ रहे द्वेष, जैसे कि विशेषतः पुरुष द्वारा स्वयं को श्रेष्ठ सिद्ध करने के वर्चस्व की लड़ाई के विचारधारा वाले सिद्धांत पर आधारित हो।

