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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO. 676 OF 2019
WITH
CIVIL APPLICATION NO. 636 OF 2019
IN
FIRST APPEAL NO. 676 OF 2019**

1. Subhash Sakharam Sakre

2. Mr. Viabhav Subhash Sakre

3. Mrs. Prajakta Vaibhav Sakre

All adults R/at Room No.304,
Building No.6, Bipin Smriti Bldg.,
Pratiksha Nagar, Sion (East),
Mumbai – 400 022

.. Appellants

Vs.

Smt. Ujwala Hari Bobale

Aged – 67 years. Occ. Housewife

R/at Kohinoor Tower, Balgovinddas

Road, Dadar (W), Mumbai - 400 028

.. Respondent

**ALONG WITH
FIRST APPEAL NO. 677 OF 2019
WITH
CIVIL APPLICATION NO. 635 OF 2019
IN
FIRST APPEAL NO. 677 OF 2019**

Vaibhav Subhash Sakre

Adult, Occ. Service

R/at Room No.304,

Building No.6, Bipin Smriti Bldg.,

Pratiksha Nagar, Sion (East),

Mumbai – 400 022

.. Appellant

Vs.

1. Dr. Umesh Hari Bobale
Aged – 36 years, Occ. Dentist
R/at Kohinoor Tower, Balgovinddas
Road, Dadar (W), Mumbai - 400 028
(Presently lodged in Arthur Road Jail)
2. Smt. Ujwala Hari Bobale
Aged – 67 years, Occ. Housewife
R/at Kohinoor Tower, Balgovinddas
Road, Dadar (W), Mumbai - 400 028 .. Respondents

.....

Mr. Niranjan Shimpi i/b Ms. Seema M. Adate for the appellants
Mr. Kunal M. Damle for the respondent/s

.....

CORAM : PRITHVIRAJ K. CHAVAN, J.

DATED : 4th MAY, 2023

P.C.

1. These two appeals are disposed of by a common order, which are preferred under Section 47 of the Guardians and Wards Act, 1890.

2. The appellants in both the appeals are aggrieved with the impugned order dated 3rd May, 2018 passed by the City Civil Court in Guardian Petition No. 6 of 2017, by which their application came to be rejected. The learned Judge, however, allowed Petition No.17 of 2017 filed by the respondent – Ujwala

H. Bobale, maternal grandmother of Chirayu (for short “minor child”).

3. The appellant no.1 – Subhash S. Sakre is the maternal grand-father of the minor child and father of deceased Tanuja Umesh Bobale.

Appellant no.2 – Vaibhav S. Sakre is the maternal uncle of the minor child and brother of deceased Tanuja Bobale.

Appellant no.3 – Prajakta V. Sakre is the wife of appellant no.2.

Respondent - Ujwala Umesh Bobale is the paternal grandmother of the minor child.

4. Vaibhav S. Sakre has also filed a separate appeal being Appeal No.677 of 2019 as already stated above.

5. Briefly stated the facts are – deceased Tanuja Umesh Bobale was the mother of the minor child. Husband of Tanuja Bobale and father of the minor child, namely Umesh Bobale, who is a dentist by profession, committed Tanuja’s murder on 11th December 2016. He is in jail and facing a trial at the City

Civil and Sessions Court for the offence punishable under Section 302 of the Indian Penal Code.

6. The minor child is the only son of deceased Tanuja and Umesh Bobale. He was born on 17th May, 2012. The relations between the deceased and her husband were very much strained, for Umesh was suspecting her fidelity. Since he had suspected the paternity of his son, a DNA test was also carried out. A case under Domestic Violence Act had also been filed by the deceased against her husband and mother-in-law. However, the matter was subsequently settled. It is the contention of the appellants that the minor child witnessed the murder of his mother and has already testified in the Sessions Court to that effect.

7. Admittedly, from the date of the incident of murder, the minor child has been in the custody of the appellant – Vaibhav S. Sakre - his maternal uncle.

8. Appellant – Vaibhav S. Sakre as well as the paternal grandmother – Ujwala Hari Bobale moved an application under the Guardians and Wards Act before the City Civil Court,

Greater, Mumbai seeking custody and their appointment as guardians of the minor child under the said Act.

9. Learned Judge by the impugned order dismissed Petition No.6 of 2017 preferred by appellant – Vaibhav S. Sakre and allowed the Petition No.17 of 2017 preferred by paternal grandmother – Ujwala H. Bobale.

10. I heard learned Counsel for the appellants at length. I have perused the impugned order. I have interviewed the minor child in the Chamber in order to consider as to who would be the best person to be appointed as a guardian of the minor child, who would be in a position to ensure his welfare.

11. Section 17 of the Guardians and Wards Act provides as to the matters to be considered by the Court in appointing guardians. Section 17 reads thus :-

“17. Matters to be considered by the Court in appointing guardian – (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
(2) In considering what will be for the welfare of the

minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) (Sub-S. (4) omitted by Act 3 of 1951, S.3 and Sch.)

(5) The Court shall not appoint or declare any person to be a guardian against his will.”

12. Essentially, a balance has to be struck between the attachment and sentiments of the parties towards the minor children as well as welfare of the minor, which is of paramount importance.

13. Having considered the claims made by the appellants on one hand and the maternal grandmother on the other, who is about 67 years of age and having considered the wish of the child by having a conversation with him in the Chamber, alone, and also having taken into account the capacity of the minor child to understand the entire circumstances, I find that the appellants herein, more particularly, appellant – Vaibhav Subhash Sakre would be best person to be appointed as a guardian of the minor child rather than respondent – Ujwala Hari Bobale.

