IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR
BEFORE
DB :- HON'BLE SHRI ANAND PATHAK &
HON'BLE SHRI HIRDESH, JJ

FIRST APPEAL No. 571 of 2024

SMT. SUCHETA BHADORIYA
Versus
AMBARISH SINGH

***Appearance**:*
Shri P.C. Chandil- learned counsel for the appellant.
Shri R.K.Pathak- learned counsel for the respondent.

Reserved on	**:**	**25.11.2024**
Pronounced on	**:**	**18.12.2024**

JUDGMENT

Per Hirdesh, J:-

The instant first appeal under Section 19 of the Family Courts Act,1984 read with Section 47 of Guardian and Wards Act,1890 (hereinafter it would be referred as "the Act of 1890") has been preferred by appellant (maternal grandmother of minor child) challenging the impugned judgment and decree dated 13.02.2024 passed by Additional Principal Judge, Family Court, Gwalior in MJCGW No.2013/2019, whereby an application under Section 25 of the Act of 1890 filed by respondent (father of child) seeking custody of minor child Shivojas has been allowed.

(2) Necessary facts for disposal of present appeal, in short, are that as per averments of the appellant, marriage of respondent with daughter of appellant, namely, Pratibha was solemnized on 06.06.2014. Out of their wedlock, they were blessed with one male child, namely, Shivojas on 10.09.2016. After 22 days of birth of the said child, Smt. Pratibha (mother of minor child) died on

02.10.2016. Since then, minor child is living with her. On 19.06.2019, respondent filed an application under Section 25 of the Act of 1890 before the Family Court, Gwalior seeking custody of said minor child, alleging that appellant is an arrogant lady and does not care and look after the minor child properly as well as she has no source of income and dependent on her parents. The further averment of the respondent is that he is a literate person and all facilities are available in his house for the welfare of minor child.

(3) In reply, appellant submitted her written statement, alleging that respondent is not entitled for custody of minor child as he usually does not take care of minor child properly because he had never taken care of mother of minor child nor did he arrange for food and treatment as a result of which, the mother of minor child died soon after 22 days after birth of child. It was further alleged that respondent had illicit relations with a woman, namely, Shruti during life time. Immediately, after death of mother of minor child, respondent kept said Shruti as his wife and also married her. It was also alleged that Shruti was a previously married woman and after getting divorced, she is now living with respondent. It was further pleaded that a habeas corpus petition filed before the this Court is pending consideration. Upon filing of application under Section 125 of CrPC on behalf of minor child for maintenance, respondent has been directed by the Family Court on 28.08.2021 to pay Rs.8,000/- per month, but the respondent is not even paying a single penny. She usually makes proper arrangement for upbringing as well as care and education of minor child.

(4) After considering the pleadings of both the parties, the Family Court framed the issues. After going through the evidence of both the parties, the Family Court *vide* impugned judgment and decree, allowed the application filed by respondent under Section 25 of the Act of 1890 seeking custody of minor child with a direction to the appellant to handover the custody of minor child within a period of two months. Being dissatisfied, the instant first appeal has been filed at the instance of appellant (maternal grandmother of minor

child).

(5) The submission of learned counsel for the appellant is that the Family Court has committed an error in allowing the application filed by respondent. It is further submitted that even after death of mother of minor child and after getting second marriage with said Shruti, respondent is not taking proper care of minor child without providing proper nutrition, medical treatment as well as education etc. It is further contended that Shruti is a married immoral lady and is usually involved in bad habits. It is settled principle of law that while deciding the custody of minor child, the paramount consideration is the welfare of minor child, which ought to have taken into consideration by the Family Court concerned. Without going through the oral and documentary evidence in right perspective, the Family Court has wrongly passed the impugned judgment and decree in favour of respondent.

(6) On the contrary, learned counsel for the respondent submits that respondent is financially capable to take care of his minor child. Since, the child has already been exposed to his lifestyle, as per his wishes to live with his father, then the chances of his growth would be better. Relying on the judgment dated 03.04.2024 passed by Delhi High Court in the matter of **Gautam Kumar Das Vs. NCT of Delhi through the Commissioner of Police and Others in W.P. (Crl.) 416/2024**, judgments of Hon'ble Apex Court in the cases of **Shazia Aman Khan and Ors. Vs. The State of Orissa and Ors reported in 2024 INSC 163, Tejaswini Gaud and Others Vs. Shekhar Jagdish Prasad Tewari and Others reported in AIR 2019 SC 2318** and the judgment **dated 30.05.2024** passed by Indore Bench of this Court in the case of **Umesh Kaithwas Vs. Rajendra Borasi and Anr. in Miscellaneous Petition No.355/2024**, it is contended that since respondent, as father, is the best and natural guardian after death of mother of minor child, then his custody deserves to be given to the father, so that the minor child may be comfortable with his father at his tender age and he may not be able to adjust with the

present appellant. The minor child is too young and needs proper care and affection. Respondent being the natural guardian and he has a right to have the custody of his child to ensure his well-being, health, education and lifestyle. Appellant is not able to take care of minor child as she is wholly dependent on her parents i.e. father and mother and now, father of appellant is reported to be dead. To advance his argument, an affidavit has also been sworn.

