

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

**PRESENT:
THE HON'BLE JUSTICE BIVAS PATTANAYAK**

**C.O. 42 of 2024
Smt. Amrita Roy
versus
Sri Soumen Chaki**

For the Petitioner	: Mr. Joyjit Choudhury, Advocate Mr. Ajay Singhal, Advocate Mr. Somraj Paul, Advocate Ms. Sunayana Paul, Advocate
For the Opposite Party	: Mr. Milindo Paul, Advocate Mr. Nabankur Paul, Advocate Ms. Sutapa Sen Paul, Advocate Mr. Subham Das, Advocate
Heard on	: 19.06.2024, 20.06.2024, 21.06.2024
Judgment on	: 12.09.2024

Bivas Pattanayak, J. :-

1. This civil revisional application has been filed by the petitioner under Article 227 of the Constitution of India challenging Order No.89 dated 3rd February, 2024 passed by learned Additional District Judge, 2nd Court, at Siliguri in Misc. Case No. 1 of 2022 (arising out of Mat Suit No. 435 of 2021).
2. The brief fact of the case is that the opposite party filed application under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights against the present petitioner being Mat Suit No. 435 of 2021. The opposite party also filed an application under Section 26 of the Hindu

Marriage Act, 1955 being Misc. Case No. 1 of 2022 praying for custody of the minor daughter. The petitioner on the ground of cruelty filed an application for divorce under Section 13 of the Hindu Marriage Act, 1955 which has been registered as Mat Suit No. 114 of 2022. Upon joint prayers of the parties, both the suits being Mat Suit No. 435 of 2021 and Mat Suit No. 114 of 2022 were directed to be tried analogously. The application of the opposite party under Section 26 of the Hindu Marriage Act, 1955 was allowed on 3rd February, 2024 by the learned Trial Court directing that the custody of the minor child, who is presently residing with the father, shall continue with the father till she attains majority.

3. Being aggrieved by and dissatisfied with the impugned order, the petitioner has preferred the revisional application.

4. Mr. Joyjit Choudhury, learned advocate for the petitioner submitted that during the pendency of the application for custody of the minor child, the daughter expressed her willingness to spend few days with her father which was acceded by the petitioner voluntarily and accordingly, the daughter of the petitioner went to her father's house at Babupara on 23rd January, 2023. On a wrong submission made by learned advocate for the opposite party, an order was passed on 7th January, 2023 that the daughter Miss. Beshakha Chaki will continue to reside with the opposite party-husband. During her stay with her father, the daughter has been tutored by the opposite party for the purpose of getting her custody. Learned Trial Court failed to appreciate and consider that the custody of the daughter has previously been with the mother and taking advantage of the temporary stay, the opposite party has manipulated and tutored the

minor daughter against the petitioner which is not a good parenting and the opposite party had also minimized the interaction of the petitioner with the minor daughter. This Hon'ble Court appointed a Special Officer in C.O. 82 of 2023 in which challenge was made to order dated 11th April, 2023 and the visitation of the mother was permitted in presence of a Special Officer appointed by the Court. However, at the time of final disposal of the application, no such report of the Special Officer was taken into consideration by the learned Trial Court. The learned Trial Court examined the child before passing such order. The Evidence Act though does not prescribe any particular age for a witness to be a competent one, yet it is incumbent upon a Court, prior to examining a child witness, to assess the competency of the child witness to testify. This precaution is necessary because child witnesses are amenable to tutoring and pliable and liable to be influenced easily, shaped and moulded. In the present context, no such precaution was taken by the learned Trial Court prior to examining the child. Therefore, what has been stated by the child before the Court cannot be taken as sacrosanct to act upon. In support of his contention, he relied on the following decisions:

- i. ***S. Amutha versus C. Manivanna Bhupathy***¹
- ii. ***Nivrutti Pandurang Kokate and Others versus State of Maharashtra***²

He further indicated that the Court while granting custody of the child failed to give any visitation right to the mother. Normally, if the parents are

¹ ***2007 (2) CTC 97***

² ***(2008) 12 SCC 565***

living in the same town or area, the spouse, who had not been granted custody, is given visitation right. However, the learned Trial Court failed to take into consideration such aspect of granting visitation to the mother. The child of tender years requires the love, affection, company, protection of both parents which is a basic requirement for a child to grow in congenial atmosphere. By the order impugned, the child is totally deprived of the love and affection of her mother. To buttress his contention, he relied on the decision of the Hon'ble Supreme Court passed in ***Yashita Sahu versus State of Rajasthan and Others***³.

Further though endeavour was taken by this Court to resolve the issue by mediation, however, the same could not be acted upon. In the order of the learned Trial Court, there is reference of presence of a male person along with the petitioner, when she along with her mother travelled outside. The child has made certain allegations against the third party. Be that as it may, one cannot be oblivious to the fact that, prior to staying with her father, the girl child spent substantial years with her mother and, therefore, in no stretch of imagination, it can be said that the girl child would be affected if she is allowed in the custody of the mother.

