

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 489 OF 2023

01 Vijay Ramlal Pival,
age: 60 years, Occ: Service;

02 Sau. Shila Vijay Pival,
age: 55 years, Occ: Household;

03 Vishal Vijay Pival,
age: 28 years, Occ: Nil;

04 Chandrakant Suresh Bansode,
age: 40 years, Occ: Service;

Nos. 1 to 4 R/o Subhash Nagar,
Type Quarter No.20/151,
Ordinance Factory, Bhusawal,
Tq. Bhusawal, District Jalgaon.

05 Sau. Neha Satish Sankat,
age: 27 years, Occ: Household;

06 Satish Kanhaiyalal Sankat,
age: 35 years, Occ: Nil,

Nos. 5 & 6 R/o Near Machhi
Market, the quarter of Railway
Driver, Working in Railway
Hospital, Bhusawal, Tq.Bhusawal,
District Jalgaon.

Appellants

Versus

Smt. Chaitali Chetan Pival,
age: 26 years, Occ: Education
and Household, C/o Bhimrao
Ananda Shinde, R/o Mohit Nagar,

Ahead of Ganesh Colony,
Bhusawal, Tq. Bhusawal,
District Jalgaon.

Respondent

Mr. A. G. Talhar, advocate for the Appellants
Mr. P. R. Nangare, advocate for the Respondent.

CORAM : SANDIPKUMAR C. MORE, J.

Reserved on : 20th June, 2023.
Pronounced on : 23rd June, 2023.

JUDGMENT :

1 The appellants, who are original non applicants in Civil Misc. Application No. 34 of 2018, have challenged the order dated 12.01.2023, passed by District Judge-1, Bhusawal (hereinafter referred to as “the trial Court”), in that application, which was filed by present Respondent i.e. mother of child Kush for getting his custody under Sections 7, 12 and 25 of the Guardians and Wards Act, 1890.

2 The facts, leading to this appeal, are as under:

 The Respondent is mother of child Kush, who is of 10/11 years of age at present. Present appellants no.1 and 2 are the grand parents of the said child Kush, whereas,

appellants no.3 and 4 are his uncles and Respondents No.5 and 6 are Respondent's sister-in-law and husband of sister-in-law. Respondent had married with son of appellants no.1 and 2 i.e. Chetan and it was a love marriage. Out of the said wedlock, she gave birth to Kush. Unfortunately, Chetan died on 17.02.2018 due to illness.

3 According to the Respondent, she was driven out from the house of her husband by the present appellants and they forcibly snatched Kush from her at the relevant time. As such, she was constrained to file aforesaid Civil Misc. Application for getting his custody.

4 The appellants resisted the said application by filing an application at Exhibit-18 and contended that they never drove out Respondent from their house but the Respondent, in fact, had raised quarrel and left their house leaving Kush with them. According to the appellants, they, in fact, maintained Kush in proper way and also given him education by getting his admission in reputed school at Bhusawal i.e. Saint Aloysius High School.

5 The learned trial Court, after considering the contentions and on the basis of evidence on record, decided the application and granted custody of Kush to Respondent-mother. Hence, this appeal.

6 It is to be noted here that though the learned trial Court has directed to hand over custody of minor Kush to Respondent-mother, but vide order dated 02.02.2023, this Court has granted stay to the impugned order specially considering that minor Kush was taking education at Bhusawal and the academic year was yet to be completed. As such, minor son Kush is presently in the custody of appellants.

