

**HIGH COURT OF CHHATTISGARH, BILASPUR****Judgment Reserved on 14.09.2022****Judgment Delivered on 13.12.2022****FAM No. 251 of 2018**

Devnath Ratre son of Samaliya Ratre, aged about 35 years, resident of Village- Pacheda, Tahsil Arang, Police Station Vidhansabha, District Raipur, Chhattisgarh.

---- Appellant**Versus**

Smt. Malti Ratre aged about 32 years, wife of Devnath Ratre, daughter of Mahesh Lader, at present resident of Mahantpara, Lakhenagar, Police Station - Purani Basti, Raipur, District Raipur, Chhattisgarh.

---- Respondent

For Appellant/husband : Mr. A. D. Kuldeep, Advocate
For Respondent/wife : Mr. Anil Singh Rajput, Advocate

Hon'ble Shri Justice Goutam Bhaduri &
Hon'ble Shri Justice Radhakishan Agrawal

C A V Judgment**Per Radhakishan Agrawal, J.**

1. This appeal is by the husband under Section 19 of the Family Courts Act, 1984 (for brevity 'Act of 1984') against the order dated 09.10.2018 passed by 2nd Additional Principal Judge, Family Court Raipur, Chhattisgarh in C.M.C. Case No.153 of 2015 whereby application filed by husband under Section 8 of the Guardians and Wards Act, 1890 (for brevity 'Act of 1890') for grant

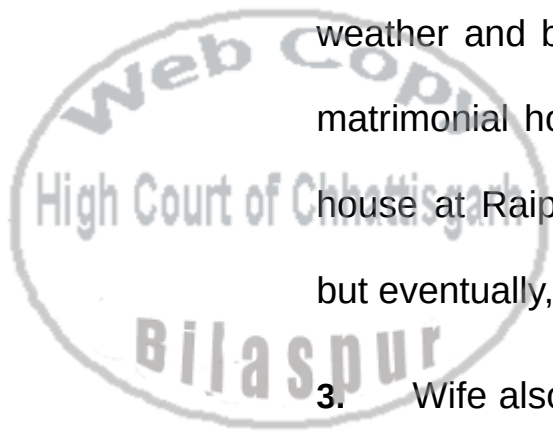


of guardianship of his daughter, namely, Ku. Nikita from the wife was dismissed.

2. The facts of this case are that the appellant Devnath Ratre and respondent Smt. Malti Ratre got married on 26.04.2009 according to the Hindu Rites and Rituals. After the marriage, wife joined the company of husband and from the wedlock, one girl child, namely Ku. Nikita was born on 28.03.2010. After birth of a female child, some dispute arose between them. Subsequently, the relation in between husband and wife entered into rough weather and blame game started. In the year 2011, wife left her matrimonial home and went away with her child to her maternal house at Raipur. Thereafter, counseling proceedings took place, but eventually, it failed and they started living apart.

3. Wife also filed a petition for maintenance under Section 125 of the Code of Criminal Procedure, 1973 (for brevity 'Cr.P.C.') for herself and her daughter against the husband before the Family Court, Raipur, C.G. In Mega Lok Adalat, vide order dated 20.01.2013, compromise took place between them and according to the terms of compromise, husband was directed to pay the maintenance amount of Rs.1,500/- per month to the wife and Rs.1,000/- per month to the daughter.

4. It is pleaded by the husband in the plaint that wife has made false allegation against him that he committed torture and cruelty





upon her after consuming liquor, which defamed his reputation in society. It was also pleaded by husband that his wife has a attitude of criminal nature, hence, if the child is being kept in her custody, there would be an adverse effect on the future of child, therefore, being a natural guardian, child be given in custody of the father (appellant herein).

