

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.308 of 2015

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Kumar Amit, Son of Sri Binod Kumar Sinha, resident of New Yarpur, Gardanibagh,
Road No. 1, Jhun Jhun Mahal, P.S. Gardanibagh, District- Patna.

.... Appellant/s

Versus

Ashok Kumar Srivastava, son of Late Narakh Narain, resident of new Yarpur, Road No.
1, Jhun Jhun Mahal, P.S. Gardanibagh, District- Patna.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Uday Shankar Sharan Singh, Advocate

For the Respondent/s : Mr. Ranjee Kumar, Advocate

: Mr. Kundan Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE S. KUMAR

and

HONOURABLE DR. JUSTICE RAVI RANJAN

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE S. KUMAR)

Date: 21-09-2017

This Miscellaneous appeal is directed against the judgment and decree dated 23.07.2015 passed by Additional Principal Judge, Family Court, Patna in Guardian Case No. 31 of 2010, by which the learned Judge of the Family Court dismissed the application filed under Guardians and Wards Act by the appellant petitioner.

2. Briefly stated, the facts of the case is that appellant filed a case for custody of his minor daughter on the ground that he is the natural guardian of his minor daughter, namely, Varshika @ Tisha, a female Hindu Child. Her date of birth is 05.01.2007. The minor daughter Varshika @ Tisha presently is under the guardianship and custody of maternal grandfather Ashok Kumar Srivastava, residing at Lilawati Apartment, Flat No. 304, Gardanibagh Road No.



1, Patna-1. The appellant is the father and a natural guardian of his daughter Varshika @ Tisha, and as such, he is entitled for custody of his daughter, who, at present, is in custody of her maternal grandfather.

3. It has been further submitted by learned counsel for the appellant that since the appellant was in judicial custody from 07.10.2009, his daughter was taken away by her maternal grandfather and grandmother and thereafter she remained in their custody but now appellant father has come out from jail and being the natural guardian he is entitled for custody of his daughter, which is being denied by the respondent maternal grandfather. The appellant was married to Sambhavi, daughter of respondent, on 28.11.2005. From the said wedlock, a female child was born on 05.01.2007 at Jan Chikitsa Hospital, Mithapur, Patna. The name of minor female child is Varshika @ Tisha for whose custody present case was filed before the Family Court, Patna. The wife of the appellant died in mysterious circumstances in the matrimonial home on 07.01.2009 and a criminal case bearing Gardanibagh P.S. Case No. 177 of 2009 under Section 304B read with 34 I.P.C. was registered against the appellant and his family members for causing dowry death of mother of minor daughter.

4. The case was investigated by the police and, during



investigation, police found the case to be true against the appellant and his sister and submitted charge sheet against the appellant and his sister and thereafter charge has been framed by the Session Court against the appellant and his sister and evidences were also led on behalf of prosecution and trial is likely to conclude soon. That on fateful day i.e. 07.01.2009 the wife of the appellant died at about 2:00 AM in the morning and her parents were informed about the death of their daughter and they reached at her matrimonial house and appellant was arrested by the police and the respondent maternal grandfather and grandmother of the minor child took her away for her proper care and upbringing. The appellant was sent to jail and he remained in judicial custody. The appellant was released on bail and thereafter he has filed this case for custody of his minor daughter being her natural guardian for her proper upbringing, care and education.

5. It has been further submitted on behalf of learned counsel for the appellant that the proper care, education , love and affection to the minor daughter of appellant is not being given by her grandparents and he has sufficient means to provide proper care and education of the girl child, as such, he should be granted custody of the girl child.

6. During pendency of this case, maternal grandmother



of minor child died on 27.08.2012 and his grandfather, who was working in B.S.N.L., also retired from service and getting his pension, the mother of respondent was also in pensionary service and she is getting pension after her retirement

7. In support of his case the appellant has examined altogether four witnesses PW-1 Binod Kumar Singh, is father of appellant. PW-2 is Sabita Devi, who is a maid working in the house of appellant. Pw-3 is Lina Sinha, mother of the appellant. PW-4 is Kumar Amit , who is himself the appellant. Some documents were also filed on behalf of the appellant in which Ext. 1 is the birth certificate of minor daughter, Ext. -2 is pay slip of appellant, Ext. 3 and 3/1 are the certified copy of L.I.C. policy, Ext.-4 to 4/3 are fee receipts of New Patna Montessori School, Ext.- 5 is demand bill of the school Adarsh Vidya Mandir, Ext.- 6 and 6/1 are reservation Ticket of railway, Ext.- 7 to 7/3 are receipt of premium of L.I.C.

8. The respondent has examined altogether five witnesses, they are DW-1 Birendra Kumar Singh , DW-2 Ajay Kumar Sahay, DW-3 Binod Kumar Shrivastava, DW-4 Bharti Shrivastava and DW-5 Ashok Kumar Shrivastava. The respondent has also filed some documents. Ext. A is photocopy of F.I.R. of Gardanibagh P.S. Case No. 177 of 2009, Ext. B is photocopy of charge sheet of Gardanibagh P.S. Case No. 177 of 2009, Ext. C is the photo copy of inquest report



of Shambhavi @ Tannu, Ext. D is photocopy of Post-Mortem Report of deceased, Ext. E is photocopy of framing of charge of Session Trial No. 1204 of 2010. Three photographs are marked for identification as Y to Y5, photocopy of Sahara News Paper is marked as Y6.

