

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition No.862 of 2016 (M/S)

Shri Ashwin Chaudhry

... Petitioner

vs.

Smt. Kiran Chaudhry

... Respondent

Mr. Prashant Mendiratta, Advocate present for the petitioner.
Mr. Rajendra Dobhal, Senior Advocate assisted by Mr. Bharat Tiwari, Advocate present for the respondent.

U. C. Dhyani, J. (Oral)

1. By means of present writ petition, the petitioner seeks following reliefs, among other:

“(a) Set aside the impugned order dated 28.03.2016 passed by the learned court of Shri Amit Kumar Sirohi, learned Principal Judge, Family Court, Nainital in Divorce Petition titled as ‘Ashwin Chaudhary vs. Kiran Chaudhary’ numbered as HMA No.33/2015.

(b) Direct the respondent to produce the minor child in Nainital and send the minor child, Kushagra Chaudhary, to school to St. Joseph’s College, Nainital.

(c) Grant joint custody and meaningful visitation rights to the petitioner, and;

(d) Restrain the respondent from removing the minor child, Kushagra Chaudhary, from Nainital without the prior written permission of the petitioner.”

2. The petitioner has filed a matrimonial suit under Section 13 of the Hindu Marriage Act (*hereinafter referred to as the ‘Act’*) for obtaining a decree of divorce against the respondent on the ground of adultery. Till December, 2014, child (Kushagra Chaudhary) born out of wedlock of petitioner & respondent was studying with their parents at Nainital, where he was studying in

St. Joseph College. In December, 2014, respondent shifted to her parental house at Nainital and, then, in March, 2016 she alongwith the child shifted to Dehradun, where the child was got admitted in Asian School in Class-VII. The child is also present in the Court alongwith her mother. During lunch break, this Court called the child in the chamber.

3. The law is abundantly clear on the point that child's welfare is a paramount consideration while deciding the issue of custody of a child. On 02.03.2016, the child had an occasion to meet his father on his birthday, which was celebrated at Nainital at the house of respondent's mother (i.e. maternal grandmother of the child). When the summer vacation started in the Asian School, the petitioner moved an application under Section 26 of the Act for custody of his child. Instead of deciding such an application, the court below postponed the hearing of the same on the ground that it will be decided at the time of final disposal of the matrimonial suit pending adjudication before the said court under Section 13 of the Act.

4. This Court was taken through the judgment impugned, which finds place at Annexure-1 to the writ petition. Learned Judge Family Court, *vide* order dated 28.03.2016, observed that the application under Section 26 of the Act shall be decided alongwith the matrimonial suit, which order is under challenge in the present writ petition.

5. Section 26 of the Act reads as follows:

"26. Custody of children. – In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children,

consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made:

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.”

6. It says, among other things, that in any proceeding under this Act (read Section 13 of the Hindu Marriage Act in the context of this case), the Court may, from time to time, pass such interim orders with respect to the custody, maintenance and education of minor children, consistently with their wishes. It also provides that such an application shall, as far as possible, be disposed of within 60 days from the date of service of notice on the respondent. In the instant case, application under Section 26 of the Act is pending and the decree in a matrimonial suit under Section 13 of the Act is yet to be passed. It was, therefore, incumbent upon the court below to have decided this matter first and ought not to have kept the matter pending to be decided alongwith the final disposal of the suit. This Court is, therefore, of the view that the court below ought to have decided the application under Section 26 of the Act, which was filed in the pending suit of the petitioner under Section 13 of the Act.

7. The order impugned is, therefore, set aside. A direction is accordingly given to the court below to take up the issue of

custody of child moved under Section 26 of the Act at the earliest possible and decide the matter by 28th June, 2016. The parties will appear in person or through their counsel before the court below on 22.06.2016.

8. The next question, which arises for consideration of this Court is – what should be done during the *interregnum*? Various judgments have been placed before this Court, a reference of which seems to be necessary for the disposal of the present writ petition.

9. Hon'ble Supreme Court in **Mausami Moitra Ganguli vs. Jayant Ganguli, (2008) 7 SCC 673** held that:

“19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

24. Having interviewed Satyajeet in our chambers for some time, we find it difficult to accept the stand of the appellant that the father does not have sufficient time or resources to look after the welfare of the child. We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression to him.

26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that child's interest and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained. We feel that the visitation rights given

to the appellant by the High Court, as noted above, also do not require any modification. We, therefore, affirm the order and the aforeextracted directions given by the High Court. It will, however, be open to the parties to move this Court for modification of this order or for seeking any direction regarding the custody and well-being of the child, if there is any change in the circumstances.”