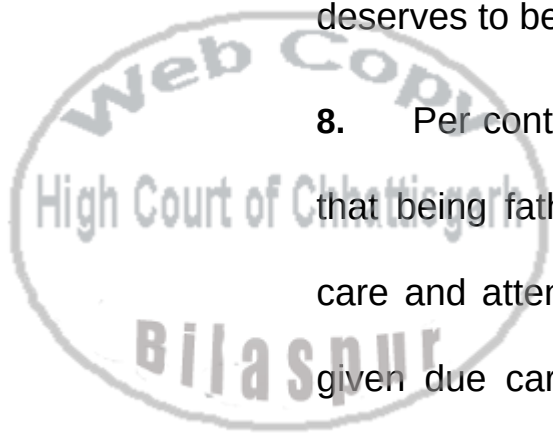
5. Wife filed her written statement denying the plaint averments. She stated that after few days of marriage, husband took her jewellery, tortured her physically and mentally as well as beat her on different occasions for demand of dowry. She also stated that husband abandoned her since 2012 without any rhyme or reason and he was very careless as also even not bothered to meet his daughter. She further stated that husband was not capable to properly maintain and educate her daughter. Apart from that, it was stated that if the custody of daughter is given to husband, there would be negative impact on her. She also stated that she is taking care of her daughter as also providing proper education and, therefore, custody of minor child sought for by the husband may not be granted.

6. Learned Family Court after evaluating evidence adduced by both the parties, dismissed the application filed by the husband. Hence, this appeal.



7. Learned counsel for the appellant/husband submits that Family Court ought to have considered the paramount interest of the minor child Ku. Nikita. The Family Court has failed to appreciate that husband is a natural guardian and is entitled to get the custody of minor child. According to the husband, he is in a better position to provide proper education for bright future of daughter. It is contended that Family Court has failed to appreciate that wife has attitude of criminal nature, and thus, impugned order passed by Family Court cannot be sustained and deserves to be set aside.

8. Per contra, learned counsel for the respondent/wife submits that being father the appellant/husband is obliged to give more care and attention for the progress of child but she is not being given due care attention by the father. It is submitted that the father is very careless towards the daughter and even does not bother to meet the child. He further submits that in fact, the appellant has no sufficient means of income to provide better education for the daughter. It is contended that now the daughter is 12 years of age, therefore, at this stage keeping in view the comfort of the daughter, the assistance of mother is necessary. The order of Family Court is just and proper, which does not call for any interference.





9. We have heard learned counsel for both the parties and perused the record of the Family Court as well as the documents attached with the appeal.

10. The statute which deals with the situation is the Guardians and Wards Act, 1890 and Section 4 of the Act of 1890 defines minor as a person who has not attained the age of majority. Guardian means a person having the care of the person of a minor or of his property, or of both his person and property. Ward is defined as a minor for whose person or property or both, there is a guardian.

11. Chapter II (Sections 5 to 19) relates to appointment and declaration of guardians. Section 7 deals with the power of the Court to make order as to guardianship' and reads as under:

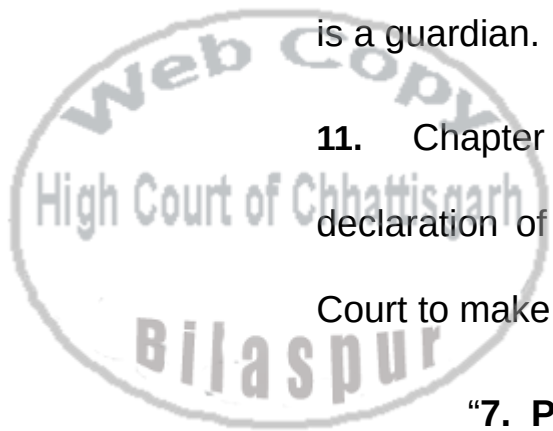
“7. Power of the Court to make order as to guardianship.-(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made--

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.”





12. Section 8 of the Act of 1890 entails the persons entitled to apply for an order as to guardianship. Section 9 empowers the Court having jurisdiction to entertain an application for guardianship. Sections 10 to 16 deal with procedure and powers of the Court. Section 17 is another material provision which is reproduced :

“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.

