

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FAMILY COURT APPEAL NO. 06 OF 2022

Sunil s/o Suresh Kambale ... **Appellant**
Age 36 years, Occu: Service
R/o Behind Ambika Hotel, Kedgaon,
Ahmednagar, Dist. Ahmednagar

VERSUS

1. Sahebrao Shankar Jagtap,
Age 60 years, Occu: Retired
2. Nirmala Sahebrao Jagtap,
Age 56 years, Occu: Household work

Both R/o Jayhind Nagar, Bhushannagar,
Ahmednagar.
3. Shubham Sunil Kamble ... **Respondents**
Age 5 years, Occu: Education
4. Samrudhi Sunil Kamble,
Age 11 months, Occu: Nil

Mr. R. N. Dhorde, Senior Advocate i/by Mr. V. R. Dhorde, Advocate for
the appellant,
Ms. S. G. Sonawane, Advocate for respondent Nos. 1 and 2.

**CORAM : MANGESH S. PATIL &
Y. G. KHOBRAGADE, JJ.**

RESERVED ON : 08.12.2022

PRONOUNCED ON : 20.12.2022

JUDGMENT (Per Y. G. Khobragade, J.):

1. Admit. The appeal is heard finally with the consent of the
learned counsel appearing for both sides.

2. By the present appeal, the appellant takes exception to the judgment and order dated 25.10.2021 passed by the Family Court, Ahmednagar dismissing the petition (D1/2021), filed by the appellant under section 25 of the Guardians and Wads Act, 1890 for custody of his two minor children i.e. present respondent Nos. 3 and 4. The respondent Nos. 1 and 2 are his in-laws i.e. parents of his deceased wife Priyanka.

3. It is the case of the appellant that, on 20.02.2014, his marriage was solemnized with Priyanka, as per custom and rites prevailing in their community and out of marital tie, on 19.01.2015 they were blessed with a male child Shubham (Respondent No.3) and on 05.03.2019, a female child, Samrudhi (Respondent No.4). Priyanka was having some health issues. Her maternal house is situated in the same city, hence, since 10.09.2019 she started residing at her maternal house. However, on 03.12.2019, around 8.30 to 9.00 p.m. Priyanka committed suicide while residing at her maternal house and the fact was informed to him through phone but after hearing the sad news, he was became unconscious. Therefore, he was hospitalized for entire night and on the second day, he visited the house of his in-laws for funeral of Priyanka. However, in the meanwhile, respondents 1 & 2 and their relatives started making allegations against the appellant and his family members which led to filing of complaint against him, which

resulted in registration of Crime No. 1766/2019 with Kotwali Police station, Dist. Ahmednagar for the offences punishable under sections 306, 498-A, 323, 504, 506 and 507 of the Indian Penal Code. Subsequently, said crime led to registration of Regular Criminal Case No.418 of 2020 which is pending on the file of learned Judicial Magistrate First Class, Ahmednagar.

4. According to the appellant, since the day of marriage, the matrimonial relations between him and his wife Priyanka were cordial. He has been serving with the Central Railway being permanent employee and Priyanka was working as the State Government employee with Irrigation Department and both of them were drawing good salary. In the month of September 2019, Priyanka went to her maternal house along-with son Shubham and daughter Samrudhi (Respondent Nos. 3 and 4) due to her sickness. On the eve of Diwali festival, he presented golden necklace to his wife. But unfortunately, his wife committed suicide on 03.12.2019 and respondent No.1 filed a false complaint against him and his family members and since then, the respondent Nos. 1 and 2 kept custody of his minor children Shubham and Samrudhi. So also, the respondent Nos. 1 and 2 did not allow him to meet his minor children. He filed a petition under section 25 of the Guardians and Wards Act and prayed for custody of his minor children- Respondent Nos. 3 and 4 from the respondent Nos. 1 and 2.