10. In **Shyamrao Maroti Korwate vs. Deepak Kisanrao Tekam, (2010) 10 SCC 314**, Hon’ble Supreme Court observed as under:

“16. If we analyze the above provisions, one thing is clear that in a matter of custody of a minor child, the paramount consideration is the “welfare of the minor” and not rights of the parents or relatives under a statute which are in force. The word “welfare” used in Section 13 of the Act 1956 has to be construed literally and must be taken in its widest sense.

17. In Gaurav Nagpal vs. Sumedha Nagpal, (2009) 1 SCC 42, this Court held:

“51. The word “welfare” used in Section 13 of the Act 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. Though 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.”

25. Inasmuch as the child has continuously been living with the maternal grandfather and his family from the date of his birth i.e. 23.03.2003 and getting good education at their hands, taking note of the position of the father of the child who is working 90 kms. away from his house in a rural village, we modify the order of the High Court and permit the appellant grandfather to have the custody of the child Vishwajeet @ Sangharsh till the age of 12 years as ordered by the District Judge. The above conclusion is based on the welfare of the minor as provided in Section 13 of the 1956 Act.

26. Since on completion of 12 years, a fresh decision is to be taken about entrusting the custody of the minor child, while modifying the order of the High Court as mentioned above, we issue the following directions about the visitation rights of the father:

1) During long holidays/vacations covering more than two weeks the child will be allowed to be in the company of the father for a period of seven days.

(2) The period shall be fixed by the father after due intimation to the maternal grandfather who shall permit the child to go with the father for the aforesaid period.

(3) In addition to the same, twice in a month preferably on Saturday or Sunday or a festival day, maternal grand-father shall allow the child to visit the father from morning to evening. Father shall take the child and leave him back at the maternal grand-father's place on such days.

(4) The father is free to provide facilities such as payment of school fees, books, dress materials, eatables etc. during this period to develop a conducive relationship with the child."

11. It was held in **Sheila B. Das vs. P. R. Sugasree, (2006) 3 SCC 62** by Hon'ble Supreme Court that:

"31. We, therefore, feel that the interest of the minor will be best served if she remains with the respondent but with sufficient access to the appellant to visit the minor at frequent intervals but so as not to disturb and disrupt her normal studies and other activities. We, accordingly dispose of this appeal by retaining the order passed by the learned Judge of the Family Court at Thrissur on 20.3.2001 while disposing of O.P.No.193/2000 filed by the respondent herein under Sections 7 and 25 of the Guardians and Wards Act, 1890 with the following modifications:-

1. The respondent shall make arrangements for Ritwika to continue her studies in her present school and to ensure that she is able to take part in extra-curricular activities as well.

2. The respondent shall meet all the expenses of the minor towards her education, health, care, food and clothing and in the event the appellant also wishes to contribute towards the upbringing of the child, the respondent shall not create any obstruction to and/or prevent the appellant from also making such contribution.

3. The appellant will be at liberty to visit the minor child either in the respondent's house or in the premises of a mutual friend as may be agreed upon on every second Sunday of the month. To enable the appellant to meet the child, the respondent shall ensure the child's presence either in his house or in the house of the mutual friend agreed upon at 10.00 A.M. The appellant will be entitled to take the child out with her for the day, and to bring her back to the respondent's house or the premises of the mutual friend within 7.00 P.M. in the evening.

4. In the event the appellant shifts her residence to the same city where the minor child will be staying, the appellant will, in addition to the above, be entitled to meet the minor on every second Saturday of the month, and, if the child is willing, the appellant will also be entitled to keep the child with her overnight on such Saturday and return her to the respondent's custody by the following Sunday evening at 7.00 P.M.

5. The appellant, upon prior intimation to the respondent, will also be entitled to meet the minor at her school once a week after school hours for about an hour.

6. The appellant will also be entitled to the custody of the minor for 10 consecutive days during the summer vacation on dates to be mutually settled between the parties.

7. The aforesaid arrangement will continue for the present, but the parties will be at liberty to approach the Family Court at Thrissur for fresh directions should the same become necessary on account of changed circumstances.”

12. Hon’ble Supreme Court in *Gaurav Nagpal vs. Sumedha Nagpal*, (2009) 1 SCC 42 observed as under:

“41. Section 8 enumerates powers of 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.

42. 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.

43. 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.

44. *The aforesaid statutory provisions came up for consideration before Courts in India in several cases. Let us deal with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well-being as paramount consideration.*

45. *In Saraswathibai Shripad v. Shripad Vasanji, AIR 1941 Bom 103; the High Court of Bombay stated;*

“It is not the welfare of the father, nor the welfare of the mother that is the paramount consideration for the Court. It is the welfare of the minor and the minor alone which is the paramount consideration.”