[***]

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

(emphasis supplied)

13. The Hindu Minority and Guardianship Act, 1956 (for brevity ‘Act of 1956’) is another equally important statute relating to minority and guardianship among Hindus. Section 4 defines "minor" as a person who has not completed the age of eighteen years. "Guardian" means a person having the care of the person of a minor or of his property or of both his persons and property,



and inter alia includes a natural guardian. Section 2 of the Act declares that the provisions of the Act shall be in addition to, and not in derogation of the Act of 1890.

14. Section 6 of the Act of 1956 prescribes the procedure to appoint a natural guardian. It reads thus :

“6. Natural guardians of a Hindu Minor.-The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl:- 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;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl:- the mother, and after her, the father.

(c) in the case of a married girl:- the husband:

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 becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.--In this section, the expressions "father" and "mother" do not include a step-father and a step-mother.”

15. Section 8 enumerates powers of a natural guardian. Section 13 is an extremely important provision and deals with welfare of a minor. The same may be quoted in extenso :

“13. Welfare of minor to be paramount consideration.-(1) In the appointment or declaration of any person as guardian of a Hindu





minor by a court, the welfare of the minor shall be the paramount consideration.

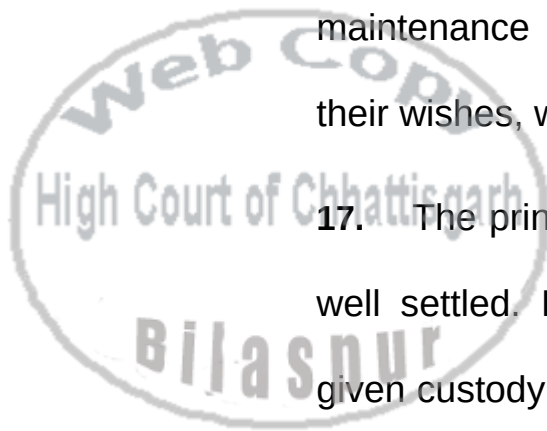
(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

(emphasis supplied)

16. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

17. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the “welfare of the child” and not rights of the parents under a statute for the time being in force.

18. The Supreme Court in **Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others** reported in **(2019) 7 SCC 42** at paras 26 and 27 has observed that the welfare of the minor child is the paramount consideration. At para 27, referring to the law laid down in **Nil Ratan Kundu and Another v. Abhijit Kundu** reported in **(2008) 9 SCC 413**, which further finds a reference in **Goverdhan Lal and Others v. Gajendra Kumar**





reported in **AIR 2002 Raj 148**, the Court held that while dealing with the child custody cases, the paramount consideration should be the welfare of child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. Paras 26 and 27 of **Tejaswini Gaud's** case (supra) are relevant and quoted below :

“26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.”

27. After referring to number of judgment and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings, in *Nil Ratan Kundu* (2008) 9 SCC 413, it was held as under (SCC pp. 427-28, paras 49-52)

“49. In *Goverdhan Lal v. Gajendra Kumar*, AIR 2002 Raj 148, the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.”





19. Therefore, it is the ultimate welfare of the child which would be dominant matter for consideration of Court when the Court is confronted with the conflicting demands made by parents, both demands are to be justified and cannot be decided on the legalistic basis and the Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. It further held that the word 'welfare' used in Section 13 of the Act of 1956 has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Therefore, the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction arising in such cases.

20. Therefore, in the instant case, averment of the husband that father is the natural guardian cannot be given a preference and welfare of minor would be the paramount consideration.

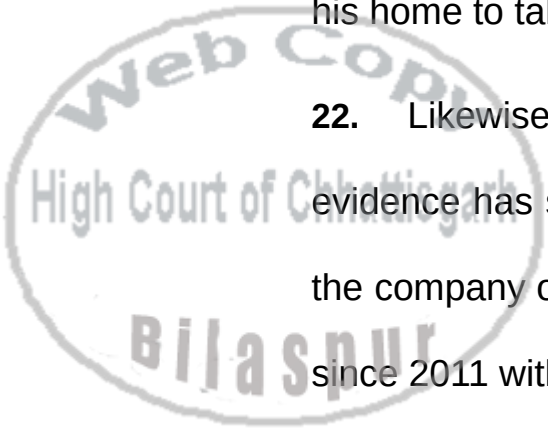
21. Devnath Ratre-husband has examined himself as AW-1, who in his evidence has stated that there was a dispute between him and his wife after the birth of a girl child, namely, Ku. Nikita. He further stated that after the birth of Ku. Nikita, behaviour of her wife was not normal and she used to reside separately in her



