

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.319 of 2020

=====

[REDACTED]

... .. Appellant/s

Versus

1. [REDACTED]
2. [REDACTED]

... .. Respondent/s

[REDACTED]

=====

Appearance :

For the Appellant/s	:	Ms. Nivedita Nirvikar, Sr. Advocate.
	:	Ms. Shashi Priya, Advocate.
For the Respondent/s	:	Mr. Rajendra Narain, Sr. Advocate.
	:	Mr. Jitendra Kumar Roy, Advocate.

=====

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA)

Date : 07-04-2025

Heard learned senior counsel for the parties.

2. The present Miscellaneous Appeal has been filed under section 19(1) of the Family Court Act, 1984 against the judgment dated 27.02.2020 passed by learned Principal Judge, Family Court, Sitamarhi in Guardianship Case No. 02 of 2018 whereby and where under the application under Section 25 of Guardians and Wards Act, 1890 for transfer of custody of minor



female child from respondents to the appellant has been rejected with certain directions therein.

3. Brief facts of the case are that appellant [REDACTED] [REDACTED] (daughter of respondents) were married on 17.01.2013. A female child namely [REDACTED] was born on 17.02.2015 from their wedlock. Appellant is a Bank Manager in the State Bank of India. In year 2015-16 he was posted at Delhi where deceased ([REDACTED]) conceived (second pregnancy) in January 2016. For proper care and delivery of her second child she alongwith minor daughter went to her parental home at Muzaffarpur in the month of July, 2016 where she met with an accident in bathroom which resulted in injury causing her death on 08.08.2016. The minor daughter remained with her maternal grandparents (respondents) for her better care. In this backdrop, appellant is stated to have got transfer of his posting from New Delhi to Patna in the month of September, 2016. Thereafter, he married for the second time to [REDACTED] on 18.04.2017. From the second marriage, they have blessed with a son, namely [REDACTED]. The girl child from first marriage of the appellant was staying with her maternal grand parents (respondents) at Muzaffarpur and when the appellant went to meet his minor daughter, he was not allowed to meet and talk with her. When the appellant, after



several efforts, not succeeded to meet and talk with his minor daughter the appellant filed the petition under Section 25 of Guardians and Wards Act, 1890 for custody of girl child namely

██████████

4. The case of the appellant is that the respondents are old aged who are not capable to look after and to provide good life style to the minor child and they are themselves dependent physically and financially on others. Accordingly, it is in the welfare of minor child to grant her custody to the appellant who is capable to take care in better ways being natural guardian of the minor girl child.

5. The case of respondents is that late ██████████
██████████, the daughter of the respondents, was not living a happy life with appellant and the girl child was born at Bathua Nursing Home at Muzaffarpur in presence of respondent and she was serious during her pregnancy and against the medical advice, she was taken to the house of the respondents by the appellant, thereafter, the appellant returned to Delhi which shows his negligent behaviour towards deceased ██████████ and her daughter. The appellant left the minor daughter with the respondents and solemnized his second marriage within one year of the death of his first wife. Respondent No. 1 is a retired Engineer and he receives adequate pension to lead a standard life



style and they are capable enough to take care of the minor child and providing her a good quality life.

6. On the basis of the pleadings of both the parties, the following issues were framed on 21.11.2019 by the learned Family Court:

(i) Whether the suit as filed by the applicant is maintainable or not?

(ii) Does the applicant has the right and cause to bring this suit as the legal guardian of the minor girl? or, Is the claim of the opponent, who claims to be the maternal grandparents of [REDACTED] justified in getting the custody of [REDACTED] to the applicant in the light of the circumstances before and after the death of [REDACTED]'s mother [REDACTED]?

(iii) Is it justified to take into consideration the wishes of the minor and her welfare before deciding this case?

(iv) Whether the applicant is entitled to the guardianship and trusteeship of the minor girl child in the light of his claim to be guardian and natural guardian or the minor girl child should be given into the custody of the opposite party?

(v) What other relief or reliefs should be given in favour of the applicant or the opposite party?

7. On behalf of the petitioner/appellant, three witnesses have been examined. PW-1 is [REDACTED] who is second wife of the appellant; PW-2 [REDACTED] who is brother of appellant and PW-3 is [REDACTED], the petitioner himself.



On the other hand, on behalf of the respondents, three witnesses have been examined. OPW-1 is minor [REDACTED]; OPW-2 is [REDACTED] respondent no. 2 and OPW-3 is [REDACTED] [REDACTED] respondent no. 1.

