

HIGH COURT OF CHHATTISGARH, BILASPUR**MA No. 6 of 2015**

- Vasant Kumar Singh S/o Shri Virendra Pratap Singh Aged About 37 Years Occupation Service, Present Address- P.G.T. (English) Central School Chudachandpur Manipur, Permanent Address- Qr. No. 4, D-Street, Number 19, Zone-1, Sector-11, Khursipar, Bhilai, Distt. Durg C.G.

---- Appellant**Versus**

1. Smt. Kavita Singh, W/o Shri Basant Kumar Singh Aged About 36 Years
2. Shreyansh Kumar Singh @ Pranjal S/o Basant Kumar Singh Aged About 8 Years, non-applicant No.2 Minor Through- Legal Guardian as respondent No.1 Smt. Kavita Singh,
both are R/o D.M.Q. 28, Hospital Colony, Bishrampur, District Surajpur C.G.

---- Respondents

For Appellant : Shri Sushil Dubey and Shri H.K. Sharma,
Advocates
For Respondents : Shri S.D. Singh, Advocate

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****24/10/2018**

1. Heard.
2. The instant appeal has been preferred against the order dated 03.12.2014 passed by the Third Additional District Judge, Surajpur in Civil Suit No.26-A/12, whereby the petition of the appellant/father under Section 6 of the Hindu Minority and Guardianship Act, 1956 (for short the Act, 1956) for the custody of the child, has been dismissed, however, reserving a right to father to meet the

child on the first Sunday of every month apart from the festivals like Holi, Diwali, New Year and birthday, in a public place in between 11am to 5 pm. The order further observed that to comply the said direction i.e. to bring the children in a public place would be that of the mother/defendant No.1 and the place of public choice would be under a prior intimation.

3. The facts of this case are that a petition was filed by the father under Section 6 of the Act, 1956 and custody of the child namely Shreyansh Kumar Singh alias Pranjal, who at the time of filing of the petition was 5 years & 4 months old in the year 2012 was claimed. Undisputed facts are that the respondent No.1 Smt. Kavita Singh was married to Vasant Kumar Singh on 03.02.2006 according to the Hindu rituals. Subsequently, out of the wedlock a child namely Shreyansh Kumar Singh was born on 18.01.2007. As per the averments of the appellant, when the matrimonial life could not go along, the wife Smt. Kavita Singh lodged a complaint under Section 498-A IPC at Vishrampur, which is her maternal place, the said complaint on further date was transferred to the Durg, wherein the place of crime was said to have happened. It is contended that on behalf of the child namely Shreyansh Kumar Singh, the mother had filed an application before the Chief Judicial Magistrate, Surajpur under Section 125 Cr.P.C. and claimed an amount of Rs.2000/-. It was stated that the wife does not have any source of income as she was claiming the right of maintenance, consequently she would not be able to maintain her child with proper care. The appellant further claimed that he is a teacher of national level in central school presently and at the time of filing of petition he was posted at Manipur and being teacher in such capacity he would be able to impart the proper education

to his child. It was stated that on 27.12.2011, the mother Smt. Kavita Singh kept the son in her custody, which has hampered his education as such the child being more than 5 years, the custody may be handed over to him. It was further pleaded that the appellant being the father would be able to take care of the child in proper manner.

4. In reply to such averments, the wife came out with the fact that Vasant Kumar Singh, the father, is an employee of central school and he could be transferred anywhere in India. It was further stated that as compared to father the child would require more care, love and custody of the mother and the husband Vasant Kumar Singh being a freelancer would not be able to impart the proper education and the custom to his son. It was further denied that only being the teacher, the father would be entitled to give the child proper education and upbringing. It was further alleged that the wife and the child were forcefully thrown out of the house by husband and as such she had to take shelter to her maternal home at Vishrampur. It is further stated that the child is admitted to D.A.V. School and he is studying therein. Further the averments were made that if the child is kept along with the father, his future would be ruined and he will not get the proper environment to grow up. Consequently, it was stated that the custody of the child would be more proper with the mother.

5. Both the father & mother of the child were examined before the Court below. The court after evaluating the statement and the evidence, came to a finding that the welfare of the child would be better in custody of mother and allowed the custody of the child to her. The Court further observed that the visiting right would be given to the father as per the terms of the order. The said order is

under challenge herein.

6. Learned counsel for the appellant would submit that the evidence on record would show that the wife is not working, she is completely dependent on the maintenance which is being given by the husband, therefore, in any case, in order to bring up the child, the financial stability and the support would be necessary. He further submits that the statement of the wife would show that she herself has left the house, therefore, she cannot be allowed to take advantage of the situation for her own wrong. He placed reliance in the case of ***Mausami Moitra Ganguli Versus Jayant Ganguli*** {(2008) 7 SCC 673} and submits that the welfare and interest of the child would be better in the hands of the father, therefore, submits that the child being more than 5 years of age and according to the Section 6 (a) of the Act, 1956, the custody of the child is required to be handed over to the father.
7. Per contra, learned counsel for the respondent would submit that the order of the Court below is well merited and reasoned. He would further submit that when the wife is well educated, she could anytime avail the job and only the financial condition would not be the deciding factor to hand over the custody of the child. He further submits that the facts would demonstrate that the FIR was lodged by the wife and the case was registered under Section 498-A IPC, which is still pending and if the conviction is made it will relate back to the date of commission of crime of cruelty meted out to the wife, therefore, the order do not call for any interference.
8. I have heard learned counsel for the respective parties at length and perused the record.

