

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Miscellaneous Appeal No.725 of 2017**

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Braj Bhushan Singh, Son of Sri Anand Mohan Singh, Resident of Village-  
Chandwara, P.O. P.S.- Kartahan in the District of Vaishali.

... .. Appellant/s

Versus

1. Vivek Kumar, Son of Late Bashishta Narayan Singh.
2. Dropadi Devi, Wife of Late Bashishta Narayan Singh.  
Both are Resident of Village- Vaishali, Police Station- Vaishali in the District  
of Vaishali.

... .. Respondent/s

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**Appearance :**

|                      |   |                                                               |
|----------------------|---|---------------------------------------------------------------|
| For the Appellant/s  | : | Mr. Mr. Awadhesh Kumar Singh, Adv.                            |
| For the Respondent/s | : | Mr. Ram Chandra Singh, Adv.<br>Mr. Jitendra Kumar Singh, Adv. |

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**CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH**  
**and**  
**HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)**

**Date : 25-09-2020**

Heard learned counsel for the appellant and the respondents.

The present appeal has been directed against the judgment dated 22.06.2017, passed by the learned Principal Judge, Family Court, Vaishali at Hajipur in Guardianship Case No.15 of 2016, whereby, the learned Court below has rejected the prayer of the appellant to hand over the custody of minor children of the appellant, namely, Shneha Kumari @ Jugnu Kumari aged 12 years and Himanshu Kumar, aged 6 years to



him.

The factual matrix of the case is that the appellant was married with Priyanka Kumari on 24.04.2002 and subsequently, the couple were blessed with a male and a female child. Thereafter, Priyanka Kumari was killed, leading to registration of Kartahan P.S. Case No. 69 of 2012, with accusations under Sections 302 and 201/34 of the I.P.C., wherein the thrust of accusation is against the appellant. The appellant was arrested in the said case. The investigation of the case has been concluded, leading to submission of final form (chargesheet) and the appellant has been chargesheeted after remaining in custody for a considerable period.

Subsequently, the appellant preferred Guardianship Case No. 15 of 2016 before the Principal Judge, Family Court, Vaishali at Hajipur for the custody of his minor children. The learned Principal Judge, Family Court, Vaishali at Hajipur vide order dated 22.06.2017 dismissed the aforementioned guardianship case of the appellant, as the Court did not find it safe to hand over the custody of the children to the appellant, on the ground that the appellant is the main accused in the murder case of the mother of the minor children.

During the hearing of the present proceeding, this



Court directed for production of the children. While interacting with the children, the Court finds that the children were fear-stricken.

Learned counsel for the appellant submits that the appellant is the natural father of both the children and he can be given the guardianship for their proper upbringing and development. The appellant claims to have an earning of Rs.20,000/- per month, whereas the respondents have no such source of earning.

Learned counsel for the respondent nos. 1 and 2 submits that the appellant has killed the mother of both the children and he wants custody of the children only for the purpose that the children may not depose against him during trial, as he has been chargesheeted under Section 302 of the IPC in the said criminal case.

This Court, vide order dated 31.1.2019, on the joint prayer of the appellant and the respondents, permitted them to file affidavit with regard to source of their income and their plan to bring up the minor children with dignity. Consequently, the appellant filed affidavit dated 19.2.2019 through I.A. No. 1 of 2019 claiming that he has earning of Rs.15000/- per month and has two bighas of land of his share in the joint family property.



Paragraph no.5 of the aforementioned interlocutory application reads as under :-

“That it is submitted here that appellant is presently earning about Rs.15,000/- per month after selling of daily newspaper and having share of 2 Bigha of land in joint family property after partition.”

In view of the submissions of learned counsels for the appellant, the learned counsel for the respondents submits that the respondents have no objection if the appellant provides financial help for the maintenance and development of the minor children and consequently, the bank account number of Shneha Kumari has been brought on record by respondents vide affidavit dated 7.5.2019. The appellant appeared in the Court and flatly refused to provide any money for the welfare of the children until their custody is given to him. Consequently, the Court granted several indulgences to the appellant offering him to inspire confidence in his small children and the respondents, i.e., the maternal uncle and grand mother so that children may feel inclined to go to their father's (appellant's) house, but the appellant refused to do so.

Section 7 of the Guardians and Wards Act, 1890 elaborates the power of the Court to pass order of guardianship



for the welfare of a minor. The pre-condition for passing order for the guardianship is that the Court must be satisfied that the said order is always for the welfare of the minor. Section 7 of the said Act reads as follows:

***“7. Power of the Court to make order as to guardianship.—*** (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(a) appointing a guardian of his person or property or both, or

(b) declaring a person to be such a guardian the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.”

While deciding the matter of custody of child , it is not the view of one of the spouse or either of the spouses which is important. The Court should decide the issue of custody on a



paramount consideration which is in the best interest of the child who is the ultimate victim in the custody battle. The guiding principle is “where the welfare of the child would lay”.

A gainful reference may be made to para 17 of the judgment of Hon’ble Supreme Court in the case of SHEOLI HATI Vs. Somnath since reported in (2019) 7 SCC 490, which reads thus :-

It is well settled that while taking a decision regarding custody or other issues pertaining to a child, welfare of the child is of paramount consideration. This Court in Gaurav Nagpal vs. Sumedha Nagpal, (2009) 1 SCC 42, had occasion to consider the parameters while determining the issues of child custody and visitation rights, entire law on the subject was reviewed. This Court referred to English Law, American Law, the statutory provisions of Guardian and Wards Act, 1890 and provisions of Hindu Minority and Guardianship Act, 1956, this Court laid down following in paragraph Nos. 43, 44, 45, 46 and 51:

“43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the “welfare of the child” and not rights of the parents under a statute for the time being in force.

44. The aforesaid statutory provisions came up for consideration before Courts in



India in several cases. Let us deal with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well being as paramount consideration.

45. In *Saraswathibai Shripad Ved v. Shripad Vasanji Ved*, ILR 1941 Bom 455 : AIR 1941 Bom 103; the High Court of Bombay stated;

“....It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the Court. It is the welfare of the minor and of the minor alone which is the paramount consideration.....” (emphasis supplied)

46. In *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840, this Court held that object and purpose of the 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

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. ”

In the present case, when the appellant being the natural father, is an accused for the murder of the mother of the children, prima facie, it does not inspire confidence that the children will be safe under the guardianship of the appellant. Hence, we do not find any infirmity in the impugned order.

It appears that the minor children were O.P. Nos. 3 and 4 before the learned Court below but the appellant has not made them party in the present Miscellaneous Appeal. On that score also, we are not inclined to interfere in the matter.

Accordingly, this Miscellaneous Appeal is dismissed.

**(Dinesh Kumar Singh, J)**

**( Anil Kumar Upadhyay, J)**

Ashwini/-Anil/-

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