5. According to the appellant, respondent No.1 is his father-in-law and respondent No.2 is his mother-in-law. The respondent Nos. 1 and 2 are having two unmarried children and no one is in a position to take care of his both the minor children. The children are studying in Jainacharya Shri Shivmuniji Gurukul School (JSS Gurukul) and he is capable of taking every care of his children. His son Shubham is having good affection with his mother Alkabai and he is natural guardian of both children having every love and affection towards them. Therefore, he requested respondent Nos.1 and 2 to be given in his custody.

6. Respondent Nos. 1 and 2 filed their written statement at Exh. 30 and denied all adverse allegations made against them. According to respondent Nos. 1 and 2 marriage of their daughter Priyanka was solemnized on 02.02.2014 with the appellant at Yesh Grand Hotel, Ahmednagar and they borne huge expenses of Rs.10 lakhs towards marriage of their daughter and also provided dowry of Rs. 3 lakhs cash and 3 tolas gold ornaments. After the marriage, their daughter Priyanka cohabited with the appellant at her matrimonial house. Though Priyanka was serving with Irrigation Department, Ahmednagar from the year 2012, the appellant and his family members meted out physical and mental harassment to her by suspecting about her character and due to unbearable torture, she committed suicide. According to respondent Nos. 1 and 2, on 03.02.2019 at around 5.00 p.m the

appellant had contacted Priyanka through mobile phone and threatened to kill her and her family members because of which she committed suicide. Thereafter, the respondent No.1 lodged a report with Kotwali Police Station on the basis of which Crime No. 1766/2019 registered against the appellant for the offences punishable under sections 306, 498-A, 323, 504, 506 and 507 of the Indian Penal Code.

7. The respondent Nos. 1 and 2 further contended that since the day of death of their daughter, respondent Nos. 3 and 4 minor children are in their custody and they are taking every care of both the minor children. The respondent No.1 is retired teacher and drawing pension and respondent No.2 is home maker, hence, they are able to take care and maintain both the minor children. Since the appellant had threatened Priyanka by suspecting her character. They are receiving threats from the appellant. Life of both the minors would be at peril. It is not safe to handover their custody to the appellant. Hence, they prayed for dismissal of the appeal. Hence, they prayed or dismissal of the appeal.

8. On the basis of rival pleadings of both sides, the learned Judge of the Family Court framed issues at Exh.90. The appellant/petitioner filed his evidence affidavit and also examined his mother Smt. Alka Suresh Kambale by filing evidence affidavit at Exh. 62. The appellant examined PW-3 Anand Dilip Kataria, Headmaster of the GSS

Gurukul at Exh. 68. The appellant filed purshis Exh. 91 and closed his evidence. Apart from stepping into witness box, the respondent Nos. 1 and 2 filed purshis Exh 92 by stating that, the appellant ill-treated their daughter and in consequence thereof, their daughter committed suicide. Therefore, the report was lodged against the appellant with Kotwali Police Station, on the basis of which Crime No. 1766/2019 registered against the appellant for the offences punishable under sections 306, 498-A, 323, 504, 506 and 507 of the Indian Penal Code.

9. The appellant and the respondents filed their written notes of arguments and after due hearing, on 25.10.2021, the learned Judge of the Family Court, Ahmednagar passed the impugned judgment and dismissed the petition on ground that the appellant is facing criminal trial for the offences punishable under sections 306, 498-A, 323, 504, 506 and 507 of the Indian Penal Code and it would not be in the welfare of both the minors to disturb their custody from their grandparents i.e. respondent Nos. 1 and 2 and both the minors would be entitled to meet the appellant on every 1st and 3rd working Saturday in children complex of the Court.

