* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 17th July, 2023

% ***Pronounced on: 01st September, 2023***

\+ **MAT. APP. (F.C.) 218/2018 with CM APPL. 34442/2018 & 41653/2021**

MOHD. IRSHAD & ANR. ..... Appellants

Through: Mr.Jai Bansal, Advocate along with appellants in person.

versus

NADEEM ..... Respondent

Through: Respondent in person.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

1. The present Appeal under **Section 19 of the Family Courts Act, 1984** has been filed by the appellants against the impugned Order dated 21.03.2018 vide which the petition filed by the appellants/maternal grandparents of the minor child to be appointed as 'Guardian' and to seek permanent custody was dismissed.

2. **The factual matrix in brief** is that a petition under Section 7 read with Section 25 of the Guardians and Wards Act, 1890 was filed on behalf of the maternal grandparents/appellants to be appointed as Guardian and for permanent custody of their grandson Master Rehan. The appellants'

daughter Quamar Jahan was married to the respondent herein on 25.11.2007 and the couple was blessed with one son Master Rehan on 24.11.2008. According to the appellants, Quamar Jahan, their daughter was killed by the respondent on account of dowry demand and harassment within 7 years of marriage i.e. on 22.01.2010. The FIR under Sections 304-B/34 IPC was registered at P.S.Jyoti Nagar against the respondent and his parents. The respondent eloped with the child. However, subsequently, the respondent and his parents were arrested and sent to judicial custody.

3. Immediately after the respondent and his parents were sent to jail, the Guardianship Petition was filed by maternal grandparents/appellants on 24.02.2010 seeking the custody of the child. Initially, the other family members of the respondent had the custody of Master Rehan as the respondent was absconding. Child was recovered on 30.05.2010 and was handed over to the appellants on the same day and since then, the child is in their continuous custody.

4. The respondent and his other family members were acquitted in the criminal case on 07.11.2012. The appellants have however, preferred a criminal Appeal against the acquittal of the respondent and his family members and the same has been admitted by this Court.

5. On 18.08.2012, the respondent filed an application seeking interim custody of the child from the appellants under Section 12 of the Guardians and Wards Act, 1890 on the premise that he and his family members have been acquitted in criminal case. The learned Judge, Family Courts initially directed the custody of the child to be handed over to respondent from June, 2013 vide Order dated 04.03.2013. However, the Order was

set aside by this Court in CM Petition No. 558/13 vide Order dated 22.05.2013 and the matter was remanded back to be decided afresh. The Judge, Family Courts vide Order dated 29.05.2013 directed the custody of the child to remain with the maternal grandparents/appellants. The respondent filed two SLP(s) bearing Nos. 19464/2013 and 19465/2013 before the Supreme Court of India challenging the Orders dated 22.05.2013 of this Court and 29.05.2013 of Family Court, but they also got dismissed by the Apex Court on 11.06.2013.

6. The appellants claimed the custody of the child on the ground that the acquittal of the respondent in criminal case is under challenge before this Court. The custody of the child has always been with the appellants and it is only after the acquittal that the respondent ever sought the transfer of the custody. There has been no change in circumstance since the custody of the child has been permitted to be with the maternal grandparents. It was also claimed that the respondent has been cruel to their daughter and as such, is not capable to keep the custody of the child. It was also claimed that the child was being used as a puppet to compromise with the respondent and his family members in the criminal case.

7. The appellants further asserted that the respondent and his family members are neither well educated, well mannered nor having etiquettes.

8. Since beginning their attitude was cruel which was manifested in their behaviour towards the daughter of the appellants. Moreover, they displayed rude behaviour and negligent attitude even towards the grandson. It was also claimed that there was every possibility that career of the child would be ruined if the child is allowed to stay with the

respondent. On the other hand, the appellants claimed that they are well educated and reputed and the career and future prospects of the child would be very well looked after if the custody is given to the appellants. Hence, the petition was filed by the appellants under Section 7 read with Section 25 of the Guardians and Wards Act, 1890 seeking their appointment as Guardian of the minor child and also his permanent custody.

