

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **MAT. APP. (F.C.) 68/2020 and C.M. APPL. Nos. 8112-2020**
and 8113/2020

Date of decision: 01.05.2020

IN THE MATTER OF:
FAISAL KHAN

..... Appellant

Through: Mr. N.U. Ahmed, Advocate

versus

HUMERA

..... Respondent

Through: None.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE ASHA MENON

HIMA KOHLI, J.

1. The present appeal is directed against an *ex-parte* judgment dated 29.11.2019, passed by the learned Family Court, South-East District, Saket, New Delhi, dismissing a petition filed by the appellant/father under Section 25 of the Guardians & Wards Act, 1890 for seeking custody of the minor son of the parties, master Azhaan, who is in the care and custody and the respondent/mother.
2. The brief facts leading to filing of the Guardianship petition by the appellant/father are as follows:-
3. The appellant and the respondent got married as per the Muslim customs and rites at Nizamuddin Mosque, Delhi on 14.6.2009. The couple was blessed with a baby boy, Azhaan on 11.2.2011. The respondent gave birth to the child at the residence of her parents at Hyderabad. In less than

five months from the date of birth of the child, the appellant gave a *talaq* to the respondent on 01.07.2012 and sent her the *talaqnama* through registered post while she was still at her parent's residence in Hyderabad. In September, 2012, the appellant filed a suit for declaration before the Principal Judge, Family Court, Saket, New Delhi praying *inter alia* that a decree of declaration be passed, declaring that pursuant to the *talaqnama*, his marriage with the respondent stood dissolved.

4. On 05.10.2012, on the complaint of the respondent at the Women Police Station Begumpet, North Zone, Hyderabad, FIR No. 132/2012 was registered against the appellant under Sections 498-A/406/34 IPC. On the FIR being registered against the appellant and his family members, they had to approach the court for seeking anticipatory bail, which was declined right upto the Supreme Court. Finally, the appellant got regular bail from a court at Hyderabad on 28.12.2012.

5. In May, 2013, the appellant filed a petition under Section 25 of the Guardians & Wards Act 1890 before the learned Family Court, Saket stating *inter alia* that he is entitled to take the custody of the child being his natural guardian; that the child is of a tender age and cannot live without the appellant; that no persuasion has worked with the respondent and her family members to hand over the custody of the child to him; that the respondent had deserted him and left the matrimonial home without any justification and has deprived him of his child. The appellant further averred that he is comfortable at his parents' house that provides a secure environment and 24 hours security; that he has all the basic amenities of life and if the child is handed over to him, he along with his parents and younger sisters would be able to rear him; that when the respondent was pregnant, she had sent

repeated messages to the appellant that she was not in favour of bearing the child and had even threatened to terminate the pregnancy and this is the main reason for the appellant's worry. With this narrative, the appellant prayed that he be appointed as the guardian of the minor child and his custody be handed over to him.

6. On summons being issued, the respondent entered appearance and contested the Guardianship petition by filing a written statement on 21.10.2013. She raised several preliminary objections including an objection with regard to the territorial jurisdiction of the Family Court at Saket to entertain the Guardianship petition. On merits, it was averred in the written statement that she and her family members had suffered a lot of harassment at the hands of the appellant, from day one; that the parents of the appellant had demanded huge amounts from the respondent and her family members towards dowry. It was submitted though the marriage of the parties was performed at Delhi on 14.6.2009, where the parents of the respondent had showered several gifts, cash and jewellery on the appellant and his family members, they refused to take the respondent to the matrimonial home claiming that they were waiting for an auspicious day for the parties to cohabit. As a result, the appellant had to accompany her parents to Hyderabad on 16.6.2009. After two months, the appellant and his parents visited Hyderabad but again they refused to take the respondent back with them stating that she would have to wait for some more time. While returning to Delhi, they made further demands of dowry in the shape of a flat, mobile phone, car and for a trip to USA.

