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HIGH COURT OF CHHATTISGARH BILASPUR

Judgment reserved on : 26.09.2022

Judgment delivered on : 20.12.2022

FAM No.182 of 2018

Prabhat S/o Shiv Kumar Sahu, aged about 32 years, R/o Village Odia, Police Station and Tahsil Chuikhadan, District Rajnandgaon, Chhattisgarh.

---- Appellant

Versus

1. Minor [redacted] through guardian Maternal Grandfather Bisheshar Sahu, R/o Village Bhimpuri, Police Station and Tahsil Chuikhadan, District Rajnandgaon, Chhattisgarh.

2. Bisheshar Sahu S/o Dhur Singh Sahu, aged about 55 years, R/o Village Bhimpuri, Police Station and Tahsil Chuikhadan, District Rajnandgaon, Chhattisgarh.

---- Respondents

For Appellant : Mr. Hemant Kesharwani , Advocate

For Respondents : Mr. Abhishek Sharma, Advocate

Hon'ble Shri Goutam Bhaduri, Judge

Hon'ble Shri Radhakishan Agrawal, Judge

C A V Judgment

Per Radhakishan Agrawal, Judge

1. This appeal is by the appellant under Section 19(1) of the Family Courts Act, 1984 (for brevity, ‘Act of 1984’) against the judgment and decree dated 11.05.2018 passed by Link Court, Khairagarh of Family Court, Rajnandgaon, District Rajnandgaon Chhattisgarh in Civil Suit No.13-A of 2016

whereby application filed by the appellant under Section 6 of the Hindu Minority and Guardianship Act, 1956 (for brevity, 'Act of 1956') for grant of guardianship of his son, namely, Master Lomesh from respondent No.2, i.e. maternal grandfather of respondent No.1 (son) was dismissed.

2. Appellant is the father of respondent No.1 and respondent No.2 is maternal grandfather of respondent No.1.

3. The facts of the case, are that, appellant was married to Mohini Bai (since deceased) prior to 15 years back according to Hindu rites and rituals and from the wedlock, one son, namely, Master Lomesh was born. It was pleaded in the plaint that after the marriage, deceased wife was remained ill and suffered from back bone fracture. The appellant used to take care of her treatment. Suddenly, in the year 2014, deceased wife left the house of appellant and resided in her maternal house. When appellant visited his matrimonial house to take back of his wife, respondent No.2 misbehaved with him and deceased wife refused to come back with the appellant. Appellant tried many times to bring back her wife, but deceased wife refused to come back with him.

4. Subsequently, deceased wife filed an application under Section 125 of the Code of Criminal Procedure, 1973 before the Link Court, Khairagarh of Family Court, Rajnandgaon for maintenance. The appellant submitted his reply to the application, but on 01.02.2016, Mohini Bai was died.

Learned Link Court allowed the application and awarded Rs.2,000/- as maintenance vide order dated 11.05.2018.

5. Thereafter, the appellant filed an application under Section 6 of the Act of 1956 before the Link Court, Khairagarh of Family Court, Rajnandgaon claiming custody of the child *interalia* on the ground that he being the natural guardian of the child is legally entitled for the custody. It was further pleaded that his financial status is very good and it would not be proper to deprive the child from love and affection of father. In order to look after the welfare of the child, he is the most suitable person to take care of the child, hence, he is entitled to seek custody of his minor son.

6. Respondent No.2 (father-in-law of appellant) denied the allegations. According to him, soon after the marriage, appellant used to commit physical cruelty upon her daughter. Due to wrong treatment given to her, she died. Last rituals of Mohini Bai was performed by her father and not by the appellant. It was pleaded that since the birth of the son of the appellant, he was not bothered to meet his son. It was further pleaded that appellant has contracted second marriage. Respondent No.2 is maintaining the child with all due caution and care and the child is growing up well in an atmosphere which is conducive to its growth, therefore, he should keep the child with him.

7. On appreciation of materials placed on record, learned Link Court, Khairagarh of Family Court, Rajnandgaon dismissed

the application filed by the appellant.

8. Learned counsel for the appellant submits that Family Court ought to have considered the paramount interest of the minor child. The Family Court has failed to appreciate that father is a natural guardian and is entitled to get the custody of minor child. According to the appellant, though he has contracted second marriage, still it would be better in the welfare of the minor to be in the custody of him, and thus, impugned judgment and decree passed by Family Court cannot be sustained and deserves to be set aside.

9. Per contra, learned counsel for the respondents submits that the appellant is very careless towards the minor child and even does not bother to meet the child. He further submits that in fact, the appellant has no sufficient means of income to provide better education for the minor child. It is contended that impugned judgment and decree passed by the Family Court is well reasoned, which does not call for any interference.

10. We have heard learned counsel for both the parties and perused the record of the Family Court as well as the documents attached with the appeal.

