

**HIGH COURT OF MADHYA PRADESH****Bench: JUSTICE SHEEL NAGU & JUSTICE VINAY SARAF****Date of Decision: 18 JANUARY, 2024**

MISC. APPEAL No. 368 of 2020

**MANOJ GHODEHWAR ...PETITIONER****Versus**

- 1. YASHWANT MESHRAM**
- 2. PRATEEK GHODESHWAR (Minor through Guardian Yashwantraï Meshram) ...RESPONDENTS**

**Legislation:**

Section 16, 17, 19 and 25 of the Guardians and Wards Act, 1890

Section 6 of the Hindu Minority and Guardianship Act, 1956

**Subject:** Appeal against the custody of a minor child denied to the biological father and awarded to the maternal grandparents, focusing on the welfare of the child as the paramount consideration.

**Headnotes:**

Custody of Minor – Guardianship Dispute – Appeal against the order of First Additional District Judge, Waraseoni, rejecting the application for custody of the minor son under Section 25 of Guardians and Wards Act, 1890 – Trial court's decision based on the welfare of the child, considering the conduct of the appellant and the ability of maternal grandparents to provide care. [Paras 1, 4]

Welfare of Minor – Paramount Consideration – Emphasis on the welfare of the minor as the paramount consideration in custody matters – Reference to Section 6 of the Hindu Minority and Guardianship Act, 1956, and Section 19(b) of the Guardians and Wards Act, 1890 – Decision based on the welfare of the child rather than the legal right of the parents. [Paras 8, 9, 10, 11]

Preference of the Minor – Consideration of the minor's preference in custody matters – Section 17(3) of the Guardians and Wards Act, 1890, acknowledging the importance of the minor's preference if old enough to form an intelligent decision – The minor's desire to live with the maternal grandfather respected. [Paras 11, 12, 13, 15]

Judicial Observations and Precedents – Reference to Supreme Court judgments emphasizing the welfare and best interests of the minor as the

paramount concern in custody disputes – Factors influencing the decision include the minor's welfare, upbringing, educational opportunities, and overall growth. [Paras 14, 16, 17]

Decision Upheld – High Court upholds the decision of the First Additional District Judge, Waraseoni – Custody of the minor to remain with the maternal grandfather, considering the minor's welfare and preference – Appellant's appeal dismissed, but the option to seek modification in future based on changed circumstances remains open. [Paras 17, 18, 19]

#### **Referred Cases:**

- **Mausamui Moitra Ganguli vs. Jayant Ganguli (2008) 7 SCC 673**
- **Smriti Madan Kansagra vs. Perry Kansagra (2021) 12 SCC 289**
- **Rosy Jacob v. Jacob A. Chakramakkal (1973) 1 SCC 840**
- **V. Ravi Chandran (2) v. Union of India (2010) 1 SCC 174**
- **Gaurav Nagpal v. Sumedha Nagpal (2009) 1 SCC 42**
- **Vivek Singh v. Romani Singh (2017) 3 SCC 231**
- **Nil Ratan Kundu v. Abhijit Kundu (2008) 9 SCC 413**

#### **Representing Advocates:**

**Ashok K. Mishra for the petitioner**

**Sandeep Mahawar for the respondents**

#### **ORDER**

By the present miscellaneous appeal filed under Section 47 of Guardians and Wards Act, 1890, appellant has assailed the order dated 8.11.2019 passed in M.J.C No.03/2018 whereby learned First Additional District Judge, Waraseoni, District Balaghat has rejected the application filed by appellant under Section 25 of Guardians and Wards Act, 1890 (hereinafter referred to as "Act of 1890) for custody of his son Prateek - respondent No.2.

2. Bare facts of the case are that, appellant married to Reena on 7.5.2009 who is daughter of respondent No.1-Yashwantraji Meshram and respondent No.2Prateek born out of wedlock on 8.8.2010. Later on, marriage was dissolved by decree of divorce passed by First Additional District Judge, Waraseoni, District Balaghat and Reena solemnized second marriage and now living with her second husband. However, respondent No.2 is living with his maternal grand parents at village Koliwada. Appellant preferred