7. After a passage of 10 months from the date of the marriage and upon much persuasion, the appellant finally agreed to take the respondent with

him to the matrimonial home on 30.4.2010, but within one week therefrom, she was again sent back to Hyderabad, on 05.5.2010, and was advised by the appellant and his family members to bring some money for the surgery of his father. On 30.05.2012, the respondent's father arranged a reception at Hyderabad, which was attended by the appellant and his family members and they returned to Delhi in the first week of June, 2010. It is the version of the respondent that repeated demands of dowry were made on her when she returned to Delhi and though her parents had visited Delhi and tried to persuade the appellant's mother to be reasonable, she had to leave her matrimonial home and return to her parents' house at Hyderabad, on 03.8.2010. Thereafter, they did not ask after the respondent. Finally, the respondent and her father came down to Delhi and approached the appellant's mother and they agreed to take her back on 27.10.2010. By then, the respondent was on the family way and she was sent back to Hyderabad on 07.12.2010 for delivering the baby. Baby Azhaan was born in Hyderabad on 11.2.2011 and the entire expenses incurred on the delivery were borne by the parents of the respondent. On 30.03.2011, the respondent returned to her matrimonial home with baby Azhaan, but she received a very cold welcome. The respondent claimed that she was constantly mistreated by the appellant and his family members and was physically assaulted by the appellant during her brief stay at the matrimonial home.

8. In June, 2011, the respondent was packed off to Hyderabad. She returned to her matrimonial home in October, 2011 and immediately thereafter, the appellant and his family members again started raising dowry demands on the respondent. Facing extreme hardship at their hands, besides physical assault, the respondent was compelled to leave her matrimonial

home with the child in the clothes that she was wearing, on 16.3.2012. Initially, she moved over to her uncle's house (father's brother) in Delhi and later on, to her parental home at Hyderabad, on 26.5.2012. The respondent stated that the appellant and his mother did not care to see the minor child or send her any amount towards their maintenance and nor did he ask after the welfare of the child in all this duration. Ever since then, the respondent and her baby were residing with her parents. On 01.07.2012, the appellant gave *talaq* to the respondent and dispatched the *talaqnama* through registered post to her at her parental home. It was only in May 2013, that the appellant filed the Guardianship petition.

9. On completion of pleadings, the Family Court framed the following issues vide order dated 25.9.2014:-

- “1. Whether it is in the interest and welfare of the minor child “Master Azhaan”, if his paramount custody is granted to the petitioner/his father? OPP*
- 2. Whether the petitioner is entitled to decree as prayed for? OPP*
- 3. Relief.”*

10. In the meantime, on the basis of an application moved by the appellant under Section 12 of the Guardians & Wards Act, 1890, the Family Court granted him visitation rights in respect of the child. He was permitted to meet Azhaan on 12.3.2016, for two hours. On 10.6.2016, the respondent appeared in the court and gave an undertaking that she will not take the child abroad without the prior permission of the court but thereafter, she absented herself and was finally proceeded against *ex-parte* vide order dated 23.2.2017.

11. On 20.9.2017, the appellant informed the court that he had given

talaq to the respondent and that she had got re-married in November, 2015. The appellant also moved an application in court, calling upon the respondent to produce and deposit her passport and that of the child in court and for issuing directions to the Passport Authority and the school of the child to produce her passport and the records of the child respectively. Vide order dated 01.9.2019, the Regional Passport Office impounded the passport of the child. The appellant informed the court that after getting re-married, the respondent had moved with the child to Dubai and she was living there.

12. At the stage of the evidence, the appellant examined himself as PW-1 and tendered an affidavit (Ex.PW1/A) wherein he reiterated the averments made by him in the Guardianship petition. He also filed several documents including his *nikahnama* and the *talaqnama*, orders passed in the proceedings initiated by the respondent under the Domestic Violence Act for maintenance, order of the High Court in the Contempt petition filed by the appellant, the marriage certificate of the respondent with one Mussavir Mustafa, the affidavit filed by the respondent with the Passport Office, orders passed by the Passport Authority impounding the passport of the child and the orders passed by the High Court in a writ petition filed by the appellant for seeking cancellation of the passport of the child etc.