11. Before proceeding to deal with the merits of the case, it would be appropriate to notice the principles which govern decision on dispute concerning custody of child.

12. As per Section 13 of the Act of 1956, in the appointment or declaration of any person as guardian of a Hindu Minor by a

Court, the welfare of the minor shall be the paramount consideration. Under Section 17 of the Guardians and Wards Act, 1890 (for brevity, 'Act of 1890'), the Court is under a duty to appoint the most suitable person amongst the rival claimants for guardianship, although a person who under the personal law would be entitled to the custody of the child in preference to any one else. The scope of Section 17 of the Act of 1890 is that the Court has to see who of the several applicants has a preferential right to be appointed as guardian of the minor under the personal law keeping also in view the welfare of the minor. The Court should be guided by the sole consideration of the welfare of the minor.

13. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force.

14. The Supreme Court in **Sumedha Nagpal v. State of Delhi and Others** reported in **(2000) 9 SCC 745** while interpreting the proviso to Section 6(a) of the Act of 1956 held that decision on the question of custody should be made bearing in mind the welfare of the child and it cannot be made simply on the basis of right of the parties under the law, and observed in paragraphs 4 and 5 of the judgment as under:

> "4. Even at this stage, Shri D. D. Thakur, the learned Counsel for the petitioner laid great emphasis that we should not shirk our task at least with respect to the limited question of

> ordering restoration of the custody of the minor child to the mother. He submitted that though Section 6 of the Act recognises guardianship of the minor child with both the parents, exclusive right of the mother is recognised in respect of the custody of a minor child below five years. This legislative recognition of the maternal instinct should be honoured by us by treating the custody of the child with the father as illegal and the custody should be handed over to the mother pending the proceedings suggested by us earlier in the course of this order.
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> 5. In deciding such a question, what we have to bear in mind is the welfare of the minor child and not decide such a question merely based upon the rights of the parties under the law. In the pleadings and the material placed before us, we cannot say that there is any, much less clinching, material to show that the welfare of the minor child is at peril and calls for an interference. The trauma that the child is likely to experience in the event of change of such custody, pending proceedings before a Court of competent jurisdiction, will have to be borne in mind. We are conscious of the emphasis laid by the learned counsel for the petitioner that the lap of a mother is the natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same, but still we feel that at this stage of the proceedings it would not be appropriate for us to interfere in the matter and leave all matters arising in the case to be decided by an appropriate forum irrespective of whatever we have stated in the course of this order. Even though we have dealt with the contentions raised by Shri D.D. Thakur as to grant of interim custody to the petitioner, we should not be understood as having held that a petition would lie under Article 32 for grant of custody of a minor child; we refrain from examining or deciding the same."

15. The Hon'ble Supreme Court in the case of **Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Another** reported in **(1987) 1 SCC 42** while dealing with Sections 7 and 17 of the Act of 1890 has held that when a question arises before a Court pertaining to custody of a minor child, the matter has

to be decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare, of the minor.

16. The Hon'ble Supreme Court in case of **Athar Hussain v. Syed Siraj Ahmed and Others** reported in **(2010) 2 SCC 654** has held in paragraph-44 as under :

> “44. The second marriage of the appellant, though a factor that cannot disentitle him to the custody of the children, yet is an important factor to be taken into account. It may not be appropriate on our part to place the children in a predicament where they have to adjust with their stepmother, with whom admittedly they had not spent much time as the marriage took place only in March, 2007, when the ultimate outcome of the guardianship proceedings is still uncertain."

17. Reiterating the well settled legal position that while deciding the dispute pertaining to custody of minor, Courts should keep in mind the paramount interest of the minor, the Supreme Court, in yet another decision rendered in **Purvi Mukesh Gada v. Mukesh Popatlal Gada and Another** reported in **(2017) 8 SCC 819**, has held that it was incumbent upon the High Court to find out the welfare of the children before passing the order regarding custody because the welfare of the child is the supreme consideration in such matters.

18. While dismissing the appellant’s prayer for custody of his son, the Family Court has observed that neither the appellant nor his parents have ever enquired about the child nor visited even on any singular occasion, and therefore,

merely because father (appellant) is the natural guardian, the custody of minor child cannot be handed over to him.

19. Prabhat Sahu – father of respondent No.1 has examined himself as AW-1, who in his evidence has stated that he was married to Mohini Bai prior to 15 years back and from the wedlock, one son, namely, Master Lomesh was born. He further stated that soon after marriage, his deceased wife was remained ill. He stated that suddenly, in the year 2014, deceased wife left his house and resided in her maternal house and when he visited his matrimonial house to take back of his wife, respondent No.2 (father-in-law) misbehaved with him and deceased wife refused to come back with him. Appellant tried many times to bring back her wife, but deceased wife refused to come back with him. Deceased wife filed an application under Section 125 of the Cr.P.C for maintenance, in which, he had submitted reply, but subsequently, on 01.02.2016, Mohini Bai was died. In cross-examination, he has stated that her wife used to live in his maternal house at Bhimpuri with his son. He further stated that his in-laws forcefully took her wife to their house. Respondent No.1 was minor and respondent No.2 is taking care of his minor child. In paragraph-15, he has stated that Nirmala Bai is the real mother of his wife and his in-laws is taking care of the minor child. He also stated that he was having no means of income.