7 Learned Counsel for the appellants submits that minor son is in the custody of appellants, which is not at all adverse to the interest of Kush. Moreover, appellant no.1 is a retired person getting pension and, therefore, he can very well look after the welfare of the child, who is taking education at Bhusawal in the reputed school like Saint Aloysius High School. He has pointed out that the learned trial Court has

not considered the evidence adduced by the appellants at all and merely handed over custody of minor Kush by observing that Respondent-mother is the natural guardian of the child and she can look after his education and welfare. He pointed out that the learned trial Court, despite having interaction with the child, who was willing to stay with appellants, ignored the said fact. His main contention is that the learned trial Court did not utter anything as regards the welfare of the child, which is the paramount consideration for deciding custody matters. He relied upon the following judgments:

- (i) In the case of **Anjali Kapoor Vs. Rajiv Bajjal**, 2009 AIR (SC) 2821; and
- (ii) In the case of **Javid Ghorashian Vs. State of Maharashtra & another**, 2001 (4) Mh. L. J. 814;

8 As against this, learned Counsel for the Respondent-mother supported the impugned order and submitted that the mother, being the natural guardian, is entitled for the custody of her son. Moreover, as per Section 6 of the Hindu Minority and Guardianship Act, 1956, needs to be given to the mother only since the appellants are not natural guardians. He also relied upon following judgments:

(i) In the case of **Tejaswini Gaud & others Vs. Shekhar Jagdish Prasad Tewari & others**, 2019 AIR (SC) 2318; and

(ii) **Abhinav Kohli and others Vs. State of Maharashtra & others**, 2021 DGLS (Bom.) 1432;

9 Heard rival submissions and also perused the entire oral and documentary evidence on record along with the impugned order.

10 It is significant to note that the learned Counsel for the appellants has prayed for setting aside the impugned order mainly on the ground that there is no discussion at all in respect of welfare of the child, which is most important aspect of the matter. He relied upon the judgment of the Hon'ble Apex Court in the case of **Anjali Kapoor** (*supra*) wherein father was denied custody of minor child and the grand mother was allowed to retain the same. In paragraphs 18 and 21 of the said judgment, following observations are made by the Hon'ble Apex Court:

“(18) Bearing these factors in mind, we proceed to consider as to who is fit and proper to be the guardian of the minor child Anagh in the facts and circumstances of this case. In the present case, the appellant is taking care of

Anagh, since her birth when she had to go through intensive care in the hospital till today. The photographs produced by her along with the petition, which is not disputed by the other side would clearly demonstrate, the amount of care, affection and the love that the grandmother has for the child having lost only daughter in a tragic circumstances. She wants to see her daughter's image in her grand child. She has bestowed her attention throughout for the welfare of reminiscent of her only daughter, that is the minor child which is being dragged from one end to another on the so called perception of judicial precedents and the language employed by the legislature on the right of natural guardian for the custody of minor child.

21 Ordinarily, under the Guardian and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute and the Courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the appellant/grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to.

Therefore, it is desirable to allow the appellant to retain the custody of the child.”

11 Further, in the case of **Javid Ghorashian** (*supra*), this Court has made following observations in paragraph 13 of the judgment:

“13 In cases where a person has expressed his desire to get himself appointed as the guardian of person and property, the Court should keep in mind that the minor’s interest is of paramount consideration. The Court should find out the material for the purpose of enabling it to judge whether such person should be permitted to be the guardian of person and property of the minor or whether his prayer should be rejected. When it is coupled with the prayer of permitting such person to adopt such child, the Court should be careful enough to see whether the said desire expressed by the said person is bona fide or is motivated with some other intention which would not be beneficial to the future of the said child. In this context, the following facts are very much important:

(a) Whether such person and his spouse is having criminal antecedents.

(b) Whether such person and his spouse are well placed in their life and are capable of shouldering responsibility of upbringing the said child.

(c) Whether the said child would get proper atmosphere to grow physically, mentally and intellectually in association with the same person and his spouse and his family members.

(d) Whether the said person, his family members would shower on such child the humanly love and affection so as to create a good life in future for such child.

(e) Whether such child would get proper education and would get future opportunities of having better life and social status.

While considering all these facts, the Court should be always careful for protecting the interest of such minor child and its welfare would always be a paramount consideration.”