10. Mr. R. N. Dhorde, the learned Senior Advocate appearing for the appellant submitted that financial status of the of the appellant is much better than the financial status of respondent Nos. 1 and 2 and the appellant is a natural guardian of both the minors i.e. respondent

Nos. 3 and 4, so also, mother of the appellant is well educated having good health drawing pension and is capable to nurture both the minors. Registration of a crime for domestic assault like offence under section 498-A and 306 IPC cannot be good and sound reason to deny custody of minor children to the appellant who is their natural father. The respondent No.1 lodged a false report against the appellant because the respondent No. 1 and 2 lost their married daughter. The respondent Nos. 1 and 2 never raised any such grievance of cruelty against their daughter at the hands of the appellant prior to said untoward incident of suicide.

11. The learned senior advocate further canvassed that respondent Nos. 1 and 2 ,who are maternal grandparents of respondent Nos. 3 and 4, are not physically and financially sound to take proper care and provide better education to respondent Nos. 3 and 4. The appellant is a permanent employee. The wife of appellant committed suicide at the house of respondent No.1 when he was on duty, therefore, denial of custody of respondent Nos. 3 and 4 on the ground that the appellant is wholly unfit guardian is illegal and bad in law.

12. Per contra, Ms. S.G. Sonawane, the learned advocate for the respondent Nos. 1 and 2 supported the findings of the learned family Court. She submitted that the appellant has never taken care of his wife during her first pregnancy, hence, she came back to the

respondents' house for her delivery but the appellant did not visit her after delivery. Shubham is in custody of the respondent Nos. 1 and 2, since he was three years old. Samrudhi is in custody of respondent Nos. 1 and 2 since her birth. Therefore, the respondent Nos. 1 and 2 are having much love and affection towards both the minors and both the respondents are capable to take care of their welfare.

13. The learned counsel appearing for the respondents submitted that the PW3 Anand Kataria, headmaster of JSS Gurukul, admitted in his cross examination that minor Shubham was not regular in school when he was residing with the appellant due to domestic dispute and he is still taking education in the same school even when he is in custody of respondent Nos.1 and 2. Minors are residing with their grandparents since December, 2019 and respondent Nos. 1 and 2 are having much love and affection towards them. Since the trial for the offences punishable under sections 306, 498-A, 323, 504, 506 and 507 of the Indian Penal Code is pending against the appellant, hence, it would not be just and proper to give custody of both the minors to the appellant and said fact is considered by the family court and has rightly dismissed the petition.

14. In support of the submissions, the learned counsel appearing for the respondent Nos. 1 and 2 placed reliance on the decision of the Supreme Court in the case of **Nil Ratan Kundu Vs. Abhijit Kundu-** in

Civil Appeal No. 4960 of 2008 decided on 8th August, 2008, wherein as father was facing charge under section 498-A IPC, hence, custody of minor was not granted to the father and he was allowed to remain with his maternal uncle. She further relied on the case of **Smriti Kansagara Vs. Pery Kansagara (2020 SCC Online SC 887)** and **Ritika Sharan Vs. Sujay Ghosh (2020 SCc Online SC 878)** wherein the Hon'ble Supreme Court held that wishes of minor should be considered while deciding their custody application.

15. Having regard to the submissions canvassed on behalf of both the sides, we have gone through the record. It is an admitted fact that on 20.02.2019, marriage of appellant with Priyanka was solemnized at Ahmednagar and prior to marriage, she was in government employment. Out of wedlock on 19.01.2015 Shubham was born and on 05.03.2019 Samrudhi was born. Therefore, the appellant is natural guardian of both the minors.