20. Likewise, Shivkumar (AW-2), Dukalu (AW-3) have stated in

their evidence that after the death of Mohini Bai, Lomesh is being looked after by his maternal grandparents. They further stated that their village Odia is a very small village and Bhimpuri is a big village. There were 12 members in the family of the appellant and everyone lives in a joint family. They lastly stated that during the treatment, Mohini Bai was died in the year 2016.

21. Respondent No.2 - Bisheshar has examined himself as DW-1, who in his evidence stated that Minor Lomesh is his grandson. He stated that appellant used to commit cruelty upon his daughter, of which, she was resided with him. Lomesh is being taken care by him and his wife. He further stated that appellant was performed second marriage with Durga Sahu, and from the wedlock, one child was born. Appellant has never ever come to meet his wife and child and even he was only attended the last ritual of his daughter. Appellant was an independent person and due to continuous harassment upon her daughter, she died. He lastly stated that his village Bhimpuri is a big village from Odia and there is sufficient means of getting higher level of education. In cross-examination, he has stated that her daughter has two children from appellant, one of whom is with appellant.

22. Likewise, Mannu (DW-2), Hinchha (DW-3) and Ashok (DW-4) have reiterated the evidence of Bisheshar (DW-1). They stated in their evidence that appellant has performed second marriage and due to continuous torture and harassment

upon Mohini Bai, she died. They further stated that Lomesh is being taken care by his maternal grandparents since his birth and appellant is never bothered to meet his minor child.

23. On 21.09.2022, this Court had made a specific query from the appellant that he ever met his child since from his birth. In reply, appellant had admitted that he never met his son after his birth and meet first time in the Court today itself, i.e., on 21.09.2022.

24. Thus, it really becomes important that when the appellant had no love and affection for his newly born son, nor any effort was made by him seeking his custody soon after his birth, it does not impress our judicial conscience that the appellant is really interested in the well being of his child.

25. Now reverting to the facts of the instant case, it is not in dispute that the child is in the lawful custody of respondent No.2 since the death of the mother, the appellant had contracted second marriage, the minor has not spent any time with his father till now and remained with respondent No.2/maternal grandfather for a long time and is growing up well in an atmosphere, which is conducive of its growth.

26. In the pleading and the material placed before us, we cannot say that there is any, much less clinching, material to show that the welfare of the minor child is at peril and calls for an interference. It is also not shown that the minor child is not happy with his maternal grandparents who is taking every care for his welfare.

27. The learned Family Court is fully justified in observing that merely because the appellant is natural guardian of his minor son, the issue of custody cannot automatically be decided in his favour. The welfare of the minor is a proposition, which depends on a host of factors. Sufficient means to raise the minor is one of the factors, which governs the issue of welfare of minor, but that cannot always be the sole determining factor. If the mother or father, who is seeking custody of the minor does not have attachment with the child in real sense, it will discourage the Court to direct handing over custody to such appellant.

28. In view of the above, the impugned judgment and decree rendered by the Link Court, Khairagarh of Family Court, Rajnandgaon is based on sound reasoning born from the facts and circumstances of the case, therefore, we are not inclined to interfere with the same and we see no reason to disturb the custody of minor child and give him in the custody of the appellant.

29. Learned counsel for the appellant, at this stage, argued that visitation rights may be granted to the appellant and he may be allowed to meet his minor child.

30. In turn, learned counsel for the respondents contested this argument by saying that when the appellant has never tried to visit or meet his minor child, he is not entitled for any visitation rights.

31. Having considered the submissions advanced by learned

counsel for the parties on the issue of allowing visitation rights and considering the facts and circumstances of the case, we are of the considered view that the appellant being the father and natural guardian is entitled to visit his minor child.

32. Accordingly, we direct that the appellant shall be allowed to meet his minor son, Master Lomesh once in a month before the Family Court, Rajnandgaon. The date and time would be fixed by the Family Court. Contact right by telephone/mobile phone would be provided once in a fortnight for 5-10 minutes. It is further directed that during such meeting, the parties shall maintain amicable atmosphere and shall not raise any dispute or quarrel.

33. As an upshot, the appeal sans merit is liable to be and is hereby dismissed. However, the appellant is allowed the visitation rights as mentioned supra. No order as to cost(s).

34. A decree be drawn accordingly.

Sd/-
(Goutam Bhaduri)
Judge

Sd/-
(Radhakishan Agrawal)
Judge

Yogesh