IN THE HIGH COURT OF MADHYA PRADESH AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE RAVI MALIMATH,
CHIEF JUSTICE
&
HON'BLE SHRI JUSTICE ANAND PATHAK

FIRST APPEAL No. 2526 of 2018

BETWEEN:-

1. **ANAND KUMAR S/O GOVERDHAN AHIRWAR, AGED ABOUT 60 YEERSA, OCCUPATION LABOUR, R/O LAHAR GIRD REEPARI BAJAR, JHANSI (UTTAR PRADESH)**

2. **SMT. KIRAN W/O SHRI ANAND KUMAR, AGED ABOUT 42 YEARS, OCCUPATION HOUSEWORK, R/O LAHAR GIRD, SEEPARI BAZAR, JHANSI (UTTAR PRADESH).**

.....APPELLANTS

(BY SHRIHARDAYESH KUMAR SHUKLA AND SHRI ROMESH PRATAP SINGH - ADVOCATES)

AND

LAKHAN JATAV S/O SHRI KAMLU JATAV, AGED ABOUT 28 YEARS, OCCUPATION GOVT. SERVANT, R/O BEHIND KOTHI NO. 27, AJAD NAGAR LALMATI, DISTRICT SHIVPURI (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI SURESH AGRAWAL – ADVOCATE)

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Reserved on : 13.10.2022
Pronounced on : 16 .11.2022

……..

This appeal having been heard and reserved for judgment, coming on for pronouncement this day, ***Hon'ble Shri Justice Anand Pathak*** delivered the following:

JUDGMENT

Instant First Appeal is filed under Section 19 of Family Court Act, 1984 against the order dated 22/11/2018 passed by Principal Judge, Family Court, Shivpuri in case No. 07/2018 (Guardian); whereby, application of respondent filed under Section 6 of the Guardian and Wards Act, 1890 has been allowed.

2. Precisely stated facts of the case are that respondent filed an application under Section 6 of the Guardian and Wards Act, 1890 (hereinafter shall be referred to as "Act of 1890") seeking custody of his son- Ayush, aged about 2 year 3 months with the submissions that his minor son was born on 13/1/2016 and after his birth, wife of respondent namely Mala alias Manjula went to her maternal home with his minor son, where she died (suicide) on 8/4/2017. Therefore, case against respondent at the instance of appellants under Section 304-B, 498-A, 506, 34 of IPC and Section 3/4 of Dowry Prohibition act was registered.

3. It was further alleged that he requires the custody of his minor son because his maternal grandparents are not looking after him properly with their meager financial resources and they are less literate, which have an adverse effect over the child. Appellants are keeping him aloof from love and affection of his son. He is able to maintain his child as he is a Govt. Employee, a Constable in Indo-Tibetan Border Police (I.T.B.P.). He is the natural guardian of the child. Therefore, custody be provided to him.

4. Present appellants (respondents in original proceedings) contested the case. According to them, criminal proceedings were pending under Sections 304-B, 498-A, 506 and 34 of IPC against the respondent and he may be

convicted therein. Respondent'sfather consumes liquor and his mother is differently abled. Coupled with this fact, respondent is in transferable job, therefore, he cannot look after his child properly. So far as financial condition is concerned, appellant No. 1 stated that he is a Contractor and have sufficient financial resources to bring him up.

5. Family Court after considering the rival submissions and evidence surfaced over the record passed the impugned order; whereby, respondent being father was found to be the natural guardian and looking to the welfare of the child gave his custody to respondent. Being aggrieved by the said order, maternal grandparents as appellants are before this Court.

6. It is the submission of learned counsel for the appellant that Court below erred in passing the impugned order and holding that respondent is entitled to get the custody of child; whereas, he is in I.T.B.P. by which he is required for long period of duty and his job is transferable. Therefore, in absence of any regular member to look after him, welfare of the child would be defeated. Appellant No. 1 referred his financial position while placing certain documents to show that recently he laid out a colony and sold the plots to purchasers. He is likely to earn around Rs. 1 crore from the said transactions, therefore, it is not the case, where appellants lack financial resources. Since birth, child is living with maternal grandparents and does not recognize his father. Rather, he has disliking for his father, therefore, on this count also, case of appellants gains ground. Child does not show any inclination to go his father's house and live with him, therefore, family Court erred in passing the impugned order. In support of his arguments, learned counsel for the appellants relied upon decision of Apex Court in the case of **Gaurav Nagpal Vs. Sumedha Nagpal, (2009) 1 SCC 42.**

7. Learned counsel for the respondent (appellant in original proceedings) vehemently opposed the prayer. According to him, respondent is in Indo-Tibetan Border Police and working as Constable and his pay slip which was considered by the Court below and found that respondent is financially capable enough to take care of his child and when child would be exposed to the life style of respondent; where, he lives in ambience of paramilitary forces, then his chances of growth would be better. Since respondent, as father is the natural guardian after death of child's mother, then custody deserves to be given to the father. Even otherwise, maternal grandmother of child is not original maternal grandmother but after death of original grandmother, his grandfather solemnized second marriage and therefore, present grandmother is step grandmother and not biological / real one. He supported the impugned order and prayed for dismissal of the appeal.