16. The appellant filed evidence affidavit and stated that in the month of September 2019, his wife Priyanka visited her maternal house due to her health problem but he was in contact with her. So also, on the eve of Diwali festival, he purchased golden ornaments i.e. Necklace and Mangalsutra and presented to her, however, on 03.12.2019, at about 8.30 to 9.00 p.m., she committed suicide while staying at her maternal house. At that time he was on duty and after

hearing the news, his blood pressure increased due to which he fell down and was hospitalized for entire night. Therefore, on next day, with his family members visited the house of respondent Nos. 1 and 2 to attend funeral. But in the meanwhile, the respondent No.1 lodged a false complaint against him and his family members about cruelty which resulted in registration of Crime No. 1766/2019 with Kotwali Police station, Dist. Ahmednagar for the offences punishable under sections 306, 498-A, 323, 504, 506 and 507 of the Indian Penal Code. During the course of evidence, the appellant produced receipts Exh. 46 in respect of purchase of golden ornaments to the tune of Rs.58,204/-, Exh.47- extract of landed property, Exh. 48 receipt of purchase of gold ornament in the year 2018, bonafide certificate in respect of Shubham Exh. 40. In the cross examination of the appellant, it has been brought on record that from the month of August 2018 to June 2019, Priyanka was residing at her maternal house and during that period, minor Shubham was residing with his mother- Priyanka, so also, after birth Samrudhi was staying with her mother Priyanka.

17. It is not in dispute that, in the year 2018, Shubham was 3 years old, therefore, naturally, he was staying with his mother Priyanka at the house of respondent Nos. 1 and 2 because at the relevant time, Priyanka had gone to her maternal house for second delivery and on 05.03.2019 Samrudhi born. It is not in dispute that on 03.12.2019,

Priyanka, the wife of the appellant committed suicide by hanging at her maternal house and on the next day i.e. on 04.12.2019, respondent No.1 lodged a FIR with Kotwali Police Station, Ahmednagar alleging that on 10.09.2019, the appellant and his relatives drove away her from his house and from 28.11.2019 the appellant was continuously making phone calls on mobile and was threatening Priyanka. Consequently, she committed suicide. Though the respondents filed their written statement at Exh. 13 and alleged that due to ill-treatment and for non fulfillment of demand of dowry, Priyanka committed suicide, but the respondents failed to lead evidence. Therefore, the defence set out by respondent Nos 1 and 2 remained uncorroborated.

18. It is well settled principles of law that the father is natural guardian of the minor children. Only due to unnatural death of minors' mother and registration of FIR, their custody remained with respondent Nos. 1 and 2-grandparents.

19. Section 25 of the Guardians and Wards Act 1890 provides as under:

"(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order, may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of Code of Criminal Procedure, 1882.

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not itself terminate the guardianship."

20. It is settled principle of law that in custody matters, paramount consideration is welfare of the minor children including ethical upbringing, economic well-being of the guardian, overall comfort of the child, contentment, health education, physical, mental and intellectual development of the child and favourable surroundings required to be considered and father who is a natural guardian of his children is certainly entitled for custody of his minor children. In the case in hand, the appellant, is the natural father of minor children respondent Nos. 3 and 4 and he is serving with railway department. The mother of the appellant i.e. PW-2 is also educated and she is receiving family pension. The financial condition of the appellant and his family members is sound. As against this, the brother and sister of Priyanka are educated and having landed property but certainly they would marry in future. The respondent No.1 and 2 running more than 60 and 56 years of age.

21. As per evidence of PW-3 Anand Dilip Kataria, respondent No.3 Shubham is studying in JSS Gurukul School and the appellant is

paying his school fees. During the course of hearing, we also interacted with the minors in chamber and during interaction Shubham stated that he is studying in second standard and Samrudhi stated that she is studying in senior KG in GSS Gurukul and nothing was attributed against the appellant. It is needless to mention here that as on today, the trial against present appellant for the offence punishable under sections 306, 498-A, 323, 504, 506 and 507 of the Indian Penal Code is pending on the file of learned Judicial Magistrate First Class and the custody of the minors- respondent Nos. 3 and 4 remained with respondent Nos. 1 and 2 from the date of unnatural death of Priyanka. Though, the appellant who is natural guardian of both minor children and having the legal right of nurture and up-bring them, but the respondent Nos. 1 and 2 denied custody of minors to the appellant.