- application under Section 25 of the Act of 1890 for custody of respondent no.2 on the ground that respondent No.1 is not financially capable to maintain respondent No.2 and appellant being natural guardian and father of respondent No.2 is entitled for his custody.
3. Respondents filed reply denying allegations and prayed for dismissal of application on various grounds. Respondents alleged in their reply that appellant used to harass and torture the mother of respondent No.2 and therefore, she filed a petition for divorce, which was allowed. It is alleged that appellant never fulfilled the duty and liability of a father and welfare of the child will serve living with maternal grand parents. It is also stated that when respondent No.1 filed an application under Section 125 of Cr.P.C. for grant of maintenance, appellant preferred application under Section 25 of the Act of 1890, only to avoid payment of maintenance amount, otherwise earlier he never demanded the custody of Ward.
  4. Learned trial Court framed five issues and after recording evidence of both the parties dismissed the application filed by appellant on the ground that conduct of appellant was objectionable and welfare of child is paramount and in the considered opinion of trial Court, maternal grand parents of child are competent to take care of him. They are providing him proper education and fulfilling his all requirements.
  5. Learned counsel for appellant submits that the order passed by learned trial Court is erroneous as appellant being the father of the child cannot deprived of custody of his son. He further submits that mother has already solemnized second marriage and child is living with maternal grand parents, therefore, custody of child ought to have been given to the father.
  6. *Per contra*, learned counsel appearing on behalf of respondents submits that the most suitable person amongst the rival claimants for guardianship of the Ward is maternal grandfather, who is properly maintaining the Ward. It is not a rule that father should get custody of child. In absence of mother too, father can be denied the custody of child, if welfare lies with grand parents of a child. It is further submitted that Ward would be scared to be in custody of appellant, who was habitual to beat mother of the Ward and learned trial Court has not

committed any mistake in continuing custody of Ward with the maternal grand parents and dismissing the application preferred by appellant.

7. Heard counsel for the parties and perused the record.
8. According to Section 6 of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as "the Act of 1956), father is natural guardian of a minor and custody of male child above age of five years, normally should be given to the father. However, the welfare of Ward is the paramount consideration.

Section 13 of the Act, 1956 provides following:-

**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 any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.
9. Section 19 (b) of the Guardians and Wards Act, 1890 (hereinafter referred to as "the Act 1890) also speaks about the appointment or declaration of guardianship of father, if he is not unfit. Section 19 (b) is reproduced here under:-

**19. Guardian not to be appointed by the Court in certain cases.**

Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person:-

(b)[of a minor, other than a married female, whose father or mother is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or]

10. The welfare of child depends on facts and circumstances of each particular case. The term custody should not be interpreted in its strict sense as physical custody are control over the child, but the custody should be construed in the sense of supervision and upbringing of child. The father's right to the custody of his minor child is no longer absolute, it is circumscribed by the consideration of the welfare of the minor. The legal right or financial

affluence is not decisive but the welfare of the minor which is decisive for the claim of custody.

11. Section 17 of the Act, 1890 provides:-

**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.

12. Section 17(3) of Act of 1890 provides that, if minor is old enough to form an intelligent preference, the Court may consider that preference and sub section 5 provides that, court shall not appoint or declare any person to be a guardian against the will of Ward. In the present matter, respondent No.2 is aged about 14 years and studying. He has shown his preference to live with the maternal grandfather with whom he is living since birth i.e. 8.8.2010 and it appears that welfare of the Ward is in continuing his custody with his maternal grandfather. It is trite law that preference of minor should be respected.

13. Looking to the above provisions of law, this Court by order dated 5.12.2023 directed to present the Ward i.e. respondent no.2 before court on 10.1.2024 and on 10.1.2024, Ward who is aged about 14 years boy appeared before the Court and was heard in camera. After conversing with respondent No.2, this Court found that respondent No.2-Ward is being looked after well by his maternal grandfather-respondent No.1 by satisfying all his necessities and comforts. Respondent No.2 has expressed his desire and willingness to continue staying with his maternal grandfather-respondent No.1. The Ward further informs that he is not in regular touch with his father-appellant.

Respondent No.1-Maternal Grandfather of the Ward was also heard in camera and he informs that his source of livelihood is trading in food grains. Respondent No.1 informs that he and his wife are taking good care of the Ward and are physically and emotionally attached to the Ward and intend to continue their relationship with the Ward for all times to come. The observations were recorded by this Court in proceeding dated 10.1.2024 and it is also recorded that respondent No.1 appears to be in his early 50's and is able bodied man.

14. Apex Court in the matter of **Mausamui Moitra Ganguli vs. Jayant**

**Ganguli, reported in (2008) 7 SCC 673** has stated that:-

19. The principles of law in relation to the custody of a minor child are wellsettled. 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 a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

20. 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.