9. This Court by an earlier order dated 10.10.2018 had directed the respondent to appear in person along with the child before the Court so as to adjudge the intelligent preference of the child. Pursuant to such order the child is produced before the Court. The Court had interacted with the child and it was reduced in the form of question & answer, which would be relevant in the case and are as under :-

“Q.1- what is your name?”

Ans.1 -My name is Shreyansh Singh.

Q. 2- What game you play?

Ans.2- Cricket.

Q.3 -What is the name of your father?

Ans. 3- Vasant Kumar Singh.

Q. 4.- What is the name of your mother?

Ans.4 -Smt. Kavita Singh.

Q.5 -Whether you want to become an advocate?

Ans.- 5 No.

Q. 6- Where do you study?

Ans. 6- D.A.V. School, Vishrampur.

Q.7- Whether you want to stay with your mother or father?

Ans.7- I want to stay with my mother.

Q.8.- Whether you meet your father?



Ans.8- Yes.

Q.9.- *Who stays along with you in the house?*

Ans.9- *My maternal grandfather, maternal grandmother, Maternal uncle Mama and Maternal Aunty Mami.*

Q.10.- *What is the name of your Maternal uncle (Mama)?*

Ans.10.- *Name of my Mama is Sourabh Singh."*

During such interaction, the child was friendly and was answering the questions without any hesitation or fear.

10. The Statute as governs the subject issue is Section 6 of the Hindu Minority and Guardianship Act, 1956. The relevant part of Section 6 is reproduced 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) xxx	xxx	xxx
xxx	xxx	xxx
xxx	xxx	xxx

11. At present apparently the age of child is more than 5 years. Therefore, the question arises whether the Court can only follow the rule book or lens the child mission with a object of welfare of child.

12. The Supreme Court in the case of **Mausami Moitra Ganguli** (*supra*) had occasioned to consider this likewise situation while deciding the custody of the child and upbringing of the minors. The Court has laid down that the principles of law in relation to the custody of a minor child, the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. It further held that the question of welfare of the minor child has to be considered in the background of the relevant facts and circumstances as every case has to be decided on its own facts. It further held that no doubt, 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. It further held that 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. Therefore, judicial discretion is cast on the Court to consider the custody in the background of all the relevant facts and circumstances. The relevant part of the judgment i.e. para 19, 20, 21 & 22 are reproduced hereunder:-

19. The principles of law in relation to the custody of a minor child are well settled. 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 Vs. Jacob A. Chakramakkal*¹, a three- Judge Bench of this Court in a rather curt language had observed that:

"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* (Fourth Edition, 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

¹ (1973) 1 SCC 840

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."

13. In view of the principles laid down in the case of **Mausami Moitra Ganguli**

(*supra*) in order to assess the welfare of child and to read the mind of the child to judge the intelligent preference, he was produced before this Court. The child who is said to be studying in class 6th unequivocally without interruption and free liberty of thoughts stated that he wants to stay with the mother. This Court cannot ignore the fact that the child was in the custody of the mother and when the application was filed he was 5 years and 4 months old. Now with the roll of time the child has attained the age of 11 years and said to be studying in the 6th class at D.A.V. School, Vishrampur. By evaluating the answer given by the child before the Court, it appears that neither he was under any influence of fear but instead volunteered his choice to stay with his mother. The financial stability even if that of father cannot be given the sole deciding factor to give edge over the choice of the child of 11 years and to superimpose the force handing over the custody of child like a hired chattel to leave the child with unforgettable and unbearable agony and horror against his wish.

14. In continuity of other facts, if the statement of the husband & wife both are considered, the facts would reveal that a report was made by the wife under Section 498 A IPC and it is admitted by both the parties before the Court that the said criminal case is still pending before the JMFC and serious allegations have been made by mother against father. The statement of the father given before the Court would reveal that he stays at Sagar alone and gets his food

from the mess in the afternoon and prepares his food himself in the evening. The circumstances points out that he stays alone. The statement also reflects that he has to do his job in the school for a considerable period. As against this the mother stated that she is completely in charge of the child to take care and give all possible affection & moral support and has completely dedicated herself to the welfare of the child. Both the statements if are compared and evaluated together to decide the custody of the child the mother would hold the sway in her favour. So after evaluating all the facts together and having given an anxious consideration to the statement given by the child before the Court, I am of the opinion that the custody of the child would be better in the hands of the mother for a idyllic life.

15. In a result, the appeal has no merits. It is accordingly dismissed.

Sd/-

Goutam Bhaduri
Judge

Ashu