9. It has been submitted on behalf of the appellant that marriage between the appellant and mother of minor daughter was solemnized on 28.11.2005 and from the said wedlock, female child was born on 05.01.2007 at Jan Chikitsa Hospital Mathapur, Patna. The wife of appellant died on 07.01.2009 because of burn injuries and he has been falsely implicated for committing murder of his wife at the instance of respondent and their family giving rise to P.S. Case No. 177 of 2009 and after investigation police has submitted charge sheet against the appellant under Section 304B read with Section 34 of I.P.C.

10. It has further been submitted on behalf of the appellant that appellant is the natural guardian under the provisions of Guardian and Ward Act and also as per Hindu Minority and Guardianship Act and as such he should be given custody of his minor daughter. It has further been submitted on behalf of the appellant that he has prepared a plan for maintenance, education and care of his minor daughter. He has opened a LIC policy of Rs. 2, 10,000/- for benefit of daughter. The policy is marriage endowment policy and it was opened on



28.01.2007. He is depositing premium of Rs. 9364/- per month. He has also submitted his salary chart and has stated that he has sufficient source of income to maintain his minor daughter. Her minor daughter is studying in Bal Bharti Montessori School at the time of her admission, she was two and a half years of age. He is area Sales Manager in Cosmetic Limited Company. He is income tax payee. His father has retired from service and is getting pension. His younger brother is also in service. He has a joint family and monthly income of joint family is more than Rs. 48,000/- per month. It has been further submitted on behalf of the appellant that he or his any family members are not responsible for death of mother of minor daughter. On the date of occurrence the police arrested him and his sister. At that time his father -in-law and mother-in-law and other in-laws took away the minor female child Varshika and since then she is in their custody. The appellant has also contended that he is financially better than respondent and, hence, the custody of child should be given to him. The appellant is more suitable to look after interest of minor child and imparting required education for better prospect.

11. On the other hand, counsel for the respondent has submitted that appellant is responsible for murder of his wife and mother of minor daughter. The police has registered case under Section 304B I.P.C. against the appellant and his family members and



after investigation has submitted charge sheet against the appellant and his sister. The Session Court has also framed charges under Section 304B read with 34 of I.P.C. against the appellant and his sister. The evidences on behalf of prosecution is being led and trial is to be concluded soon. The appellant remained in jail and after coming out on bail has filed this case whereas he may be convicted in the case. It has further been submitted on behalf of the respondent that the minor child is in their custody from 07.01.2009 and since then proper care, love and affection is being bestowed upon her and she is the only child in the family. She has been admitted in a very reputed school and she is doing very good in her study and proper education and health care is being provided to her. The academic performance of the minor child was also brought before the Family Court from which it appears that she is doing very good in her studies. She is very happy and contented in company of her grand parents. It has further been submitted on behalf of the respondent that no one on behalf of family of appellant has ever come to see the minor child. The father is the natural guardian and custodian of minor child but that would not Ipso facto entitled him to the custody. It is the interest of the child which is of paramount importance. The welfare of minor daughter is paramount consideration and the custody of minor cannot be decided only on the ground of being natural guardian. The dominant factor for



consideration of the Court is the welfare of the child and the welfare of child cannot be managed only with money.

12. Under the Guardians and Wards Act, 1890 as also Minority and Guardianship Act, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. Ordinarily under the Guardians and Wards Act, the natural guardian of the child have a right to the custody of the child and 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 respondent grand parents for a long time and is growing up well in an atmosphere which is conducive to her growth. It may not be proper at this stage for diverting the environment of the child. Therefore it is desirable to allow the respondent to retain the custody of the child.

13. We have interviewed the minor child, who is 10 years old, and found her to be intelligent and of good understanding. She expressed her willingness to live with her grand parents and was not very good to her father. Even after persuasion, she was not ready to go with her father or her Grandparents. She has an impression in her mind that his father is responsible for death of her mother. In such circumstances, she could not be forced to go with her father.

14. The Apex Court in a case reported in 2012 12 SCC



page 471 (Gaytri Bajaj Vs Jiten Bhalla) has held that it is the ultimate desire and willingness of the child which decide the custody of child.

Para No. 14 of the judgment is quoted below:-

From the above it follows that an order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

15. The Apex Court in a case reported in (2009) 7 Supreme Court Cases 322 (Anjali Kapoor Versus Rajiv Baijal) where dispute



of custody in respect of minor girl child was between father and maternal Grand mother and Apex Court upheld the custody of Maternal Gran mother to the continued against claim of father. The relevant paragraph Nos. 22, 23 and 26 are quoted below:-

22. *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 the present case. In this 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 alongwith 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 legislatures on the right of natural guardian for the custody of minor child.*

23. *Anagh is staying with the appellant's family and is also studying in one of*



the reputed school in Indore. It must be stated that the appellant has taken proper care and attention in upbringing of the child, which is one of the important factor to be considered for the welfare of the child. Anagh is with the appellant right from her childhood which has resulted into a strong emotional bonding between the two and the appellant being a woman herself can very well understand the needs of the child. It also appears that appellant, even after her husband's demise, is financially sound as she runs her own independent business.

26. 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.

15. Considering the facts and circumstances of the present case and after having interaction with the child who appears to be



quite intelligent and of good understanding and keep her willingness to remain with her grand parents, this court is not inclined to interfere with the order passed by the Family Court. As such, the present Miscellaneous appeal filed by the appellant is dismissed.

(S. Kumar, J)

Dr. Ravi Ranjan, J: I agree

(Dr. Ravi Ranjan, J)

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