9. The **petition was contested by the respondent** who asserted that the petition was an abuse of the process of the Court as the material facts have been concealed by the appellants/petitioners. It was claimed that the true facts have not been disclosed in the appeal. The appellants are old aged persons who are incapable of taking care of the minor child and the appeal must be dismissed on this ground itself. It was further asserted that the petition was filed with the sole motive of harassment and causing humiliation to the respondent and his family members. They are legally entitled to keep the custody of the child who have always been in their care and custody. It is explained that on registration of FIR and arrest of the respondent and his family members, the custody of the child was handed over by them to Moinuddin and Fahmida, *Tau* and *Tai* of the respondent and the child was living in their care and custody. It is further explained that the police directed the *Tau* and *Tai* of the respondent to produce the child before the Court on 03.07.2010 on which date, the custody of the child was handed over to the appellants. Thereafter, the *Tau* and *Tai* (Paternal Uncle and Aunt) of the respondent moved an application under Order I Rule 10 CPC to be impleaded as party and also moved an application under Section 12 of the Guardians and Wards Act,

1890 and they were impleaded as party i.e. the respondent Nos. 2 and 3.

10. The father and mother of the respondent herein came to know that during the pendency of the Guardianship Petition, the custody of the child has been taken away from paternal uncle and aunt by the Order of the Court. On being released on bail vide order dated 26.09.2012, the names of previous respondent Nos. 2 and 3 i.e. *Tau* and *Tai* of the respondent were deleted and instead, the parents of the respondent were impleaded as respondent Nos. 2 and 3 therein.

11. It was contended on behalf of the respondents therein that the deceased Quamar Jahan, wife of the respondent No.1 was suffering from mental illness and she was under treatment from various hospitals as is evident from the medical treatment record. It was further explained by the respondents that the fact of mental ailment of the deceased/wife of the respondent was not disclosed at the time of marriage and it came to the knowledge of the respondent and his parents only thereafter. It is denied that the deceased Quamar Jahan was abandoned by the respondent but it is claimed that he took care of her to the best of his ability and took her to the various hospitals for treatment. It was unfortunate that she committed suicide by jumping from the house of the respondent. It is further asserted that during her life time, no complaint whatsoever was made by the appellants that their daughter was being harassed for dowry and the false allegations against the respondent only emerged after her sad demise. It was also explained that the respondent had been acquitted by the judgment dated 07.11.2012 as the allegations of cruelty by the respondent could not be proved and it was established that the wife of the respondent was suffering from mental illness and she was taking regular treatment

from Holy Family Hospital, IHBAS and other private clinics.

12. The respondent has asserted that during the life time of the daughter of the appellants and thereafter, the respondent and his parents have great love and affection towards the child and the respondent has been maintaining him well by providing him all the facilities and meeting his requirements. The future of the child would be spoiled if the custody remains with the maternal grandparents of the child as they cannot provide better education, atmosphere and status since they have no source of income even to meet his daily requirements. The custody of the child was requested to be handed over to the respondent/father being the natural guardian of the child.

13. The respondent/father has further stated that he is 12th class pass and he was running a mobile shop under the name and style of M/s. N.K.Mobile Shop & Training Centre, Maujpur, Delhi. While he was in judicial custody in the case under Sections 498-A/304-B/34 IPC, his business was handed over to his younger brother namely Naved and after being released from judicial custody, he has continued with the business of mobile shop along with his brother and is earning more than Rs.25,000/- per month. The respondent No.2 (therein) Naimuddin is doing his business and has an independent status and earning about Rs.30,000/- per month. They have also got moveable and immovable properties in their names and are in sound financial position in all manner and in a position to provide good care to the child. It was therefore submitted that the Guardianship Petition filed by the appellants was liable to be dismissed and the custody of the child must be permitted to remain with the respondent/father being the Natural Guardian of the child.

14. On the pleadings, the **issues were framed** by the Family Court on 10.04.2013 as under: -

> *"1. Whether it is in the interest and welfare of the minor child Master Rehan to appoint the petitioners as the guardian of his person and property as well as to hand over his permanent custody to them? OPP.*
>
> *2. Relief."*

15. The appellants examined themselves as PW-1 and PW-2 in addition to their two sons PW-3 Mohd. Imran and PW-4 Mohd. Irfan. The respondent No. 1 tendered his evidence by way of affidavit Ex.RW-1/A.

16. The learned Principal Judge, Family Courts after due consideration of the entire evidence concluded that the natural parents under law like Hindu Minority & Adoption Act, 1956 and Guardians and Wards Act, 1890 have a preferential right for the custody of a child but the term 'Guardian' under Guardians and Wards Act, 1890 makes a deviation in as much as it provides that the custody of the child may not always be with the natural parents and the custody/guardianship may be decided on the anvil of the paramount interest and welfare of the child.