parental house for last 6 years. He also stated that wife has levelled allegation against him of beating and harassing her under the influence of liquor, due to which, his social reputation was defamed. He also stated that relationship between him and his wife became deteriorated since the birth of their daughter. In his cross-examination, he has stated that he was earning Rs.6,000/- per month and lived alone at home. He further stated that he went for duty in the morning and come back to house at 7.00 PM. His brother and sister-in-law lived separately and there was nobody in his home to take care of his daughter except him.

22. Likewise, Chhannulal has examined as AW-2, who in his evidence has stated that after the birth of Ku. Nikita, wife was left the company of husband and used to reside in her parental house since 2011 without any reason.

23. On the contrary, Smt. Malti Ratre-wife has examined herself as DW-1 and stated in her evidence that after giving information about the birth of daughter Ku. Nikita to her husband, he went away saying that he will come in some time, but he did not come to meet her. She has further stated that husband and his family members started misbehaving and harassing her saying that she has given birth to a girl child. In her cross-examination, she has stated that she is teaching her daughter in English Medium





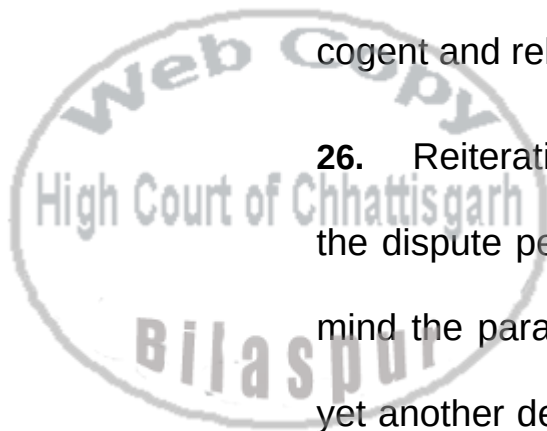
School, namely, New Central Convent School. She further stated that she and her sister were teaching their child at home.

24. Perusal of the evidence of Devnath (husband) would show that he was not having proper income to maintain his daughter as also when he spent most of the time on duty, there was nobody at his home to take care of his daughter.

25. The Family Court in its order held that it has not been proved by the husband that his wife has an attitude of criminal nature and in this regard, the husband has not produced any cogent and reliable piece of evidence.

26. Reiterating the well settled legal position that while deciding the dispute pertaining to custody of minor, Courts should keep in mind the paramount interest of the minor, the Supreme Court, in yet another decision rendered in **Purvi Mukesh Gada v. Mukesh Popatlal Gada and Another** reported in **(2017) 8 SCC 819**, has held that it was incumbent upon the High Court to find out the welfare of the children before passing the order regarding custody because the welfare of the child is the supreme consideration in such matters.

27. In the light of what has been discussed above, it is also important to bear in mind a very germane biological aspect of the matter concerning puberty, privacy and care needed to a girl child at age between 10 to 15 years. At this juncture of life, the girl





needs special care and attention of the mother. There are certain biological changes, which a girl child undergoes during this age, which cannot be taken care of by the father. (See : 2017 SCC OnLine Chh 1247, *Balram v. Sushma*).

28. In view of the aforesaid discussion, after taking into the overall facts, we are of the opinion that considering the paramount interest of the child, it would be proper if the mother holds the custody of the child and accordingly, the finding arrived at by the learned Family Court with respect to custody of child to be with the mother, we refrain to interfere with the same.

29. As a sequel, the appeal, sans merit, is liable to be and is hereby dismissed, leaving the parties to bear their own cost(s).

30. A decree be drawn accordingly.

Sd/-

(Goutam Bhaduri)
Judge

Sd/-

(Radhakishan Agrawal)
Judge