In light of his aforesaid submissions, he prayed for setting aside the impugned order under challenge or in the alternative, allow visitation right to the mother to visit her daughter on such date and time as the Court may deem fit and proper.

5. In reply to the contentions raised on behalf of the petitioner, Mr. Milindo Paul, learned advocate appearing for opposite party submitted that

³ (2020) 3 SCC 67

the welfare of the child is of paramount consideration while considering the prayer for custody of a minor child. In the present case at hand, the child is of 13 years which is a vulnerable age. Statutory stipulations cannot stand in the way of the welfare of a child. Before the learned trial court as well as before the mediator appointed by this Court, the minor child all along has stated that she wishes to stay with her father. The statements made by the minor child would show that there is presence of a male person with her mother due to which reason she was uncomfortable while being in the company of her mother. The statements of the child before the learned trial court also reveal that the child was uncomfortable due to the touch by the male friend of her mother. One cannot be oblivious to the fact that possibility of the girl of such tender age getting exploited by an outsider cannot be discarded. Further while residing with the father, the academic result of the child has improved. In an application for custody of the minor child, the proposition as laid down by the Hon'ble Supreme Court is that the Court is to see what is conducive to the welfare of the minor. The wishes of the minor child are to be respected. In support of his contention, he relied on the following decisions:

- i. ***Vikram Vir Vohra versus Shalini Bhalla***⁴
- ii. ***Selvaraj versus Revathi***⁵
- iii. ***Shazia Aman Khan and Another versus State of Orissa and Others***⁶

⁴ (2010) 4 SCC 409

⁵ 2023 SCC OnLine SC 1644

⁶ 2024 SCC OnLine SC 225

He further submitted that in *Yashita Sahu (supra)* the child was less than 3 years of age and the Hon'ble Court taking into consideration of such fact observed that if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each, which is distinguishable with the case at hand. He further submitted that the proposition in *Nivrutti Pandurang Kokate (supra)* deals with corroborative value of child witness in criminal proceedings and, therefore, does not apply to the facts of the case.

Distinguishing the decision in *S. Amutha (supra)*, he submitted that the proposition deals with the competency of the child witness. The interaction with the child is a procedure and cannot be construed to be evidence.

In light of his aforesaid submissions, he prayed that the order of the learned trial court should be affirmed.

6. Having heard learned advocates for respective parties, the only issue which has fallen for consideration is that whether the learned trial court was justified in passing the said order granting custody of the child to the father.

7. At the outset, upon going through the decisions of the Hon'ble Supreme Court in *Vikram Vir Vohra (supra)*, *Selvaraj (supra)* and *Shazia Aman Khan (supra)*, there cannot be any quarrel that so far as the dispute pertaining to custody of the child is concerned the paramount consideration is the welfare of the child.

8. In the case at hand, the girl child is of 13 years of age and studies in Class VIII at St. Joseph's School. Upon perusal of the impugned order

under challenge, it is found that the learned Trial Court, prior to passing of the order, has interacted with the child and it has noted as follows:

“...The girl child was introduced in the chamber when the girl child Besakha Chaki revealed that her mother was very much acquainted with one Mr. Sharma, and that Mr. Sharma and her mother visited Darjeeling, Lataguri, restaurant, cinema etc. together, and that said Sharma uncle tried to pull her hand while she was in room, and that she did not like the act. The following are the statements of Besakha Chaki during her interview, “Earlier I used to reside with my both parents, but after separation of my parents just before Durga Puja in the year 2019, I continued to reside with my mother. My mother used to roam around with one Sharma uncle and visited Darjeeling, Lataguri and also used to visit restaurant, cinema, etc. together. I have same liking for both of my parents. Sharma uncle tried to pull my hand at Lataguri while I was playing badminton and my mother was in a room, and that I did not like the act of pulling by Sharma uncle. I do not like Sharma uncle. My mother forces me to talk with Sharma uncle and his daughter which I do not like. My mother is planning to send me to a boarding school which I do not want. Even my maternal grand mother does not like Sharma uncle and that there had been quarrels between my mother and my maternal grand mother because of Sharma uncle. I feel better and get better company while staying in my father and I like to stay with my father. My mother once assaulted me and used to become angry when I refused to accompany her along with Sharma uncle. My mother came to the house of my father by six times after my last school examination result. My mother was invited to come and attend my birthday in the second half of the day but she refused to come on the pretext that she was busy elsewhere. Later my mother met me on the first day of the new sessions of my school and gave me chocolates. I told before the principal of my school that I wanted to stay with my father. On 05.03.2023 my mother tried to pull me and take me away, but I did not go. I wish to stay with my parents if they stay together. If my parents do not decide to stay together then I wish and want to stay with my father. My mother and her sister did not allow my father to meet me at her house. My father used to meet me in absence of my mother at the house of my mother.””