8. The learned Principal Judge, Family Court, Sitamarhi after considering the evidence on record and the facts and circumstance of the case decided the issues against the appellant and in favour of respondents and held that admittedly, appellant is natural guardian of the minor child but in the present situation the custody of minor child shall continue with respondents until she attains majority or the respondents are alive or the minor herself does not want to go with her parents. The appellant alongwith his second wife and his son has been given visitation rights to meet his daughter and the respondents shall not oppose the same. The learned family Court also directed that whenever the respondents would feel difficulty in maintaining the minor [REDACTED], they shall handover the custody of the minor girl [REDACTED] to the appellant with intimation to the Court so that she can make herself a healthy, educated and competent citizen. For the purpose of higher education/marriage expenses/employment of minor daughter, the appellant has been directed to deposit a lump-sum amount of Rs 10 Lakhs in fixed deposit for a period of 13 years in the account of [REDACTED] who



shall be entitled to withdraw the said amount on attaining her majority. For the current education and maintenance, the appellant shall deposit Rs.7,000/- per month in her account and every year there shall be increment of Rs. 500/- till she attains majority. The respondents, if they do not want to withdraw the said monthly amount, they can make expenses from their own for the maintenance and educational expenses of minor [REDACTED] In case of non compliance, the minor shall be entitled to receive interest @ 6% per annum on the said amount for delay. It has been clarified that the minor being the daughter of appellant shall be entitled to her share as daughter in the movable and immovable property of appellant in accordance with Law. In the light of said order, the separate Maintenance Case No. 209 of 2019 for maintenance of minor [REDACTED] was disposed of.

9. The learned senior counsel on behalf of the appellant submitted that the learned trial court has erred while passing the impugned judgment dated 27.02.2020, without properly assessing the facts of the case and without taking the welfare of the child into consideration, and same is liable to be set-aside. It is further submitted that appellant is natural guardian of the minor girl child as per section 4 (c) of the Hindu Minority and Guardianship Act, 1956 and he has legal right to take the custody of his minor girl child.



10. Learned Senior Counsel for appellant pointed out that Section 19 (b) of the Guardians and Wards Act, 1890 lays down that the Court will not be authorized to appoint a person as a guardian of a minor whose father is living and is not in the opinion of the Court, unfit to be guardian of the person of the minor. Hence, similar consideration would also arise while handing over the custody of the minor child to someone other than the father of the minor.

11. It is submitted that the appellant is professionally well settled, well qualified and having handsome income and other properties as well who is willing to give warmth of love and affection of parents and care of family to the minor child who requires for her all round development. Learned senior counsel further submitted that remarriage of appellant is not a ground for not granting custody of child and paramount consideration should be given to the welfare of child. It is further submitted that *malafide* intention of the respondents is evident from the fact that respondents have filed a complaint case against the appellant belatedly alleging that the appellant is responsible for death of his first wife which will give negative impact in the innocent mind of the minor child towards him. The appellant can give proper and better care, education and quality of life to his minor child 



12. He further submitted that the respondents cannot take proper care and provide good quality of life further to the girl child because of their old age. It has been stated that the appellant with his deceased wife (mother of minor daughter) was living a happy conjugal life. The girl child wanted to spend time with the appellant, her step-mother and the younger step-brother but the respondents did not allow her to meet her own father and mix with them. The real concern of the respondent is not the welfare of the girl child but just to satisfy their inflated ego.

13. Per contra, the learned senior counsel for the respondents submitted that the learned Trial Court has rightly not disturbed the custody of the minor girl child from the respondents. It is further stated that although the appellant being the natural guardian of girl child but the paramount consideration should be the welfare of the child. The child is getting good education and being brought up properly in the custody of the respondents. Furthermore, it is stated that the minor girl would get more love and affection from the respondents when compared to that of her father along with step-mother, which is essential for proper growth of the child. Also, the minor girl herself does not want to reside with the appellant and his second wife. The learned Trial Court has allowed visitation right to the appellant alongwith his second wife and his son and also directed the



respondents that if they are not comfortable in providing proper nourishment and good quality of life, they shall handover the custody of minor child [REDACTED] to the appellant. The learned Trial Court also taken care of welfare of minor child and directed to deposit Rs.10,00,000/- in bank account of minor child for her expenses of higher education and marriage and also directed for payment of monthly sum of Rs.7,000/- for her maintenance and educational fees which cannot be said to be unreasonable but the appellant who is bank officer instead of compliance of the said order, making false allegation against the respondents who are providing not only love and affection but also providing quality life and proper education to her. He further submitted that conduct of the appellant towards minor child shows that he is not interested in welfare and well being of the child and this appeal is liable to be dismissed. Therefore, in the paramount interest and welfare of the girl child, the order of the learned Family Court requires no interference by this Court in this appeal.

