

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal (M) No. 234 of 2018

- Mohammed Sarwar, aged about 31 years, R/o Kurud Road, Kohka, Near Hanuman Mandir, Kohka Bhilai, District Durg (CG)

---- Appellant

Versus

- Armaan Khan (Minor), aged about 5 years, S/o Mohammed Sarwar, through Mother Mrs. Tabassum Aara, R/o Behind Hanfi Mosque, Shanti Nagar Road, Kohka, Bhilai, District Durg (CG)

---- Respondent

For the Applicant	:-	Mr. Faiz Kazi, Advocate.
For the Respondent	:-	Mr. Hariom Rai, Advocate on behalf of Mr. Jitendra Gupta, Advocate.

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor,

Order on Board by Justice Manindra Mohan Shrivastava J.

13.08.2019

1. This appeal is directed against order dated 31st August, 2018 passed in Miscellaneous Civil Suit No.21/2015 passed by First Additional Principal Judge, Family Court, Durg rejecting appellant's application under Section 10 (1) of the Guardians and Wards Act, 1890 for custody of his minor son - Mohammad Arman Khan.

2. The appellant moved an application before the Family Court seeking custody of his child on the pleadings, *inter alia*, that son Arman, was born on 07.11.2007, out of the wedlock of appellant and the respondent. According to the appellant, respondent/wife left the matrimonial house after conceiving and thereafter, she never returned. False cases were also got registered against the appellant alleging cruelty but, in all those cases, he has been acquitted. He is not being allowed to meet his own child. According to him, respondent/wife does not have the requisite financial capacity to arrange for education and

other needs of the child. Lack of interaction within the family and in the society is adversely affecting growth of the child and the father, being natural guardian, has all the financial capacity to provide for the needs, custody of the child may be awarded to him.

3. Opposing the application, the respondent/wife stated that Arman is an adolescent child and is fully dependent upon her and as she is earning well and is also getting full support from maternal side, custody of child may be given to her. She has further stated that as the appellant has contracted second marriage and three children have been born out of their wedlock, the child Arman may not get conducive atmosphere for his proper growth in such a family consisting of step mother.

4. The learned Family Court, after allowing the parties to lead oral and documentary evidence, came to the conclusion that taking into consideration the wishes of the child and also that his welfare for the present rests in allowing him to remain in the custody of his mother, rejected the application giving rise to this appeal.

5. Learned counsel for the appellant would argue that the learned trial Court committed illegality in rejecting the application because the appellant is the father and natural guardian of the child Arman. He would submit that the appellant has led evidence which has not been disbelieved by the trial Court that the appellant is earning well by running a workshop and there will be no financial impediment in proper upbringing of the child. It is also submitted that learned Court below was swayed only by wishes of the child without appreciating that the mother is actually not residing at Kohka Bhilai but in connection with her job, she is residing at Ahmadabad and the child is virtually left in the

hands of maternal grand parents and uncle. If the mother herself is not in a position to personally look-after the child, the Court below ought to have granted custody of the child to the appellant.

6. On the other hand, learned counsel for the respondent would argue that the order passed by Family Court is on relevant consideration, proved from the facts that the child is young and has remained with the mother ever since his birth and further that the mother is financially capable and is actually taking proper care by providing him necessary education. He would further submit that the appellant having admitted in his cross-examination that he has contracted second marriage and there are three children born out of that wedlock, the welfare of minor child Arman would not lie in subjecting him to be in the company of step mother where he may not get proper attention and care.

7. We have heard learned counsel for the parties and perused the records.

8. It is not in dispute that the child Arman ever since his birth on 07.01.2007 is residing with his mother. The respondent/mother has led reliable evidence stating in her cross-examination that she is earning Rs.25,000/- per month. In her evidence, she has also stated that she is making certain periodical deposits under premium schemes, mutual funds, etc. and she is providing education to her son by getting him admitted in the school. The receipts of payment of school fees and other documents evidencing that child Arman is studying in school have also been led in evidence by the respondent. Report card has also been placed on record which also shows that the child is being

provided proper education and it is not a case where there appears to be any shortcoming in giving proper attention to the child.

9. No doubt, the father is natural guardian of the child, however, at the same time it has to be kept in mind that welfare of the child is paramount consideration. The child was also examined by the trial Court and he has stated that right from the beginning he is residing with his mother and is not willing to go along with his father. We also ascertained the wishes of the child Arman who is present in the Court. The child even at this stage, clearly expressed that he wishes to reside only with his mother and not with his father.

10. After going through the impugned judgment passed by the learned Family Court and the material available on record we find that though both mother and father appear to be competent, the wish of the child is to reside with his mother only because ever since his birth, he has been residing with his mother. An argument that his mother in connection with her job is residing at Ahmadabad and the child is not presently residing with her there but has been kept in her maternal house along with his maternal grand parents and uncle, in our considered opinion, does not entitle the appellant, only on this ground, to claim custody of the child. The evidence of respondent is that she has been taking proper care of the education of her son by frequently visiting him every month and is also planning to take the child to Ahmadabad with her. Since the child never resided with his father at earlier point of time nor is he still willing to live with him, it would be against his interest to force him to reside with his father in the family of step mother and other three children.

11. On overall considerations, we are of the view that at this stage, the welfare of the child which is a paramount consideration in the matter of custody, lies in allowing him to remain with his mother rather than to force him to reside with his father. Nevertheless, the father is entitled to proper visitation rights. We find that the learned Court below has already protected this right of the father in an appropriate manner, calling for no interference in this appeal.

12. In the result we are not inclined to interfere with the order impugned and being so it is hereby maintained. Appeal thus being without any substance is liable to be and is hereby dismissed.

Parties shall bear their respective costs. Let appellate decree be drawn accordingly.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Vimla Singh Kapoor)
Judge

Ajay