17. The learned Principal Judge observed that the child during his interaction expressed his willingness to remain with the maternal grandparents. Further, the child has been in continuous custody with the maternal grandparents from 2010 when he was barely 1½ years old and had been made to believe that the respondent, his father had killed his mother. The evidence as led by the parties reflected that the appellants had a serious grudge against the respondent/father. Also aside from the criminal case under Section 498-A IPC, the respondent has not been

shown to have any criminal background and there is no disqualification of the respondent has been proved. It was concluded that there can be no comparison of love and affection of a natural parent of a child to any other relative and the custody should not be denied unless there are imperative reasons. Contentions that the respondent has not contributed financially and he was least concerned about the well being of the child was rejected by observing that the terms between the parties were still bitter and they did not see each other eye to eye. The record reflected that after being released from judicial custody, he had moved an application seeking custody of the child and had continued to visit him for about one year. Also, he has been rigorously pursuing the litigation and there exists no reason to deprive him from the custody of the child. Hence, the Guardianship Petition filed by the appellants/maternal Grandparents was dismissed.

18. Aggrieved by the dismissal of the Guardianship Petition, the present Appeal has been filed. The **main grounds agitated** by the appellants are that by repeated change of custody, the child is being made a shuttle cock which is not in his interest. The respondent and his family members have no love and affection for the child. The child has been in custody with the appellants since he was about 1½ years old and at the time of filing of the Appeal, he was about 10 years old. He, during interaction with the Court, had categorically expressed his unwillingness to reside with the respondent. The learned Family Judge, Family Courts has failed to appreciate the intelligent preference of the child who had expressed his desire to remain with the appellants. Moreover, the respondent has got remarried and has a child from the second marriage

which incapacitates him from taking the custody of the child Master Rehan. Moreover, the respondent is only 8th Pass and has no source of income and has also sold his house and shop during the pendency of the Guardianship Petition. The respondent was incompetent to take care of his wife and is also unable to take care of the child. It is further agitated that the though the respondent has claimed that he has two mobile showrooms, but he has failed to place any documents in support thereof. It has been erroneously observed in the impugned judgment that the respondent is well educated when he is barely even 8th Pass. It is further contended that the respondent is claiming the custody of the child on the ground that he has been acquitted in the criminal case but the Appeal against the said acquittal is still pending in this Court and the future fate of the respondent is still uncertain.

19. Finally, it is stated that the child who has been living with the appellants for more than 8 years, has deep love and affection for them and is being well taken care of by the appellants. Uprooting the child now would cause tremendous trauma to the child who has already lost his mother. Furthermore, the appellants have never denied any access or visitation rights to the respondent. During the pendency of the Guardianship Petition, the respondent could have developed affection and taken the custody, however, the respondent never came forward to avail the visitation rights. It is asserted that the respondent cannot claim the custody of the child as a right merely because he is the natural father. He has neither any education nor any income to able to ensure the welfare of the child.

20. Reliance has been placed in the judgments in *Ruchi Majoo Vs.*

Sanjeev Majoo (2011) 6 SCC 479, *Anjali Kapoor Vs. Rajiv Baijal* (2009) 7 SCC 322, *Muthuswami Chettiar Vs. K.K.Chinna Muthuswami Moopanar* AIR 1935 MAD 195, *Kirtikumar Maheshankar Joshi Vs. Pradipkumar Karunashanker Joshi* 1992 (3) SCC 573, *Yogesh Kumar Gupta Vs. M.K.Agarwal and Anr.* AIR 2009 UTR 30, *Nil Ran Kundu Vs. Abhijit Kundu* 2008 AIR SCW 5769, *A.Gopalan Vs. Thattoli Rajan* ILR 1995 (1) Kerala 214 and *Tarun Ranjan Majumdar and Another Vs. Siddhartha Datta* AIR 1991 Cal 76 in support of the assertions.

21. The appeal has been opposed by the respondent who has asserted that he was arrested in the false case under Sections 498-A/304-B/34 IPC on the allegations of having caused dowry death of his wife. However, from the trial, it has been established that his wife was suffering from mental ailments and had committed suicide. No role of culpability could be attributed to the respondent. Furthermore, the custody of the child had been taken away from him merely because he was charged with a criminal offence. However, he being the natural father, is best suited to ensure the welfare of the child having regard to not only to his circumstances but also that the appellants have their old age against them. It is submitted that the Guardianship Petition filed by the appellants, has been rightly dismissed.

22. **Submissions heard.**

23. The Guardians and Wards Act, 1890 deals with two aspects in regard to a minor child. The *first aspect* is the appointment/declaration of the Guardian under Section 7 of Guardians and Wards Act, 1890 and *second aspect* is the interim and permanent custody of the child under Sections 12 and 25 respectively of the Guardians and Wards Act, 1890.