8. Heard learned counsel for the parties and perused the record.

9. This is a case; where, respondent / father moved an application under Section 6 of Act of 1890 which was allowed by the Court below and directed to handover the custody of child – Ayush to his father namely Lakhan Jatav (respondent herein).

10. While approaching the dispute in respect of custody of child, relevant provisions under Hindu Minority & Guardianship Act, 1956 (hereinafter shall be referred as "Act of 1956") are also to be taken into consideration. As per Section 2 of Act of 1956, the provisions of this Act shall be in addition to, and not, save asexpressly provided, in derogation of, the Guardian and Wards Act, 1890. Section 6 of the Act of 1956 talks about Natural Guardians of a Hindu Minor. Same is reiterated as under:-

> *"**6. Natural guardians of a Hindu minor.-** The natural guardian 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).”*

If the provisions of Act of 1890 and Act of 1956 are seen in juxtaposition then the conclusion appears is that the welfare of minor is paramount consideration while considering the custody, in appointment or declaration of a person as guardian of Hindu minor by a Court. Section 13 of Act of 1956 is reproduced for ready reference:-

> *“**13.Welfare of minor to be paramount consideration.-(**1) 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.*
> *(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of law relating to guardianship in marriage among Hindus, if the Court is of the opinion that his or her guardianship will not be for the welfare of the minor.”*

11. The Hon’ble Supreme Court had the occasion to consider this aspect time and again and reiterated in following words in the matter of **Tejaswini Guad and Ors. Vs. Shekhar Jagdish Prasad Tewari and Ors. (2019) 7 SCC 42**:-

*"**26.**The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. 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 custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.*

***27.** After referring to number of judgments and observing that while dealing with child custody cases, the 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 favourable surroundings, in Nil Ratan Kunda Vs. Abhijit Kundu, (2008) 9 SCC 413, it was held as under:-*

"49. In Goverdhan Lal v. Gajendra Kumar, 2001 SCC Online Raj 177, the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

50. Again, in M.K. Hari Govindan v. A.R. Rajaram, AIR 2003 Mad 315, the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The 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.

51. In Kamla Devi v. State of H.P. AIR 1987 HP 34, the Court observed:

"13. ... the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. 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 giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other.'

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

28. *Reliance was placed upon Gaurav Nagpal Vs. Sumedha Nagpal, (2009) 1 SCC 42, where the Supreme Court held as under (SCC pp. 52 & 57, paras 32 & 50-51):-*

"32. In McGrath, (Infants), In re (1893) 1 Ch 143 (CA), Lindley, L.J. observed: (Ch p. 148) 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.'

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 Mausami Moitra Ganguli vs. Jayant Ganguli, (2008) 7 SCC 673, 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.

(emphasis in original)

29. *Contending that however legitimate the claims of the parties are, they are subject to the interest and welfare of the child, in Rosy Jacob vs. Jacob A. Chakramakkal, (1973) 1 SCC 840, this Court has observed that:-*

"7. …. the principle on which the court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors."

(emphasis supplied)

12. In somewhat similar facts and circumstances of the case, Division Bench of Kerla High Court in the matter of **Munnodiyil Peravakutty Vs.Kuniyedath Chalil Velayudhan, AIR 1992 Kerala 290** has considered the question of custody of child and discussed the conditions for welfare of child. In that case also, father, a Sergeant in the Indian Army was found to be natural guardian of minor. Relevant discussion can be reproduced as it applies to a great extent to the present set of facts also. Para 15 is reproduced hereinbelow:-