(7) Heard the learned counsel for the parties at length and perused the documents available on record as well as the impugned judgment and decree.

(8) The main controversy in the present matter is whether the respondent is entitled to custody of minor child or not?

(9) While approaching the aforesaid dispute in question, the relevant provisions under Hindu Minority and Guardianship Act, 1956 (in short " the Act of 1956") are also to be taken into consideration. As per Section 2 of the Act of 1956, the provisions of this Act shall be in addition to, and not, save as expressly provided, in derogation of, the Act of 1890. Section 6 of the Act of 1956 speaks about the natural guardian of a Hindu minor child 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 —
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> (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;
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> (b) in 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).

(10) In *juxtaposition*, if the provisions of the Act of 1956 and Act of 1890 are seen, it appears that the welfare of minor child is paramount consideration while considering his custody in appointment or declaration of a person as

guardian of Hindu minor by a Court.

(11) Section 13 of the Act of 1956 reads 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."

(12) The aforesaid aspect has been considered time and again in catena of decisions by various High Courts as well as the Hon'ble Supreme Court. It is appropriate to reiterate the same in the matter of **Tejaswini Gaud (supra)** in which it was observed as under:-

> "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.
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> 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, Lahari Sakhamuri v. Sobhan Kodali 2019 (5) SCALE 97 education, intellectual development and favourable surroundings, in Nil Ratan Kundu, it was held as under:-
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> > "49. In Goverdhan Lal v. Gajendra Kumar, AIR 2002 Raj 148 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.
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> > 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, where the Supreme Court held as under:-

> "32. In McGrath, (1893) 1 Ch 143, 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." (emphasis supplied) ……

> 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 Gaurav Nagpal v. Sumedha Nagpal (2009) 1 SCC 42 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 case (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.
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> 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.

28. Contending that however legitimate the claims of the parties are, they are subject to the interest and welfare of the child, in Rosy Jacob, 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. ……..

(13) On perusal of the impugned judgment and decree as well as the material available on record and in view of the aforesaid legal position, on the anvil of facts and circumstances of this case at hand, it is not in dispute that respondent is the father of minor child and is in private job. He leads a disciplined life inculcating in his family set up, which would help the minor child to grow in future in a disciplined manner, which in comparison with the life is likely to be led with maternal grandmother, then the difference would clearly appear. The record impugned shows that father, being the natural guardian after death of mother is in keen interest to bring up his child and take him under his supervision. Besides that, the minor child will get better exposure in life and growth of his personality would be more prominent under the guardianship of his father, rather than in the company of maternal grandmother.

(14) In the case of **Anand Kumar Vs Lakhan 2023 (1) M.P.L.J 457,** this

Court has discussed the status of father as an important aspect for a child to get better exposure in life and since his father is in private job, therefore, child 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 grand parents. Besides that appellant appears to be an old lady whereas father of child is comparatively young. Therefore, looking to age related elements and geriatric limitation, it is apposite that custody of child be given to father of minor child.

(15) So far as the allegation of appellant that the second wife of respondent Shruti is lady of easy virtue and welfare of minor child does not appear to be proper is concerned, but the appellant has utterly failed to prove before the Family Court in order to substantiate such apprehension. Over and above, the respondent, being father of minor child as per Section 6 of the Act of 1956, is the best and natural guardian of minor child and since he is the biological father of minor child also, the statute also favours the cause of respondent being custody of minor child, as father.

(16) Testing on the anvil of welfare of minor child as well as balancing the facts and circumstances of the case, this Court does not find any illegality or impropriety in the findings recorded by the learned Family Court. The learned Family Court after evaluating the materials available on record as well as on going through the relevant provisions of aforesaid Act of 1956 and Act of 1890 has rightly passed the impugned judgment and decree with a direction to appellant to hand over the custody of minor child to respondent. No case is made out to interfere in the impugned judgment and decree passed by learned Family Court.

(17) In the result, we confirm the impugned judgment and decree and dismiss the appeal.

(18) However, before parting with the matter, it is made clear that appellant being real maternal grandmother of minor child, if she wishes to meet him, she

is at liberty to avail the visitation rights to interact with the minor child as per cooperation between the rival parties. Respondent shall not cause any obstruction in meeting between child and appellant.

(19) In view of above, this appeal *sans* merit and is hereby **dismissed** with no order as to costs.

(ANAND PATHAK)
JUDGE

(HIRDESH)
JUDGE

MKB