14. Considering the facts and circumstances of this case, the only question which this Court has to decide is *“whether the Judgment/order dated 27.02.2020 passed by the learned Family Court requires any interference by this Court in this appeal having regard to overall welfare and best interests of the minor child?”*



15. The respondents are unfortunate parents whose daughter died untimely and they were entrusted with the custody of the girl child soon after death of her mother because the appellant was working in Bank at Delhi who was unable to take care of the child at that time and respondents were in a position to take care of the requirements of the child. They are taking care of the minor child, who was only one and half years old when her mother passed away. Given their profound loss of married daughter, they are bound to have developed deep emotional bond with the child, who remains their only living memory of her.

16. The minor daughter of the appellant is now about 10 years old who is living with her maternal grandparents/respondents since the month of July, 2016, before the death of her mother. The appellant has solemnized his second marriage with [REDACTED] (P.W.-1) and they are blessed with a son. The appellant earns a handsome income and is a Senior Bank Manager. The respondent no.1 is a retired Engineer. The minor child expressed unwillingness to reside with her father-appellant and she is comfortable with respondents where she excelled in her studies and progressed well. It appears from the evidence adduced by both parties, that they want welfare of the child by providing healthy environment. Both the parties argued



that child's welfare is their paramount consideration.

17. In matter of custody of a minor child the statutory provisions in favour of father is only one of the circumstances requiring consideration but the major concern of the Court has to be welfare of the child. The welfare, as explained in various judgments, includes not only physical welfare but also moral and ethical welfare.

18. It is well settled that the application for custody of a minor child is in exercise of its *parens patriae* jurisdiction and the principal consideration of the Court whilst deciding would be the paramount 'welfare' of the minor child. In this context, it would be appropriate to refer to a decision of Hon'ble Supreme Court in **Nil Ratan Kundu v. Abhijit Kundu** reported in **(2008) 9 SCC 413** wherein parameters of 'welfare' and principles to be considered by courts whilst deciding questions involving the custody of minor children came to be enunciated. The relevant paragraph is reproduced as under:

"52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with



custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and wellbeing of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, not bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

(emphasis supplied)

19. Furthermore, the allegation of the petitioner is that respondents are financially not sound, cannot be accepted, since respondent no.1 is a retired Engineer and in his evidence it has been stated that he has sufficient properties and facilities, and his son and daughter-in-law are working in foreign country which is not denied by the appellant. We cannot, in these circumstances, say that the interests of minor child would in any condition suffer for reasons of financial stringency by keeping her in the custody of respondents.

20. The Supreme Court in case of **Mausami Moitra**



Ganguli v. Jayant Ganguli reported in (2008) 7 SCC 673 emphasized that financial condition of the parties or the statutory presumption cannot be sole determining factor and a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of the relevant facts and circumstances, bearing in mind the welfare of the child as paramount consideration.

21. After death of the mother of the child, the respondents willingly undertake to look after the child. Bringing up a child is not only a pleasure but also involves the discharge of a responsible duty. The maternal grandparents of the child appear to be rearing up the child for all these years with great love and affection, and the minor child is found intelligent to form a preference. In the totality of the circumstances, there is no compelling reasons that would justify the cutting of this bond of emotional attachment and security that has been found and has been allowed to grow by the father himself between the child and his grand-parents. However, the right of the father to claim custody of a minor child is not unlimited and is subject to the welfare of the minor child. Therefore, in the peculiar circumstances of this case, it would not be just to direct the child to be handed over at this stage to the appellant.



22. It is well settled that guardianship and custody are two distinct factors. In **Athar Hussain v. Syed Siraj Ahmed & Ors**, reported in **AIR 2010 SC 1417** the appellant-father had married for the second time and the children were in custody of their maternal aunt and uncle. It was held that although the second marriage of father was not a disentitling factor but it was an important factor. The Court pointed out that guardianship and custody are two distinct factors. Father was found fit to be guardian and was allowed to continue as such but was denied custody.

23. It is not in dispute that the role of a father is very important for the upbringing of a minor child. The father's care and guidance and his role for upbringing and grooming of the minor child to face the realities of life could not be undermined. The minor child in this case has lost her mother. The allegation and counter allegation between the parties is making negative feelings in child and dislike towards father could not serve the interest and welfare of the minor child. Both the parties are expected to cooperate in creating a positive environment for wholesome development in the personality of the minor child. It will be in the interest of the minor and both the contesting parties, if they are able to sort out their differences amicably, so



that the minor may not be deprived of matured guidance and strong support of her maternal grand-parents as well as the love and affection of her father.