> *"**15.** We will now attempt to balance the circumstances and judge which way the welfare of the child lies. The father, a sergeant in the Indian Army has a record of disciplined life. Secondly he has a regular monthly income which guarantees a continuous flow of money -- modest though -- which will enable him to look after the interests of the child. Thirdly he has demonstrated his urge to bring up the child and educate her under his supervision by taking a transfer to Kozhikode. Fourthly his parents, who live with him are in their 50's and therefore young enough to lend a helping hand to the father in his endeavour to look after the child, its schooling, food and health. These facts create the picture of a father willing and capable of looking after the welfare of the child. His awareness of the need to educate the child, regular income and presence of parents to lend a helping hand, assure that in his house Anisha's welfare will be best looked after.*
>
> *As against the factors set out above, there is no evidence of regular earning by the grandparents. The maternal grandfather is a humble coconut plucker which does not guarantee regular or adequate flow of income. This is not to suggest that a humble man cannot look after the child. But the economy is an important factor in the concept of welfare. The economic condition of the maternal grandparents does not endow them with the ability to meet adequately the responsibility of looking after the health and education of the child. Secondly the maternal grandfather is 76 years old and the grandmother is 65 years old. At such old age and with income, which is by no means adequate or regular, it is unlikely that they would be able to take the same amount and*

> *kind of care of the child as would the paternal grandparents and the father do. Thirdly, there is a mentally retarded son living with the maternal grandparents. There may be occasions when the grandparents due to their age, might leave the care of the child to the mentally retarded son. This certainly does not create a healthy atmosphere for a child to grow up."*

13. The above discussed legal position can be applied on the anvil of facts and circumstances of this case to reach to a just conclusion. In the case in hand, respondent / father is working as Constable in I.T.B.P., a paramilitary force and earning regular salary. Regular source of income guarantees a continuous flow of money, modest though, but certainly sufficient to look after the interest of child. Secondly, being a member of Indian Paramilitary Force, he leads a disciplined life and therefore, discipline would inculcate into the family set up and would help the minor to grow in disciplined manner which if compared to the life likely to be led with maternal grandparents then the difference wouldappear clearly. Thirdly, father has shown his keen interest to bring upon his child and take him under his supervision. Therefore, he moved the application before the trial Court and pursuing it here also. When both the parties were called by this Court and when father was asked about his position then he was very firm and interested in taking his child in his custody.

14. Beside that, being employee of Central Paramilitary Force, minor will get better exposure in life and would have access to different regions and cultures and therefore, growth of his personality would be more prominent in guardianship of his father rather than in company of his maternal grandparents.

15. Although, appellants raised the point regarding suicide committed by mother of minor and also referred the trial faced by respondent under

Section 304-B, 498-A, 506, 34 ofIPC and Section 3 /4 of Dowry Prohibition Act, but it is noteworthy that vide judgment dated 20/09/2022 (filed with I.A.No 4549/2022 by respondent under Order XLI Rule 27 CPC) passed in ST No. 190/2017, prosecution could not prove the case beyond reasonable doubt and therefore, acquittal was recorded in favour of respondent. Therefore, allegation of appellants, so far as apprehension of arrest of respondent because of pending trial is concerned, stands overruled. Vide judgment dated 20/9/2022 all accused (family members of respondent) stand acquitted.

16. One more glaring aspect deserves consideration is the fact that respondent has his parents in his household and despite ailments (age related) as tried to be projected by the other side, has no consequences in the present case because parents can take care of child in absence of respondent, especially when he goes out for duty.

17. Over and above, father as per Section 6 of Act of 1956, is Natural guardian of minor and since he is his biological father also, therefore, statute also favours the cause of respondent as father.

18. On the other hand, appellant No. 2- maternal grandmother of minor is step grandmother of child and not the real / biological one. Both are aged and age is not with them; whereas, respondent is young and age is with him.

19. Although, appellant No. 1 tried to demonstrate that he is having ample resources as Contractor but when he was called by the Court to establish his resources and regular income then he could not make sufficient explanation to bring home the fact that his finances are sufficient enough to match the growing requirement of minor with passage of time. Maternal grandfather in cause title of appeal memo has referred his occupation as Labour and now tried to project himself as Contractor and a person who has

enough land to his ownership to maintain the minor but no proof of steady income has been referred or established by the appellant No. 1.

20. When matter is tested on the anvil of welfare of minor and the comparative resources of the parties and emotional attributes involved in the case then after balancing of the totality of the circumstances, only one conclusion appears inevitable. The conclusion is that Ayush's welfare lies in living with his father. The judgment relied upon by the appellants move in different factual realm, therefore, not applicable in the present set of facts.

21. In the cumulative consideration and findings given, this Court is of the considered opinion that no occasion exists to interfere in the impugned order. Accordingly we confirm the impugned order and dismiss the appeal.

22. Before parting, it is made clear that after handing over the custody of minor to father, maternal grandparents will have visitation right to interact with child and to take note of overall wellbeing of the minor on every Saturday and Sunday between 11 am to 2 pm and / or any days and time mutually fixed by them. Respondent shall cooperate in this regard.

23. The appeal stands dismissed. No costs.

(RAVI MALIMATH)
CHIEF JUSTICE

(ANAND PATHAK)
JUDGE

jps/-