

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.480 of 2022

[REDACTED]

... .. Appellant/s

Versus

1. [REDACTED]

[REDACTED]

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Abu Bakar, Advocate
For the Respondent/s	:	Mr. J.S. Arora, Sr. Advocate
		Mr. Krishna Chandra, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 03-04-2023

Heard Mr. Abu Bakar, learned Advocate for the
appellant/wife and Mr. J.S. Arora, learned Senior Advocate
for the respondent/husband.

The Principal Judge, Family Court, Patna in
Guardianship Case No. 38 of 2022 by his judgment dated
3rd September, 2022 has conclusively opined that the
petition preferred by the respondent/father is maintainable
and based on valid cause of action and it would be more
beneficial for the child (a girl child aged 6 years) to remain



with her father/respondent in this appeal as the brother of the child is residing with the father.

Based on such opinion of the Family Court, it was ordered that the respondent herein shall be the guardian of the child and would have the physical custody of her but the mother/appellant herein shall have visitation rights during school holidays and important festivals at a proper or a suitable place viz. park which would provide healthy environment at Patna once in a month.

The aforesaid meeting shall be facilitated by the respondent/husband.

The wife has challenged the aforesaid judgment of the Family Court on various grounds.

Before dealing with those grounds, it would be necessary to cull out the circumstance under which the Guardianship case was filed by the respondent/father.

The appellant and the respondent were married in accordance with Hindu religious rites on 10.11.2008. The respondent suspected the fidelity of his wife and was also



troubled by her violent behaviour. The relationship at home always remained charged and strenuous. Nonetheless, two children were born out of the wedlock viz. [REDACTED] (Date of Birth 19.05.2011) and [REDACTED] (Date of Birth 19.05.2015).

Because of such strained relationship between the spouses, a case of divorce was filed by the husband/respondent. During the pendency of the case, the parties agreed to go for divorce but by mutual consent with certain conditions.

One of the terms of the consensus of the spouses was that the husband shall have the custody of the boy whereas the mother will keep the girl with her. It was also agreed upon by the parties that the parents shall have the right to meet the children.

It is the case of the respondent that within seven days of the decree of divorce, the appellant/wife solemnized marriage with one [REDACTED] This fact, itself, sent the respondent/husband worrying about the future of the girl,




who was only seven years by then and was in custody of the mother.

Shortly thereafter, the respondent was denied visitations.

One of the conditions for the grant of divorce was that the wife shall withdraw the complaint filed by her, which promise was never respected and money was demanded from the husband for withdrawing the case.

After the wife married aforesaid [REDACTED] a child has been born from that wedlock on 07.12.2021. The husband/respondent got a whiff that the girl is not safe with her mother because of an outsider in the family viz. her newly married husband. This suspicion was further concretized when on one occasion, the girl accompanied her brother to the house of the respondent and disclosed that the mother used to threaten her and [REDACTED]'s touch were not natural.



A POCSO case also was registered against , which is pending adjudication. Till date but no cognizance has been taken.

Vexed by this kind of a disclosure by the girl, the respondent/husband refused to let go the daughter to her mother, plodding the mother to file a *Habeas Corpus* petition before this Court *vide* Criminal Writ No. 189 of 2022, which was disposed of on 01.07.2022.

While disposing of such criminal writ petition, a Division Bench of this Court directed that the parties shall file appropriate application before the competent Court with respect to the custody/visitation rights under the provisions of ***Hindu Minority and Guardianship Act, 1956*** within a period of 10 days; whereafter the Court shall take up and decide the matter within two weeks by giving daily hearing to such case. The parties were directed to co-operate in the proceedings. It was also clarified by the Division Bench of this Court that the decision of the Family Court shall be based on a proper consideration of law, but the paramount



interest of the child has to be kept in mind. The Court could elect to have a medical opinion to work out an arrangement between the parties so that the issues are finally decided. Expert opinion could also be obtained by the Court in case it was found necessary. The Division Bench had also found some justification for directing that the newly married husband of the mother would keep himself away from the household for at least 14 days.

After having said that, a note of caution was sounded that the Court ought to take utmost care and to as far extent possible to account for the freewill of the child before any final order is passed.

However, while disposing of the writ petition, the Bench directed for the custody of the child with the mother in the interregnum.

In the proceedings, which ensued the Court recorded the statements of the parties and specially of the girl, who appeared to understand the basic questions which were put to her.



In her statement, she has disclosed that she was not happy with the mother and, if she stays with her, she will have to stay with the step-father. She also categorically said that she would like to reside with her brother at her father's house.

The Principal Judge, Family Court, Patna after analyzing various provisions of the ***Guardians and Wards Act, 1890***, especially Section 17 thereof, found that the best interest of the child would be to allow her to stay with her brother at her father's house with visitation rights to the mother.