46. *In Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840, this Court held that object and purpose of the 1890 Act is not merely physical custody of the minor but due protection of the rights of ward’s health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.*

47. *Again, in Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544, this Court reiterated that the only consideration of the Court in deciding the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the Court. Mature thinking is indeed necessary in such a situation to decide what will ensure to the benefit and welfare of the child.*

48. *Merely because there is no defect in his personal care and his attachment for his children—which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.*

49. *In Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu, (1984) 3 SCC 698, this Court held that Section 6 of the Act constitutes father as a natural guardian of a minor son. But that provision cannot supersede the paramount consideration*

as to what is conducive to the welfare of the minor. [See also Elizabeth Dinshaw (Mrs.) v. Arvand M. Dinshaw, (1987) 1 SCC 42; Chandrakala Menon (Mrs.) v. Vipin Menon (Capt), (1993) 2 SCC 6].

50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. 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. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word 'welfare' used in Section 13 of the Act 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. Though 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.

55. In partial modification of the order passed by the District Judge and the High Court, we direct that the visitation rights shall be in the following terms:

(1) During long holidays/vacations covering more than two weeks the child will be allowed to be in the company of the father for a period of seven days.

(2) The period shall be fixed by the father after due intimation to the mother who shall permit the child to go with the father for the aforesaid period.

(3) For twice every month preferably on Saturday or Sunday or a festival day, mother shall allow the child to visit the father from morning to evening. Father shall take the child and leave him back at the mother's place on such days."

13. In Ruchi Majoo vs. Sanjeev Majoo, (2011) 6 SCC 479, Hon'ble Supreme Court observed as below:

"68. The order of the Delhi Court granting interim custody of the minor to the appellant did not make any provision for visitation rights of the respondent father of the child. In the ordinary course the court ought to have done so not only because even an interim order of custody in favour of the parent should not insulate the minor from the parental touch and influence of the other parent which is so very important for the healthy growth of the minor and the development of his

personality. It is noteworthy that even the respondent did not claim such rights in his application or in the proceedings before the High Court.

70. The question then is what should the visitation rights be and how should the same be exercised. But before we examine that aspect, we may advert to the need for the visitation rights of the father to be recognised in the peculiar circumstances of this case.

71. From what we gathered in the course of an interactive session with the minor, we concluded that the minor has been thoroughly antagonized against the respondent father. He held him responsible for his inability to travel to Malaysia, with his grandparents because if he does so, both the mother and her parents will be arrested on the charge of abduction of the minor. He also held the respondent responsible for his grandparent's skin problems and other worries. He wanted to stay only in India and wanted to be left alone by the respondent. He was reluctantly agreeable to meeting and associating with the respondent provided the respondent has the red corner notice withdrawn so that he and his grandparents can travel abroad.

72. For a boy so young in years, these and other expressions suggesting a deep rooted dislike for the father could arise only because of a constant hammering of negative feeling in him against his father. This approach and attitude on the part of the appellant or her parents can hardly be appreciated. What the appellant ought to appreciate is that feeding the minor with such dislike and despire (sic) for his father does not serve his interest or his growth as a normal child.

73. It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life. Nor can the role of the father in his upbringing and grooming to face the realities of life be undermined. It is in that view important for the child's healthy growth that we grant to the father visitation rights; that will enable the two to stay in touch and share moments of joy, learning and happiness with each other. Since the respondent is living in another continent such contact cannot be for obvious reasons as frequent as it may have been if they were in the same city. But the forbidding distance that separates the two would get reduced thanks to the modern technology in telecommunications.

74. The appellant has been according to the respondent persistently preventing even telephonic contact between the father and the son. May be the son has been so poisoned against him that he does not evince any interest in the father. Be that as it may telephonic contact shall not be prevented by the appellant for any reason whatsoever and shall be encouraged at all reasonable time. Video conferencing may

also be possible between the two which too shall not only be permitted but encouraged by the appellant.

75. Besides, the father shall be free to visit the minor in India at any time of the year and meet him for two hours on a daily basis, unhindered by any impediment from the mother or her parents or anyone else for that matter. The place where the meeting can take place shall be indicated by the trial Court after verifying the convenience of both the parties in this regard. The trial Court shall pass necessary orders in this regard without delay and without permitting any dilatory tactics in the matter.

76. For the vacations in summer, spring and winter the respondent shall be allowed to take the minor with him for night stay for a period of one week initially and for longer periods in later years, subject to the respondent getting the itinerary in this regard approved from the Guardian & Wards Court. The respondent shall also be free to take the minor out of Delhi subject to the same condition. The respondent shall for that purpose be given the temporary custody of the minor in presence of the trial court, on any working day on the application of the respondent. Return of the minor to the appellant shall also be accordingly before the trial court on a date to be fixed by the court for that purpose.”

