

HIGH COURT OF CHHATTISGARH, BILASPUR**First Appeal (M) No. 23 of 2018**

(Arising out of order dated 12.12.2017 in Civil Suit No. 01-A/2015 of
the learned Family Court, Rajnandgaon)

- Kishore Prajapati S/o Alopi Prasad Prajapati Aged About 34 Years Caste - Kumhar, Occupation Cement And Hardware Shop, R/o Choube Colony, Geeta Nagar, Raipur, P.S., Tahsil And Distt. Raipur (Chhattisgarh), District : Raipur, Chhattisgarh

---- Appellant

Versus

1. Smt Manisha Prajapati W/o Kishore Prajapati Aged About 28 Years Caste- Kumhar And R/o Village Akarjan, Police Station, And Tahsil Khairagarh, Distt. Rajnandgaon (Chhattisgarh), District : Rajnandgaon, Chhattisgarh
2. Ku. Raina D/o Kishore Prajapati Aged About 12 Years Minor Through Legal Guardian Mother Manisha Prajapati (Resp. No.1), Caste- Kumhar And R/o Village Akarjan, Police Station, And Tahsil Khairagarh, Distt. Rajnandgaon (Chhattisgarh), District : Rajnandgaon, Chhattisgarh
3. Kumar Raunak S/o Kishore Prajapati Aged About 8 Years Minor Through Legal Guardian Mother Manisha Prajapati (Resp. No.1), Caste- Kumhar And R/o Village Akarjan, Police Station, And Tahsil Khairagarh, Distt. Rajnandgaon (Chhattisgarh), District : Rajnandgaon, Chhattisgarh

---- Respondents

For Appellant	: Shri Uttam Pandey, Advocate
For Respondents	: Shri Dashrat Prajapati, Advocate

Hon'ble Shri Manindra Mohan Shrivastava, Judge

Hon'ble Shri Sharad Kumar Gupta, Judge

Judgment On Board

Per Manindra Mohan Shrivastava, J.

13.01.2020

1. By this appeal, appellant being father of two children namely Ku. Raina and master Raunak has assailed the correctness and validity of order dated 12.12.2017 by which the learned Family Court has

rejected application for grant of custody of two minor children to the appellant.

2. An application under Section 6 of the Hindu Minority and Guardianship Act read with Section 10 of the Guardianship and Wards Act was filed by the appellant before Family Court seeking custody of his two minor children namely Ku. Raina (Aged 9 years) and Master Raunak (Aged 6 years) on the pleading that marriage between the appellant and his wife Manisha was solemnized in the year 2005 and from their wedlock, a daughter was born on 18.02.2006, thereafter, a son was also born on 28.07.2009. It was pleaded that the respondent wife has left the matrimonial house without any justified cause and is residing with her parents and not allowing appellant to meet children or get their company, due to which, appellant is deprived of the company of his children. As the mother herself is not financially competent, it is adversely affecting the education and growth of two children. As pleaded by appellant, he is running a shop and is financially competent to maintain his children, therefore he may be granted custody.
3. Opposing the prayer, respondent No 1 Smt. Manisha pleaded that in connection with certain demands which were in the nature of dowry, he used to harass her and frequently physically assaulted in state of intoxication and when the behaviour, conduct and treatment crossed limits, causing physical and mental cruelty, even then, respondent wife continued and finally on 13.05.2012 she was unceremoniously shunted out from the matrimonial house and thereafter, she left house of her husband and came with her two minor children at Khairagarh where she is providing proper education to the children and they are

being well maintained by her. It was also pleaded that in other proceeding under Section 125 of Cr.P.C, maintenance has been awarded to her and children but the appellant is not making payment and huge arrears of Rs.1,54,000/- remains to be paid and the application for custody has been filed at this stage to avoid such financial obligations under the order passed by the Court.

4. After allowing the parties to complete their respective pleadings, learned trial Court framed various issues including an issue as to whether the welfare of the child lies in granting custody of two children to the plaintiff, allowed the parties to lead oral documentary evidence and on consideration of pleadings and the evidence on record, came to the conclusion that welfare of the children lies in allowing them to continue in the custody of their mother rather than handing over the custody to appellant-father.
5. Learned counsel for the appellant, assailing correctness and validity of the judgment, argued to submit that appellant is the natural guardian in preference to the mother in view of the provisions contained in the Hindu Minority and Guardianship Act, looking to the age of the children. The other important submission by the learned counsel for the appellant is that from the pleadings and evidences on record, it is clear that the respondent-wife had applied for grant of maintenance and she, as well as children were awarded maintenance by the appellant and the evidence on record led by both the parties clearly proves that appellant is financially sound and the respondent wife is not having any substantial earning to maintain the children and herself. He would also submit that appellant's affinity and concern for wellbeing of the children is proved from the fact that appellant has

already been making financial arrangement and saving money for better future of his children. Even then, the learned Court below committed serious illegality in granting custody of two children to the mother, swayed only by the fact that respondent happens to be mother.