While coming to this opinion, the Court took note of the fact that shortly after the divorce by mutual consent was effected, the mother re-married and that a child has already been born to the new parents.

The Court was constrained to observe that the child had not been studying while staying with her mother and in case she like the company of her brother, who is staying with her father without any complaints, it would be



better that the girl accompanies her brother at her father's house.

Mr. Abu Bakar, learned Advocate for the appellant/wife has submitted that the Court below accepted the statement of the appellant/husband as sacrosanct and also heavily relied on a one time statement by the girl, who appears to be tutored by the father as also her brother, who is only five years older to her.

The other ground raised on behalf of the appellant/wife is that it is a breach of mutual consent as it was clearly decided that the girl will stay with the mother and the boy shall stay with the father. This aspect has been completely overlooked by the Family Court.

Lastly, it has been urged that the Clinical Psychologist's report was accepted in the absence of any cross-examination of such doctor. He further submitted that the nature of the report itself evinces that the doctor had been won over by the father.



Taking exception to such arguments, Mr. Arora on the other hand, submitted that he was entitled to dispute the contentions of the appellant/wife on demurer which was allowed with reasons.

Mr. Arora further argued that true it is that the mutual consent document provided for the girl to stay with the mother but in the changed circumstances, it was not possible to give effect to the afore-noted condition.

After having heard the learned counsel for the parties and having interacted with the children and the parents, we find that a just decision has been arrived at by the Family Court, keeping the interest of the girl paramount.

Under normal circumstances, a girl child would be reared up in a better manner with her mother but in the present circumstances, even if the allegations are not ultimately found to be true, the better place to stay for the girl would be her father's house as the girl would have the company of her brother. The girl, in no uncertain terms, has expressed her desire of staying with her father.



We did not find that the girl was speaking after tutoring or that her only childly concern was to be in the company of her brother, who was only five years older to her.

She did not appear to be quite comfortable with the mother. This may be a temporary circumstance; nonetheless a very necessary ground to be factored in for the Family Court to opine and direct that the girl shall stay with her father.

We have no reasons to find such opinion to be bad in any manner whatsoever.

Mr. Abu Bakar's uncharitable comment on the doctor appear to us to be highly unwarranted. Fortunately, Mr. Bakar did not insist on such point.

We have also examined the certificate given by the Clinical Psychologist, viz., Dr. Smt. Binda Singh, who on interaction with the child found that she was having a feeling of inadequacy, insecurity and lack of confidence. She was fearful and was also longing for love. Thus, it was



opined by her that the girl needed emotional support and she feels safe in the company of her father and brother. The doctor also found that while staying with the mother, the child had not been learning anything.

The opinion of the doctor does not appear to be vitiated on any count whatsoever.

The Supreme Court in a number of cases has held that welfare of the child prevails over legal rights of the parties. Children are not chattels or playthings for the parents. Absolute right of either of the parents over the life and destiny of children has yielded to welfare and balanced growth of children.

[Refer to **Rajeshwari Chandresekar Ganesh Vs. State of Tamil Nadu and Ors. 2022 SCC Online SC 885; Anjali Kapoor Vs. Rajiv Baijal (2009) 7 SCC 322; Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840; Sumedha Nagpal Vs. State of Delhi, 2000 (9) SCC. 745 and Syed Saleemuddin v. Dr Rukhsana, (2001) 5 SCC 247].**

In **Vivek Singh v. Romani Singh, (2017) 3 SCC 231**, it was observed by the Supreme Court that a child



feels tormented because of the strained relationship between her parents and ideally needs the company of both of them. The choice, therefore, before a court is very difficult. However, even in such a dilemma, the paramount consideration is the welfare of child.

[Also refer to **V. Ravi Chandran Vs. Union of India & Ors 2010 (1) SCC 174; Dhanwanti Joshi V. Madhav Unde (1998) 1 SCC 112** and **Nithya Anand Raghavan Vs. State (NCT of Delhi) & Anr., (2017) 8 SCC 454.**]

The Court exercising *parens patriae* jurisdiction has to look at the child's comfort, contentment, health, education, intellectual development, favourable surroundings etc. He has thus to tread the delicate path very cautiously while deciding whether the father's claim in respect of custody and upbringing is superior or the mother's.

A special notice is required to be taken of the judgment of the Supreme Court in **Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673**, wherein it has been held that the welfare and interest of child and



not the rights of parents which is the determining factor for deciding the question of custody.

In the facts and circumstances of this case, we are absolutely satisfied that the girl will be happier in house of her father at present.

After having said that, we do indicate that this situation is not irreversible and would depend on the will of the child in future.

The visitation rights as directed by the Family Court shall be followed and facilitated by the parties.

There is no merit in this appeal.

The appeal is dismissed but without any order as to costs.

(Ashutosh Kumar, J)

(Harish Kumar, J)

krishna/shivank

AFR/NAFR	AFR
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