12 It is also made clear by the Hon’ble Apex Court in many judgments, especially in the case of ***Mausami Moitra Ganguly vs. Jayan Ganguli, (2008)7 SCC 673*** that the welfare of the child should be the aspect of paramount consideration while

deciding custody matters; and the rights acquired by the parents under the Statute cannot be an impediment while deciding such matters. Though, in the judgments relied upon by the learned Counsel for the Respondents, it has been observed that for restoration of custody of minor child from the person, who according to personal law, is not his legal or natural guardian, in appropriate cases, the writ Court has jurisdiction. This observation is not helpful to the Respondent mainly because this Court is dealing with the custody of child under Sections 7, 12 and 25 of the Guardians and Wards Act, 1890.

13 The most important fact, which is evident from the impugned order, is that the learned trial Court has merely stated contentions of the rival parties, observations in case laws, relied upon by the parties and their respective evidence. However, nothing is there in the impugned order in respect of welfare of the child in the light of facts and material produced by the appellants. The record and proceeding shows that the appellants have produced on record number of documents, which are exhibited, but nothing is discussed about the same. The learned trial Court has given findings, in para 25 of the impugned order, as to why it came to the conclusion for granting custody of minor Kush to Respondent, which is reproduced below for ready reference:

“25 After carefully going through the evidence led by both the sides on record and keeping in sight the observations in the citations relied on by both the sides, it appears that this is a case where custody is claimed by natural mother of the child from his paternal grand parents after the death of father of the child. The mother is young and educated lady. She is ready to maintain the child and look after his education and welfare. The non-applicant Nos.1 and 2 have the custody of the child at present, and after having questioned the child by this Court, he could not state the name of his mother though stated the names of deceased father and grandparents, and further stated that he wishes to stay with his grand parents. It has to be taken into consideration that when the child was separated from the custody of applicant-mother in the year 2018, he was aged 6 years, and the statement of the child is recorded after about four years thereof. Thus, the child is grown up by remaining in the custody of non-applicant Nos. 1 and 2, and his maturity of understanding in the course of time also developed. However, during the intervening period, he was not in the custody or upbringing by applicant. The said answer of child cannot be taken into consideration as a fact that would affect the case of applicant having viewed in the light of facts and circumstances that she is the natural mother claiming his custody for the purpose of welfare of the child. Giving the child Kush to the custody of his mother will be conducive to the welfare of child.”

14 Thus, it seems that even after mentioning the rival contentions and details of evidence, there is no objective analysis by the learned trial Court as regards the aspect of welfare of the child. It appears that the learned trial Court has decided to give

custody of the minor child to Respondent-mother only on the assumptions and presumptions.

15 I am of the opinion that the learned trial Court should have discussed the material on record by considering the welfare of the child and the capacity of either of the parties and then should have come to the conclusion as to who is in better position to take care of welfare and interest of the minor child. As such, it appears that the matter needs to be remanded back to the learned trial Court for considering the valuable aspect of welfare of the child in the light of evidence on record and to make objective analysis to that effect. Also the capacity of either of the parties to safeguard welfare of the child needs to be discussed afresh by considering the evidence adduced by the parties.

16 In view of the same, following order is passed:

ORDER

(i) The appeal is partly allowed and the impugned judgment and order dated 12.01.2023, passed by learned District Judge-1, Bhusawal in Civil Misc. Application No.34 of 2018, is hereby set aside and the matter is remanded back to the learned trial Court for deciding it afresh in the light of the opinion expressed by this Court in this judgment in respect of welfare and interest

of minor child. The parties are at liberty to adduce additional evidence.

(ii) The parties are directed to appear before the learned trial Court i.e. District Judge-1, Bhusawal, on 15th July, 2023. The learned trial Court is directed to decide the matter expeditiously and as far as possible, within the period of six months after this order is communicated to it.

(iii) It is made clear that no findings on merit of the case are recorded by this Court.

(iv) The Record & Proceedings be sent back to the learned trial Court forthwith.

(v) Civil Application No.1137 of 2023 stands disposed of.

(vi) There shall be no order as to costs.

(SANDIPKUMAR C. MORE)
JUDGE