9. From the order of the learned trial court, it appears that there is one acquaintance of the mother of the girl child namely Mr. Sharma. The statements made by the girl child before the Trial Court divulge of certain

acts caused at the instance of Mr. Sharma to which the girl child is not comfortable with. She also stated that she was once assaulted by her mother, who used to become angry when she refused to accompany her along with Mr. Sharma. Whereas on the other hand, she feels better in staying in her father's company. One cannot be oblivious to the fact that she is of a tender age at which mental perception of the environment and things around and the mental awareness develops. Bearing in mind the above, the uncomfortable aspect as stated by the girl child is concerning.

10. Pursuant to the order of this Court dated 14th March, 2022, mediation was held by the mediator. From the report of the mediator, it manifest that the girl child, who is presently living with her father and ailing grandmother, expressed her desire to meet her mother, however, she stated to return back to her father's place at night.

11. This Court has also interacted with the girl child. She clearly and in unequivocal terms stated that she wants to reside with her father. She also stated that she is comfortable living with her father and that he also looks after her studies. The growth of a child needs conducive and healthy environment. Since the girl child has herself stated that she is comfortable with her father, in the opinion of this Court it would not be appropriate to remove her from the custody of her father to the custody of the mother keeping in mind the statements made by the child before the learned trial court as indicated above.

12. It has been strenuously argued on behalf of the petitioner that the statements made by the girl child cannot be considered since the competency of the child witness to testify was not assessed by the Court

prior to examining her, relying on *Nivrutti Pandurang Kokate (supra)* and *S. Amutha (supra)*. In *Nivrutti Pandurang Kokate (supra)*, competency of a child of tender age to testify and the question of acceptability of a child witness in criminal trial was before the Hon'ble Supreme Court. Therefore, the facts is distinguishable and does not apply to the present case. Similarly, in *S. Amutha (supra)* in a matrimonial suit, the minor son, as a witness, spoke against his mother which was objected to by the mother on the ground that the child witness was not competent to speak about the dispute between the wife and the husband and the minor child is not competent to swear affidavits as witness. The facts clearly differs from the case at hand and as such the ratio does not apply to the fact of the case.

13. Mr. Choudhury, learned advocate for the petitioner relying on *Yashita Sahu (supra)* submitted that mother should be given a visitation right since the same is important for development of child. In the case before the Hon'ble Supreme Court, the child was less than 3 years of age. By birth, the child was a citizen of the USA. Her father was already working in the USA when he got married. The facts involved in the case is factually different. In the case at hand, the child is of 13 years of age and she has categorically stated that she wants to remain in the custody of the father and has also stated of certain uncomfortable situation while residing with her mother, at the instance of one male acquaintance of her mother. The mother assaulted the child and became angry when the minor girl child refused to accompany her along with the said male acquaintance.

14. There can be no cavil that when a Court is confronted by conflicting claims of custody there are no rights of the parents which have to be

enforced. The child is not a chattel or a ball that is bounced to and fro the parents. It is only the child's welfare which is the focal point for consideration (**See Roxann Sharma versus Arun Sharma**⁷).

15. Another principle of law which is settled with reference to custody of the child is the wish of the child, if she is capable of, but then, the question as to 'what would be the best interest of the child' is a matter to be decided by the Court taking into account all the relevant circumstances. Reference can be made to **Rohith Thammana Gowda versus State of Karnataka and others**⁸. It was held as under:

"13. We have stated earlier that the question 'what is the wish/desire of the child' can be ascertained through interaction, but then, the question as to 'what would be the best interest of the child' is a matter to be decided by the court taking into account all the relevant circumstances. A careful scrutiny of the impugned judgment would, however, reveal that even after identifying the said question rightly the High Court had swayed away from the said point and entered into consideration of certain aspects not relevant for the said purpose. We will explain the raison d'être for the said remark."

16. In the present case, material reveals that the girl child was assaulted by the mother and the mother showed anger when the child refused to accompany her along with her male acquaintance who, as per the child, did certain acts which she was not comfortable with. Thus, from the statement of the child as above there is insistence by the mother upon the child to accompany her along with her male acquaintance with whom the child is uncomfortable. It is a fact that learned trial court has granted custody of the child to the father without giving visitation right to the mother. However, bearing in mind the relevant circumstances, for the best

⁷ (2015) 8 SCC 318

⁸ AIR 2022 SC 3511

interest of the child, this Court finds that the order passed by the learned Trial Court does not call for interference.

17. Moreover, Mr. Paul, learned advocate for opposite party has rightly submitted relying on *Vikram Vir Vohra (supra)*, *Selvaraj (supra)* and *Shazia Aman Khan (supra)*, that welfare of the child is of paramount consideration.

18. In view of the above discussion, the civil revision being **C.O 42 of 2024** stands dismissed. The Order No.89 dated 3rd February, 2024 passed by learned Additional District Judge, 2nd Court, at Siliguri in Misc. Case No. 1 of 2022 (arising out of Mat Suit No. 435 of 2021) is hereby affirmed.

19. There shall be no order as to costs.

20. All connected applications, if any, stand dismissed.

21. Interim order, if any, stands vacated.

22. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)