24. The appointment of a Guardian and the Custody is defined under different Sections of Hindu Minority and Guardianship Act, 1956 and Guardians and Wards Act, 1890 which delineate the factors to be considered for determining the Guardianship and/or the Custody and the two rest on different parameters.

25. Section 4 of the Hindu Minority and Guardianship Act, 1956 defines the 'Minor' and 'Guardian' as under:-

> *"4. Definitions.---(a) "minor" means a person who has not completed the age of eighteen years;*
>
> *(b) "guardian" means a person having the care of the person of a minor or of his property or of both his person and property, and includes—*
>
> *(i) a natural guardian,*
>
> *(ii) a guardian appointed by the will of the minor's father or mother,*
>
> *(iii) a guardian appointed or declared by a court, and*
>
> *(iv) a person empowered to act as such by or under any enactment relating to any Court of wards.*
>
> *(c) "natural guardian" means any of the guardians mentioned in Section 6."*

26. **Section 6 of the Hindu Minority and Guardianship Act, 1956 (**hereinafter referred to as 'HMAG Act, 1956') defines the Natural Guardian of a Hindu Minor to be the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

27. *Proviso to Section 6 of the HMAG Act, 1956* defines the circumstances in which a person would not be entitled to act as the Natural Guardian of a minor and reads as under:-

"Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi)."

28. Section 7 of the Guardians and Wards Act, 1890 confers the powers on the Court to appoint a Guardian of his person or property or both of the minor or declare a person to be such Guardian.

29. Therefore, there are two kinds of remedies visualized under Section 7 of the Guardians and Wards Act, 1890 of a Declaration which is in recognition of a pre-existing right of that person to be declared as a Guardian, while appointment entails no pre-existing right in the person who has applied to be the Guardian.

30. The factors to be taken into consideration while appointing Guardian is explained in Section 17 of the Guardians and Wards Act, 1890 which reads as under:-

*"17. **Matter 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.*

In considering what will be for the welfare of the minor, the Courts 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.

If the minor is old enough to form an intelligent preference, the

Court may consider that preference.

The Court shall not appoint or declare any person to be a guardian against his will."

31. From the conjoint reading of the Hindu Adoptions and Maintenance Act, 1956 and the Guardians and Wards Act, 1890, it can be concluded that the natural father is the *de-facto* and *de-jure* Guardian of a minor but under the Guardian and Wards Act, 1890, if it is considered that it is in the interest and welfare of the child that some other person may be appointed as a Guardian, the Court may do so after considering the interest and welfare of the child and his intelligent preference. To appoint any person as a Guardian, it follows as precursor that the natural father who is the Guardian of a minor in terms of the Hindu Adoptions and Maintenance Act, 1956 shall not be disqualified till such time unless he is found to be unfit to ensure the welfare of the child. The High Court of Madras in the case of *N. Palanisami vs. A. Palaniswamy* 1998 (III) CTC 158, held:

"if there is any proof that the father has disentitled himself for the custody, that is altogether a different matter. When the court considers the welfare of the minor child, it does not mean the opinion of the minor child. Normally when the minor child is brought to court from the custody of grandfather or third party especially when the minor child has been allowed to continue for quite some time in such custody, as a young child, his preference will be to continue the status quo but the court has to consider the present and future of the minor child, not merely the close proximity of the child with the person having custody."

32. Similarly, this court in the case of *Lekh Raj Kukreja vs. Raymon* AIR 1989 Del 246 held: -

"Ordinarily custody should go to natural guardian. However,

there may be cases where there is a conflict in claim of father as natural guardian of the male child and welfare of the child. Such cases are far and few. It is only in extreme case of illiteracy, poverty or delinquency of the father that his claim to the custody of child can be disregarded. Otherwise the courts would strain to reconcile the claim of the father based on his right as natural guardian of the male child with the welfare of the child the balance tilting in favor of the welfare of the child it being of paramount and supreme importance."

33. In this backdrop, the respective case of the parties may be considered. Indisputably, respondent is the natural father of the child who was born on 24.11.2008. The destiny had its own role to play and soon after the marriage, the wife of respondent/mother of the child died an unnatural death on 22.01.2010. While a criminal case under Section 498-A/34 IPC got registered on 22.01.2010 and the respondent along with other co-accused i.e., his family members were put under arrest, the circumstances which so prevailed, compelled the custody of the child who was merely 1½ years old at that time, to be handed over to *Tau* and *Tai* of the respondent. However, soon thereafter, the Guardianship Petition was filed by the maternal grandparents who were naturally rattled by the unfortunate and untimely demise of their daughter and sought the custody of the minor. During the trial, the child was produced by *Tau* and *Tai* of the respondent before the Court and the custody was handed over to the appellants/maternal Grandparents. There could not have been any other better alternative considering the child in those difficult times, the custody of the child was given to his maternal grandparents/appellants rather than being in the custody of the relatives of the father. The respondent was admitted to bail on 26.09.2012 and immediately thereafter, he moved an