13. After hearing the arguments advanced by learned counsel for the appellant and examining the evidence, both documentary and ocular, the learned Family Court opined that it would not be in the interest and welfare of the Master Azhaan, to grant his permanent custody to the appellant/father. The reasons that weighed with the learned Family Court for declining permanent custody of the child to the appellant were that there was no evidence placed by him on record to show how the interest and welfare of

the child had been jeopardised on the respondent remarrying in the year 2015, particularly, when the step-father was admittedly working in a Multinational company in Dubai and was financially in a sound position to take care of the child; that there was no evidence to show that the step-father was treating the child with cruelty or that after her marriage, the respondent had stopped looking after the child or she had stopped taking interest in his welfare. The Family Court also observed that ever since his birth, the child had remained in the care and custody of the respondent/mother and therefore, the mere apprehension of the appellant that if the respondent gives birth to a child from her second husband, it would adversely affect the interest and welfare of the child, was rejected as baseless.

14. As for the plea taken by learned counsel for the appellant that the respondent had violated the orders of the Family Court by refusing to bring the child to meet him and had flouted the undertaking given by her that she will not leave the country without the prior permission of the court and had instead, left for Dubai, the Family Court observed that the appellant had a legal recourse for the violation of the court orders by the respondent, but that itself could not be a ground to deprive her of the custody of the child, particularly, when he had all along been under her care and custody, being the biological mother.

15. After citing several decisions of the Supreme Court and the High Courts, where it has been emphasised that in evaluating a case of custody of a minor child, the sole and predominant factor that ought to weigh with the court is in the best interest of the child which included the aspect of stability, security, love and understanding, for a wholesome development of the child's personality and talent, the Family Court opined that in the present

case, the interest and welfare of the child would be in continuing to remain in the care and custody of his mother. As a result, the Guardianship petition filed by the appellant was dismissed. Aggrieved thereby, the present appeal has been filed.

16. Learned counsel for the appellant has argued that the Family Court ought to have considered the fact that the respondent had unlawfully left the shores of India with the minor child by misleading the court; that she had committed perjury by swearing a false affidavit in the Regional Passport Office; that the Family Court has disregarded the fact that the appellant is financially sound and in a condition to give adequate support to the minor child and that his physical and emotional needs would have very well been catered to by his parents and unmarried sisters; that the respondent having absented herself from the guardianship proceedings and having failed to enter the witness box to prove her case, the Family Court ought to have drawn an adverse inference against her and hold that welfare of the child would be better served with the appellant. Lastly, it was urged that once the respondent had got remarried, the welfare of the child was bound to suffer and this was sufficient reason for directing that the permanent custody of the child be handed over to the appellant.

17. We have perused the pleadings in the Guardianship petition, the affidavit by way of evidence and the documents filed by the appellant. We have also examined the impugned judgment in the light of the aforesaid pleas taken by learned counsel for the appellant. There is a line of decisions by the Supreme Court and the High Courts, consistently holding that the paramount consideration for appointment of a guardian should always and unflinching be the welfare of the minor child. The said welfare has to be

measured not only in terms of the financial support and physical comfort that the child may get. Equally pre-eminent is the emotional, moral and ethical welfare of the child. When there is a dispute between the parents in respect of the custody of the minor, the court has to try and strike a balance between the welfare of the child and the rights of the parents over the child. While deciding a custody petition, the courts must not be swayed only by the legal rights of the parties. The sole and dominant consideration ought to be the welfare and the happiness of the minor and the need to find out what would be the best manner of serving his interest, whether by way of offering emotional security or psychological stability or by showering him with love, and understanding.