6. On the other hand, learned counsel for the respondent would argue that even if it is accepted that the financial condition of the appellant is better than the mother, looking to the welfare of the children, which is paramount consideration, the well being of the children and their mental comfort would be better served, if they are allowed to continue in the custody and company of their mother with whom they have been residing since their childhood. He would further argue that the evidence on record clearly proves that the children are getting proper education in the school and therefore, it cannot be said that continuance of children in the custody of their mother is adversely affecting their education, health and over all development and grooming.
7. We have heard learned counsel for the parties and perused the record.
8. We found that the marriage between the appellant and respondent were solemnized way back in the year 2005 and they are blessed with a daughter in the year 2006 and a son in the year 2009. As to date from which the respondent-wife is not residing with the appellant but residing in her parental house is also proved from the pleadings and overwhelming evidences on record that w.e.f. 13/05/2012 the respondent wife is not living with her husband.

9. In his application, the appellant did not state any reason as to why his wife left the matrimonial house. In her reply, however, the respondent-wife stated that she was frequently beaten by her husband in state of intoxication and various demands and finally, on 13/05/2012, she was thrown out of her matrimonial house.
10. While in the application, the appellant has not stated any reason as to why his wife left his house, an attempt has been made to come out with an afterthought ground by stating for the first time in the affidavit evidence before the Court that the respondent-wife left the house of the appellant because, appellant was suffering from leucoderma disease. His father Alopi Prasad Prajapati, PW-2 has admitted in para 16 of the cross-examination that the defendant never developed any hatred against respondent-appellant for the reason that he is suffering from leucoderma. This ground was not even pleaded in the application. Therefore, the pleading and evidence of the appellant on the aspect as to why his wife left matrimonial house are at variance.
11. On the other hand, respondent-wife has taken specific stand not only in the pleading but also led evidence that because of beating by the appellant and that he was a drunkard and that she was thrown out of the matrimonial house that the learned Court below has also leaned in favour of respondent-wife that it is not that she who left the matrimonial house but that she was unceremoniously shunted out of the matrimonial house. Therefore, on preponderance of the probability, it has to be held that it is not the respondent-wife who left the matrimonial house but it is the appellant who used to commit cruelty on her more often in state of intoxication and as a result, finally, she was beaten out from the matrimonial house.

12. True it is that the evidence on record proves that the husband is financially competent, as in his pleading and evidence, he has stated that he is earning whereas wife does not appear to be financially sound as she herself has moved an application for grant of maintenance, which was eventually allowed by the competent Court, by which she and two minor children have been awarded monthly maintenance @ Rs.6000/-. In the evidence, it has also come that the respondent-wife is only engaged in household vocation, but no definite income has been stated. Therefore, it has to be held that the husband is financially more competent to maintain his children than his wife.

13. However, when this Court interacted with the children, they expressed their willingness to reside only with their mother. This appears to be because of their affinity and bondage with their mother ever since their childhood. Till the respondent-wife was shunted out of the matrimonial house in the year 2012, the children were in the parentage of the appellant and respondent both. However, after 2012, two children are continuously residing with their mother. There is no specific evidence led by the appellant to establish any strong reason for the Court to remove the children from the custody of their mother and give it to their father. It is well settled legal position that even if the father is declared to be natural guardian in preference to the mother, the welfare of the minor has always been held to be of paramount consideration and if it is found that the welfare of the child is duly protected in allowing them to remain in custody of their mother, in such a case, the father may not be granted custody of the children. Present is a case where the respondent-mother has clearly come out with specific evidence that both the children have been admitted in the school and they are getting education. No adverse material could be

brought before us and the Court below in the evidence by the appellant to establish why continuance of the children with the mother may be against their welfare.

14. No doubt the welfare of the children would be served whether they reside with their father or mother, in the present state of affairs when the children not only have been residing with their mother ever since their childhood and after year 2012, they are being groomed by their mother by providing education also and further taking into consideration that even after interaction with the children, though they spent some time with their father in his residence, still they are willing to continue to reside with their mother only, and also taking into consideration that the appellant moved an application for custody of children after about 2 ½ years and particularly after an order for grant of maintenance was passed under Section 125 of Cr.P.C. proceeding, in our considered opinion, the welfare of two minor children is better protected if they are allowed to remain in custody of their mother rather than sending them to custody of their father against their wishes.

15. Therefore, we are not inclined to interfere with the order passed by the learned Court below.

16. However, at the same time, the appellant being the father of two children, is entitled to proper visitation rights so that the two children, while continuing in the comfortable company of their mother are not deprived of parentage of their father as well. We therefore allow visitation rights to the appellant in the manner that the appellant would be entitled to visit two children every Sunday in evening from 4.00 p.m. to 8.00 p.m. If the respondent-mother is also accompanying, the

appellant may also take children for an outdoor activity, entertainment, excursion etc. Moreover the appellant would be entitled to temporary custody of children for ten days during summer vacations and for seven days during winter holidays.

17. We hope that the parties would explore the possibilities of their re-union so that two children are benefited not only by the love, affection and care of their mother but of their father also.

18. The appeal is accordingly disposed off.

Sd/-

(Manindra Mohan Shrivastava)
JUDGE

Sd/-

(Sharad Kumar Gupta)
JUDGE