application under Section 12 of Guardians and Wards Act, 1890 to seek the custody of the child. Considering the prevailing acrimony amongst the parties and also that the respondent was facing trial for the unnatural death of his wife and also that the child was of a tender age and had been away from the custody of the respondent, he was granted visitation rights though apparently they were not meaningful or very fruitful in blossoming love and affection between the child and the respondent/father. The respondent was acquitted in the criminal case on 07.11.2012 but the matter has not ended as the appeal against the said acquittal is pending in this Court.

34. In this backdrop, one needs to consider if the respondent has suffered any disqualification for losing the status of a Natural Guardian. Aside from a criminal trial, there is no other disqualification which has been brought on record. The other aspect that has been agitated is that he has since got remarried and has a child from his second marriage, therefore, he cannot be termed as a Natural Guardian. However, mere second marriage of the father in the circumstances when he has lost his first wife, cannot be held *per-se* a disqualification from his continuing to be a Natural Guardian. No circumstance whatsoever has been brought on record to disqualify the respondent from being a Natural Guardian. The learned Principal Judge, Family Courts has thus rightly denied the appellants/maternal grandparents to be appointed as the Guardian of the minor.

35. *The second aspect however is the custody of the minor child*. It is not denied that the child was as 1½ years old since when the appellants are having his custody. Even though the respondent was released on bail

on 26.09.2012 and has been acquitted in the criminal case on 07.11.2012, his endeavour to develop the affection with the child, has not yielded much result. The child since infancy has been in custody of the appellants. When we had interaction with the child in the Chamber who is now about 15 years of age, he revealed that he felt alienated from the father and was comfortable in the custody of the appellants and was being well looked after by them.

36. It may be observed that undeniably there can be no substitute to the affection of a natural parent. No doubt, the maternal grandparents may have immense love and affection towards the child, but it cannot substitute the love and affection of a natural parent. Even the disparity in the financial status cannot be a relevant factor for denying the custody of a child to the natural parent. However, in the matters of Guardianship and Custody, we are confronted with the dilemma where the logic may say that the child must be in the custody of his father, but the circumstances and the intelligent preference of the child points otherwise. It may not be in the interest and welfare of the child to uproot him from the family where he is happily entrenched since the age of 1½ years.

37. Hon'ble Apex Court in the case of *Lahari Sakhamuri vs. Sobhan Kodali* in Civil Appeal No(s). 3135-316/2019 (Arising out of SLP (Civil) No(s). 15892-15893/2-18), held as under:

> *"Divorce and custody battles can become quagmire and it is heart wrenching to see that the innocent child is the ultimate sufferer who gets caught up in the legal and psychological battle between the parents. The eventful agreement about custody may often be a reflection of the parents' interests, rather than the child's. The issue in a child custody dispute is what will become of the child, but ordinarily the child is not a*

true participant in the process. While the best interests principle requires that the primary focus be on the interests of the child, the child ordinarily does not define those interests himself or does he have representation in the ordinary sense."

38. The learned Principal Judge, Family Courts while giving a definite finding of denying the claim of the appellants to be appointed as Guardian, has unfortunately not considered the aspect of custody while dismissing the petition of the appellants.

39. In the backdrop as discussed above, it is not considered in the interest and welfare of the child to uproot him completely at this stage, yet, as already discussed above, there can be no substitute to the parental love and affection and thus, it is considered appropriate that initially limited visitation rights be given to the respondent which may be re-visited after one year on the application of the respondent/father of the child if the circumstances so justifies.

40. We, therefore, direct that the respondent/father shall have a right to meet the child on every first and third Saturday in the Children Room of the Family Courts, Karkardooma Courts, Delhi between 3 to 5 PM. In case the child is unable to come for visitation right on any Saturday, the meeting shall be held on the next working Saturday. The said arrangement shall continue for a period of 3 months from today, thereafter, timings shall be from 03:00 P.M. to 07:00 P.M. till further orders. However, the parties shall be at liberty to adjust the timings dependent upon the suitability of both the parties.

41. With these observations, we dismiss the appeal for appointment of the appellants as Guardian but modify the impugned judgment in regard to

the custody in the aforesaid terms.

42. The appeal along with pending applications is disposed of accordingly.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

SEPTEMBER 01, 2023
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