21. In *Rosy Jacob v. Jacob A. Chakramakkal* [(1973) 1 SCC 840] a three Judge Bench of this Court in a rather curt language had observed that : (SCC p. 855, para 15)

*"15. ... The children are not mere chattels : nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a*

*just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.”*

22. In *Halsbury's Laws of England (4th Edn., Vol. 13)*, the law pertaining to the custody and maintenance of children has been succinctly stated in the following terms:

*“809. Principles as to custody and upbringing of minors.—Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other.”*

15. Respondent No.2-Ward is living with his maternal grandfather since birth and now at this stage his preference must be accepted and the Court cannot consider the matter from any other point of view by deciding claim of custody as claim over a property. In the present case, respondent No.2 is old enough and he has clearly stated before this Court that he would prefer to live with his maternal grandfather.

16. Apex Court in **Smriti Madan Kansagra vs. Perry Kansagra, (2021) 12 SCC 289** discussed the parameters for grant of custody of a child as follows:-

**15.1.** It is a well-settled principle of law that the courts while exercising *parens patriae* jurisdiction would be guided by the sole and paramount consideration of what would best subserve the interest and welfare of the child, to which all other considerations must yield. The welfare and benefit of the minor child would remain the dominant consideration throughout. The courts must not allow the determination to be clouded by the inter se disputes between the parties, and the allegations and counter-allegations made against each other with respect to their matrimonial life. In *Rosy Jacob v. Jacob A. Chakramakkal* [*Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840*] this Court held that : (SCC p. 855, para 15)

“15. ... The children are not mere chattels : nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society....” (emphasis supplied)

**15.2.** A three-Judge Bench of this Court in *V. Ravi Chandran (2) v. Union of India* [*V. Ravi Chandran (2) v. Union of India, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44*] opined : (SCC p. 194, para 27)

“27. ... It was also held that whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided

not on considerations of the legal rights of the parties, but on the sole and predominant criterion of what would serve the best interest of the minor.” (emphasis supplied)

**15.3.** Section 13 of the Hindu Minority and Guardianship Act, 1956 provides that the welfare of the minor must be of paramount consideration while deciding custody disputes. Section 13 provides as under:

**“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 any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

**15.4.** This Court in *Gaurav Nagpal v. Sumedha Nagpal* [*Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1] held that the term “welfare” used in Section 13 must be construed in a manner to give it the widest interpretation. The moral and ethical welfare of the child must weigh with the court, as much as the physical well-being. This was reiterated in *Vivek Singh v. Romani Singh* [*Vivek Singh v. Romani Singh*, (2017) 3 SCC 231 : (2017) 2 SCC (Civ) 1], wherein it was opined that the “welfare” of the child comprehends an environment which would be most conducive for the optimal growth and development of the personality of the child.

**15.5.** To decide the issue of the best interest of the child, the Court would take into consideration various factors, such as the age of the child; nationality of the child; whether the child is of an intelligible age and capable of making an intelligent preference; the environment and living conditions available for the holistic growth and development of the child; financial resources of either of the parents which would also be a relevant criterion, although not the sole determinative factor; and future prospects of the child.

**15.6.** This Court in *Nil Ratan Kundu v. Abhijit Kundu* [*Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413] set out the principles governing the custody of minor children in para 52 as follows : (SCC p. 428)

“Principles governing custody of minor children.

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.” (emphasis in original).

**15.7.** Section 17 of the Guardians and Wards Act, 1890 provides:

“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.
- (4) [Omitted]
- (5) The Court shall not appoint or declare any person to be a guardian against his will.” (emphasis supplied).

**15.8.** In the present case, the issue of custody of Aditya has to be based on an overall consideration of the holistic growth of the child, which has to be determined on the basis of his preferences as mandated by Section 17(3), the best educational opportunities which would be available to him, adaptation to the culture of the country of which he is a national, and where he is likely to spend his adult life, learning the local language of that country, exposure to other cultures which would be beneficial for him in his future life.

17. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that the child's interest and welfare will be best served if he continues to be in the custody of maternal grandfather.
18. In view of above, we do not find any error, illegality or perversity in the order passed by First Additional District Judge, Waraseoni, District Balaghat. We, therefore, affirm the order and it will, however, be open to the parties to move this Court for modification of this order or for seeking any direction regarding the custody and well-being of the child, if there is any change in the circumstances.
19. The appeal fails and is dismissed accordingly. No order as to costs.

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