14. In Paramjit Singh Lamba vs. Smt. Prabjot Kaur, I (2004) DMC 806, Hon’ble Delhi High Court has observed thus:

“3. As ready observed a decision should be taken not from the claim of the parent, but from the stand-point of the child concerned, since there can be no argument against the necessity for the child to spend time with both parents. In the present case the fixation of only one hour in a month has led to the consequence of the child refusing to meet her Father, that is, the petitioner herein. Such an abhorrence towards the father cannot but be the result of brainwashing by the mother, which has succeeded in large measure because of the extremely limited access of the petitioner with his daughter.”

15. Hon’ble Supreme Court in Vikram Vir Vohra vs. Shalini Bhalla, (2010) 4 SCC 409, has observed as under:

“7. The High Court took into consideration the provisions of Section 26 of the Act and was of the view that the aforesaid provision is intended to enable the Court to pass suitable orders from time to time to protect the interest of minor children. However, the High Court held that after the final order is passed in original petition of divorce for the custody of

the minor child, the other party cannot file any number of fresh petitions ignoring the earlier order passed by the Court. The Court took into consideration that even if the terms and conditions regarding the custody and visitation rights of the child are not specifically contained in the decree, they do form part of the petition seeking divorce by mutual consent. It was of the view that absence of the terms and conditions in the decree does not disentitle the respondent to file an application under Section 26 of the Act seeking revocation of the visitation rights of the appellant.

8. It is important to mention here that the learned Judge of the High Court had personally interviewed the child who was about 7 years old to ascertain his wishes. The child in categorical terms expressed his desire to be in the custody and guardianship of his mother, the respondent. The child appeared to be quite intelligent. The child was specifically asked if he wanted to live with his father in India but he unequivocally refused to go with or stay with him. He made it clear in his expression that he was happy with his mother and maternal grandmother and desired only to live with his mother. The aforesaid procedure was also followed by the learned Trial Court and it was also of the same view after talking with the child.

9. Being aggrieved with the judgment of the High Court the appellant has approached this Court and hence this appeal by way of Special Leave Petition.

12. In a matter relating to custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child.

21. This Court finds that so far as the order which had been passed by the High Court, affirming the order of the Trial Court, the visitation rights of the appellant-father have been so structured as to be compatible with the educational career of the child. This Court finds that in this matter judicial discretion has been properly balanced between the rights of the appellant and those of the respondent. In that view of the matter, this Court refuses to interfere with the order passed by the High Court. ”

16. In Kumar V. Jaghirdar vs. Chetana K. Ramatheertha, (2001) 4 SCC 682, Hon'ble Supreme Court observed that:

“6. We have heard learned counsel for both the parties at some length. We have also perused the order of the High Court under challenge. We are constrained to observe that the High Court in its approach to the case has ignored the well-settled principle that in a matter relating to the custody of a minor child, the interest and welfare of the child is the paramount consideration and not the convenience or pleasure of the parents. The learned Judge while stating the facts has observed that “ the petitioner (respondent herein) has married again whereas the respondent (appellant herein) has remained unmarried even after separation. He is a stock broker by profession and he is more prosperous, wealthy and affluent man with good financial background.” After noticing certain decisions cited before him, the learned Judge observed in paragraph 11 of the order that: “....while passing the order in case of custody of minor child, the paramount consideration is the welfare of the minor child”. In paragraph 12, the learned Judge has observed : Admittedly he has not remarried. In event he had remarried, there could not have been any guarantee that the child could have been looked after well by the second wife. In paragraph 14, the learned Judge expressed the opinion that the condition 8a (quoted earlier) is not a healthy condition as it has lost site of the fact that the welfare of the child is the paramount consideration. The learned Judge has expressed his views by saying that “.....Merely because there is a divorce and merely because she has remarried again does not mean that she can afford to ill-treat her child”. In paragraph 17 of the order, the High Court observed: “.....the petitioner is although a divorcee, she is not doing any work, she has got all the time in the world to attend to the needs of the girl.....”.

7. We do not intend to consider in-depth the merits of the case for the reason that both the parties have approached the Family Court with petitions seeking custody of the minor child. Suffice it to say that the High Court does not appear to have considered the welfare of the minor child in its proper perspective. Therefore, the order and the directions issued by the High Court should not influence the Family Court while deciding the question of custody of the child.”

17. Section 26 of the Act is, therefore, intended to enable the Court to pass suitable orders from time to time to protect the interest of minor child (ren). It was incumbent upon the court below to consider the custody and visitation rights of one of the parents in the matter of custody of a child. Any court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing age. It is on account of this reason, the custody

orders have been held to be interlocutory orders and they are capable of being altered or moulded or amended keeping in mind the requirement of a child. The visitation rights is, therefore, granted to the petitioner to visit his child at his mother's house at Dehradun, till such time the application under Section 26 of the Hindu Marriage Act is decided by the court below.

18. Let certified copy of this order be supplied to learned counsel for the parties within 24 hours, on payment of usual charges.

(U. C. Dhyani, J.)

Dated 20th June, 2016

Rawat