18. The expression '*best interest of the child*' is a fairly broad concept. When examining as to what would be of paramount consideration and work in the best interest of the child, we can safely fall back on Section 2 (9) of the Juvenile Justice (Care and Protection of Children) Act, 2015, which defines it as "*the basis for any decision taken regarding the child to ensure fulfillment of his basis rights and needs, identity, social well-being, and physical emotional and intellectual development.*" In an ideal situation, the best interest of the child would be served by living in the company of both the parents who are the only ones who would shower him with love and care, create a happy and conducive environment and jointly contribute to his upbringing. The parents are best placed to provide the child with an emotional bonding, physical support and a conducive environment for him to blossom. To help develop the personality of a child, both the mother and the father play a pivotal role as parents as children imbibe personality traits from both parents. But that is an ideal situation which unfortunately does not

exist in many cases. Children are the first and the most susceptible victims of a shattered inter personal relationship between the spouses. Much as children would love to always remain in the loving care and custody of both the parents, they are torn between the father and mother due to their matrimonial disputes and the battle for their custody, leaving them helpless and devastated.

19. When the court is confronted with a question relating to the custody of a minor child, the guiding factor cannot be the legal rights of the warring parties. The sole and pre-eminent criteria that ought to weigh with the court is what would best serve the interest and welfare of the minor. [Refer Elizabeth Dinshaw Vs. Arvand Shaw Dinshaw reported as **(1987) 1 SCC 42**] Playing the role of a *parens patriae*, the court must ensure that the best interest of the child is served without taking into consideration extraneous aspects related to the discord between the spouses. At the same time, the court can also not be oblivious to fact circumstances that reveal that the husband has been mistreating his wife which would be treated a negative character trait and the court would have to ponder if it would be desirable for him to claim the custody of child only because he is the natural guardian. At the end of the day, the discretion to be exercised must be in the highest interest and welfare of the child and for arriving at any conclusion, the court must weigh all the circumstances, all the pros and cons and then arrive at a decision as to whether the petitioner before it on a plea of being the guardian, is fit to take over the custody of the child. (Refer: Smt. Ainunnisa vs. Mukhtar Ahmad and Anr. reported as **AIR 1975 All 67**)

20. In a recent decision of the Supreme Court in Laharti Sahamuri Vs. Sobhan Kodali reported as **(2019) 7 SCC 311**, where factors relevant to be

kept in mind while examining the best interest of the child have been delineated in the following words:-

“49. The crucial factors which have to be kept in mind by the courts for gauging the welfare of the children equally for the parent's can be inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.”

21. Coming to the facts of the instant case, the main thrust of the arguments addressed by Mr. N.U. Ahmed, learned counsel for the appellant is that the respondent has wilfully disobeyed orders of the court, given a false affidavit to the Passport Authorities and had taken the child away to Dubai which goes to prove that she is not fit to retain his custody and the welfare of the child would be best served if his custody is handed over to the appellant. The second leg of his arguments is that the respondent has got remarried and under the said circumstances, the interest of the child is bound to suffer adversely.

22. In the course of arguments, upon our enquiring about the current marital status of the appellant, learned counsel for the appellant stated with some reluctance that during the pendency of the Guardianship petition, his client had got remarried but even the second marriage did not last for too long as he had got divorced. If this court was to accept the plea of the appellant that the Family Court has erred in refusing permanent custody of

the child to him, though it was aware of the fact that the respondent had got remarried, taken the child with her to Dubai and there was every possibility of the step-father mistreating the child, then the same arguments would apply with equal force to the appellant who had also got remarried during the pendency of the Guardianship petition. There was no guarantee that his second wife would have taken good care of the child from the first marriage of the appellant, as against the biological mother.

23. As per the information furnished by the appellant to the Family Court, after the respondent had got married to Mr. Mussavir Mustafa, she had left with the child for Dubai, where her husband is working in a multinational company. This goes to show that the respondent has sufficient funds and economic resources to attend to all the needs of the child either for purposes of his schooling or for bringing him up comfortably. The respondent's remarriage can hardly be a ground for the appellant to claim that being the natural guardian of the child, he has a better right to claim his custody, over the respondent. At the end of the day, the court must examine the facts and circumstances of the case and then come to a conclusion as to whether it would be in the better interest of the minor child to remain in the custody of the father or the mother.