14. It is pertinent to note that father of the minor child had committed murder of his mother. The minor child being an eye-witness, would definitely have a deep rooted impact of the said incident on his mind. Having suffered a trauma of such a magnitude at such a tender age by the minor child, it would not at all be feasible to appoint his paternal grandmother as a guardian and to allow the child to remain in the same house, where his mother was murdered. At this stage, it would be far fetched to anticipate the outcome of the Sessions trial, however, in any case, considering the incident in question, no sane man would even think of appointing the paternal grandmother as his guardian. Even if the accused / father of the minor child gets acquitted of the charge, considering the fact that the minor child was an eye-witness to the incident, it would not at all be advisable or proper to appoint respondent – Ujwala H. Bobale as a guardian. It would be very difficult to presume that in case of his acquittal, father of the minor child would not try to have an access with him, more particularly in light of the fact that the minor child has already deposed against his father before the Sessions Court. In that case, there could be danger to his life and

limb at the hands of his father.

15. Another important aspect is that after moving an application seeking custody for the guardianship of the child by the appellants, the paternal grandmother moved a separate application. Had there been real intention on the part of the paternal grandmother to get herself appointed as a guardian, she would not have waited for an application to be moved by the appellants.

16. Another important aspect is that the respondent – grandmother was also an accused in Domestic Violence proceedings initiated by the deceased being DV Case No. 44/DV/2016. There were specific allegation of cruelty against the respondent also. As such, subsequent application by the respondent - grandmother can be said to be a counter blast to the application moved by the appellants.

17. It reveals from the record that after filing their evidence on affidavit by the appellant in the City Civil Court, no cross-examination was conducted on behalf of the respondent -

grandmother.

18. It is apparent from the impugned order that the learned Judge has failed to appreciate all the facts and circumstances in its correct prospective as he has ignored the basic object of the Guardians and Wards Act. Learned Judge has also lost sight of the fact that ever since the death of the mother of the minor child, he has been staying with the appellants, who have been looking after the welfare of the minor.

19. It is apparent from the record that the appellant's family consists of the appellant, his wife, minor daughter and aged father, who are physically, economically, mentally and morally fit to take proper care of the minor child. On the other hand, the respondent is an aged woman staying alone, who may not be physically as fit as that of the appellants to take future care of the minor child.

20. It is apparent from the impugned order that the learned Judge has also failed to appreciate the fact that during her lifetime, deceased Tanuja had already informed the Police about

the threats to her life by her husband as well as ignorance on his part to take care of the minor child. It is brought to my notice that the appellants have admitted the minor child in a reputed school and he has been in their custody since 11th December 2016 i.e. from the date of murder of his mother.

21. The appellants have also brought to my notice that the minor child has been doing quite well in his academics and has received various medals by participating in extra curricular activities, which is possibly due to the love, care, support and affection by the appellants.

22. So far as income is concerned, the appellants are on better footing than that of the respondent grand-mother and are economically sound in comparison with the respondent.

23. The learned trial Judge has also failed to appreciate the fact that the father of the minor child had suspected paternity of his son by compelling the deceased to undergo a DNA test. The respondent herein had not objected the said conduct of her son.

24. Learned Judge had observed in the impugned order, more

particularly, in para 9 that when he interrogated the child in the Chamber in the presence of all the parties and asked the child as to where he was intending to go or to stay, the child pointed his finger towards his grandmother, Ujwala. This is quite shocking and surprising, firstly, as to how the child could be interrogated. The learned Judge ought to have interviewed the child alone in the chamber without the presence of any of the parties in a quite conducive manner, looking to the age and the trauma the child had suffered after the incident. Secondly, merely because the child has pointed his finger towards his grandmother, would not mean that he was willing to stay with his paternal grandmother.

25. Learned Judge has also misinterpreted a judgment placed on record on behalf of the appellants in case of *Kirtikumar Maheshankar Joshi Vs. Pradipkumar Karunashankar Joshi, (1992) 3 SCC 573*. In the said case, custody of minor children was sought by the father as well as maternal uncle. There was an unnatural death of mother of the children. The children were living with their maternal uncle. The father was facing a charge under Section 498-A of the Indian Penal Code. Before the

Supreme Court, the children have expressed their willingness to remain with their maternal uncle, who, according to them, was looking after them very well. They made it clear that they do not wish to live with their father. The Supreme Court found the children to be intelligent enough to understand their well-being. It is observed that though the father, being a natural guardian, has a preferential right to the custody, but after talking to the children and assessing their state of mind, it is held that it would be in the interest and welfare of the children to handover their custody to their maternal uncle instead of their father. The ratio laid down by the Supreme Court hereinabove is squarely applicable to the present set of facts.

26. The learned Judge could not distinguish the said judgment. The learned Judge has, therefore, utterly failed to take into consideration not only the wish of the child in a proper manner but all the other circumstances discussed hereinabove.

27. Having regard to the aforesaid discussion, the appellant – Vaibhav S. Sakre, indeed, shall have a preferential right to be appointed as a guardian of the minor child.

28. Consequently, the appeals are allowed.

29. The impugned orders passed in Petition Nos.6 of 2017 and 17 of 2017 are quashed and set aside.

30. It is hereby declared that the appellant – Vaibhav S. Sakre is a guardian of the minor child. He is appointed as a guardian of the minor child. The custody of the minor child will remain with the appellant – Vaibhav S. Sakre. The guardian shall perform all his duties *qua* the minor child as provided under the Guardians and Wards Act.

31. Both the appeals are disposed of in the aforesaid terms with no order as to costs.

32. In view of the disposal of the appeals, nothing survives in the applications and the same are also disposed of.

(PRITHVIRAJ K. CHAVAN, J.)