22. It is submitted that in the case of **Nil Ratan Kundu (supra)** wherein, the Hon'ble Supreme Court considered the case of **Kirtikumar Maheshankar Joshi Vs. Pradip Kumar Karunashanker Joshi (1992) 3 SCC 573** wherein custody of two minor children was sought by the father from maternal uncle of the minors on the ground that minors' mother had died due to unnatural death and the father was facing charges under section 498-A of the Indian Penal Code. In the cited case, the respondent Pradipkumar K. Joshi was married to Kumudlata and out of wedlock, son Vishal was born in July 20, 1979 and a daughter

Rachna @ Ritika on August 12, 1981 but Smt.Kumudlata unfortunately died due to cardio-respiratory arrest due some chemical poisoning and the respondent was facing criminal charges. The Police recorded statements of the minors and on the day of said untoward incident, both minors were 12 and 10 years old. When both minors were interacted in Chamber, at that time they both expressed their desire to stay with maternal uncle and not with father. Therefore, considering the facts and circumstance of said case and after assessing the state of mind of the children, the Hon'ble Apex Court held that it would not be in the interest and welfare of the children to handover their custody to their father.

However, in the case in hand, it prima facie appears that in the month of August 2018, Priyanka visited her maternal house and since August 2018 till 2019 she was staying there with Shubham. On 05.03.2019, she gave birth to Samrudhi and after delivery, she (wife) cohabited with the appellant at his house. But subsequently, in the month of September 2019, she went back to her maternal house with both minors due to her health problem and ultimately, on 03.12.2019 she committed suicide at her maternal house and on the day of said incident Shubham was 4 years old and Samrudhi was 9 months old. Under these facts and circumstances, observation made by the Supreme Court in the cited case law is not helpful to the respondents.

23. It is significant to note that under section 6 of the Hindu Minority and Guardianship Act, 1956, father is the natural guardian of minor children followed by the mother and if the custody of both minors remains with respondent Nos 1 and 2, in that circumstance, there is every possibility of their detachment from their father/appellant. No doubt, while considering and deciding the custody matters, the court is not bound by the mere legal rights of the parents or guardian but welfare of a minor child requires paramount consideration. As per section 6 of the Hindu Minority and Guardianship Act, father being the natural guardian of the minor child, has a preferential right to claim custody of his children. However, in the case in hand, the Family Court, Ahmednagar passed the impugned order and dismissed the petition only on ground that criminal trial for the offences under section 498-A, 306 of IPC is pending against him.

24. It is to be mentioned here that we interacted with t Shubham in Chamber, but he simply stated that he is studying in second standard in JSS Gurukul and he wants to stay with his grandparents i.e. respondent Nos. 1 and 2 and except this no reason was assigned by him. When we interacted with Samrudhi, she simply stated that she has been studying in Senior KG. Both the minors did not attribute anything to their father/appellant. Therefore, considering paramount welfare of the children and taking into consideration ethical upbringing, economic

well-being of the guardian, the overall comfort, contentment, health education, physical, mental and intellectual development of the minors, the appellant is entitled to the custody of the minors- respondent Nos. 3 and 4.

25. In view of the above discussion, we proceed to pass the following order:

O R D E R

- (i) The appeal is allowed.
- (ii) The impugned judgment and order dated 25.10.2014 passed by the Family Court, Ahmednagar in Petition No.D1/2021 is hereby quashed and set aside.
- (iii) The respondent Nos. 1 and 2 are directed to forthwith handover custody of the minor Respondent No.3 Shubham and Respondent No.4 Samrudhi to the appellant.
- (iv) The respondent Nos.1 and 2 shall have right to take the custody of the minors- respondent Nos. 3 and 4 on 1st and 3rd Sunday of every month till they attain majority or until further order of this Court, whichever is earlier.
- (v) No order as to costs.

(Y. G. KHOBRAGADE, J.)

(MANGESH S. PATIL, J.)

JPChavan