24. In a similarly situated case, the Hon'ble Supreme Court in the case of **Anjali Kapoor (Smt.) v. Rajiv Baijal** reported in (2009) 7 SCC 322, gave custody to the grandmother where the contest was between father and maternal grandmother. The child was an infant when her mother died at the time of delivering the baby. The grandmother continued to take care of the minor child. The Hon'ble Apex Court found that she had considerable amount of care, affection and love for her only daughter who died in tragic circumstances. The Court went into the strong emotional bonding between the maternal grand daughter and grandmother who was financially sound. The father got married for the second time and was having a child from the said wedlock. Hence, the alternative of sending the minor child to the care of step-mother did not find favour and the Court allowed custody of the child in favour of the grand mother. In paragraph 23 of the aforesaid judgment it has been noticed that the child had remained with the grandmother for a long time and was growing up well in an atmosphere conducive to its growth and hence, it may not be proper at this stage for changing the



environment to which the child has become used to.

25. Presently, the maternal grandparents are alive and fond of this minor child after death of their daughter. The argument that one day or the other the minor has to live with the appellant-father and, therefore, the sooner is better for her. Today, we cannot cast the horoscope of the coming events in the life of child. In the present circumstances, it is not justified in directing the child to be handed over to the father on the basis of an uncertain future. In our view, the sense of security which the child needs, the warmth and affection she can get today would be undoubtedly greater in the company of maternal grandparents than that of the appellant-father. It is however, made clear that it is not held that the appellant is unfit for being the legal guardian of his minor daughter [REDACTED]. Considering the dynamic nature of circumstances and the passage of time, the Court retains the authority to vary such orders in the child's best interest as and when necessary. The parties are at liberty to seek appropriate directions/orders from the court in case there is any substantial change in the situation warranting reconsideration.

26. It is apparent that the minor child has remained in the custody of maternal grand-parents for a considerable period of time and did not appear to be comfortable in the



custody of father and handing over the custody, at this stage, the child will suffer more trauma. The Hon'ble Supreme Court in the case of **Somaprabha Rana & Ors. v. The State of Madhya Pradesh & Ors.** reported in **(2024) 9 S.C.R. 64**, observed that the Court cannot treat the child as a movable property and transfer custody without even considering the impact of the disturbance of custody on child. Such issues cannot be decided mechanically and the Court has to act based on humanitarian considerations.

27. Keeping in view of the facts and circumstances of the case, at this stage, the welfare of the minor child does not require change of custody from respondents. If custody of the child is immediately transferred to the appellant-father, the child will become miserable as she has lack of affinity towards her father. Moreover, from the materials available on the record including the Psychological Counselling Report and interaction with the parties and minor child, it is found that the respondents have been taking proper care and providing decent lifestyle, good education and overall intellectual development to the minor girl child. No doubt, the appellant is natural guardian of the minor daughter, however, the present circumstances necessitate that the minor girl remain in the custody of her maternal grandparents



until she attains majority or opts to live with her father thereafter. Being natural father, the appellant is entitled to have access to meet the child and it is in the child's best interest to maintain meaningful and regular interaction with her father for her holistic development.

28. From the perusal of the impugned Judgment and Order it appears that the Principal Judge has taken care of all the situations and future possibilities considering the welfare and best interest of the minor child. The arrangement made by the learned Family Court with respect to the custody and maintenance of minor child cannot be held as unreasonable.

29. Considering the facts and circumstances of the present case, no interference is required to the judgment dated 27.02.2020 passed by the learned Family Court in Guardianship Case No.02 of 2018, accordingly, the present Misc. Appeal stands **dismissed**.

30. Interlocutory Application(s), if any, stands disposed of.

31. The appellant is directed to comply various directions mentioned in the impugned judgment including deposit of lump-sum amount of Rs.10 Lacs with interest @ 6% per annum on the said amount from the date of the impugned



judgment dated 27.02.2020 till the date of payment and also arrears of maintenance amount within eight weeks from the date of this judgment and in case of non-compliance by the appellant, the learned Trial Court is directed to take all necessary steps including direction for deduction from his salary and/or attachment of his property.

(Sunil Dutta Mishra, J)

I am on the same page
P. B. Bajanthri, J

(P. B. Bajanthri, J)

Ritik/-

AFR/NAFR	AFR
CAV DATE	18.01.2025
Uploading Date	07.04.2025
Transmission Date	NA