24. The records reveal that the respondent was on the family way when she was sent back to her paternal home in Hyderabad. The child was delivered by her at Hyderabad on 11.02.2011. The appellant did not go to meet the respondent and see the newborn till the mother and child went back to Delhi on 30.03.2011. Within one year therefrom, the respondent and the child who was about one year old, returned to the parental home on 16.03.2012. In less than 3 months, the appellant gave her *talaq*. Since the

respondent did not step into the witness box to prove the allegations of dowry demands, torture, physical assault and harassment at the hands of the appellant and his family members, we are neither in a position to comment on it and nor do we propose to go into the said allegations. But it's an admitted position that on the respondent's complaint an FIR was registered against the appellant under Sections 498A/406/34 IPC read with Sections 3 and 4 of the Dowry Prohibition Act and the appellant could not manage to get anticipatory bail right up to the Supreme Court. Though the appellant has stated in his affidavit of evidence that his sisters were exonerated in the case, charge sheet has been filed against him and the case is pending.

25. It is noteworthy that even as per the appellant, he and the child had parted company when he was about 16 months old. The minor was about one year old when his mother, the respondent herein had returned to her paternal home at Hyderabad. In such a situation, the child who would be 9 years old by now, would not be in a position to recognize the appellant as his father having remained with his mother for eight long years. The appellant would be no more than a stranger to the child even though he is his father. In such circumstances, we are of the opinion that the welfare of the child would be better served if his custody remains with the mother. Any order directing the custody of the child to be transferred to the appellant would completely displace the child and be detrimental to his growth. Since the child has remained in the custody of the respondent all this while, even if the appellant is the legal guardian of the minor, the respondent's claim to retain the custody of the child as the biological mother would stand on a better footing.

26. The contention of learned counsel for the appellant that the

respondent having violated the orders of the Court, itself was sufficient reason for the custody of the child be taken back from her and handed over to the appellant, is untenable. If he is aggrieved by the conduct of the respondent, the appellant is well entitled to take his legal remedies against her but that would not translate into an order in his favour, granting him permanent custody of the child. In exercise of its *parens patriae* jurisdiction, the court is not to look at the legal rights of the parties. It is only required to take into consideration the child's needs, see whether his day to day requirements would be taken care of, what could give him comfort, and how would his health, education etc. be taken care of. All other factors that would help in developing the character and building the personality and shaping the future of the minor child would be the guiding factors.

27. Given the facts and circumstances of the present case, where the child was just about sixteen months when the appellant had given *talaq* to the respondent on 01.7.2012 and the minor has all through remained with his mother at his maternal grandparents' place in Hyderabad, we have serious reservations about disturbing the custody of the child. Admittedly, the respondent had given birth to the child at her parental home at Hyderabad and ever since then, the child has remained in her care and custody and in all this duration, nothing has been placed on record to demonstrate that the appellant had established contact with the respondent and reached out to the child, except for some self serving bald statements made by him to the effect that he made several efforts to meet the child and that he was better positioned to take care of the needs of the child. We do not see any reason to remove the minor from the custody of the respondent and direct that he be handed over to the appellant. The guardianship petition filed by the

appellant appears to be more a tool to even out a score with the respondent, rather than a genuine means to reach out to the child and take over his custody, purely in his best interest and for his well being.

28. The respondent having moved on in life by remarrying after three years of being divorced by the appellant and fortunately, for her, having found a suitable match, where her husband is well placed in life and working in a multinational company in Dubai, we are of the opinion that the interest and welfare of the child, who would by now have completed 9 years, lies in him remaining with his biological mother. There is no reason to direct that his custody be handed over to the appellant on the flimsy excuse that the step-father would be mistreating him or that the respondent was likely to lose interest in him after she gives birth to a child from the second marriage. These are all surmises and conjectures and are not backed by any evidence.

29. In view of the aforesaid discussion, the impugned judgment is sustained and present appeal is dismissed as meritless alongwith the pending applications with no orders as to costs.

(HIMA KOHLI)
JUDGE

(ASHA MENON)
JUDGE

MAY 01, 2020
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