AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No. 35 of 2016

- Deepa Nayak D/o Shri Tunatran Nayak, Aged About 30 Years Occupation- Private Service As Office Assistant/ Field In-Charge, In N.V. Engineering Enterprises R/o Village And Post- Sankra, Thana- Sankra, Tahsil- Pithoura, Civil And Revenue Distt. Mahasamund, Chhattisgarh .....Defendant

---- Appellant

Versus

- Pitamber Nai S/o Shri Ravindra Nai, Aged About 34 Years R/o Badeloram, Thana And Tahsil- Pithoura, Civil And Revenue Distt.- Mahasamund, At Present Adds.- Prakash Trading Company, Cloths Market Pandari Raipur, P.S.- Civil Lines Raipur, Civil And Revenue Distt.- Raipur, Chhattisgarh .....Plaintiff

---- Respondent

For Appellant : Shri Sunil Sahu, Advocate

For Respondent : Shri A.K. Prasad, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Hon'ble Shri Justice Sanjay S. Agrawal

Judgment on Board

Per Goutam Bhaduri, J.

28/03/2022

Heard.

1. The instant appeal is preferred by the mother against the impugned judgment dated 28.01.2016 passed in Civil M.J.C. No.09/2014 by the learned Family Court, Mahasamund whereby the custody of the child is given to the respondent/father.

background of the facts are that the appellant and respondent were married on 05.04.2007. They could not go along eventually a divorce by mutual consent was passed on 04.03.2013 and during such divorce proceedings it was agreed that the child would be in the custody of the mother/appellant herein. Subsequently, the instant application for custody of the child was filed after the child crossed 5 years on the ground that the mother is in company of different male and she used to travel along with other male member and the attire of the lady was not befitting to which would reflect that she had lost her chastity. So if the child is kept in her custody, there would be an ill effect to the mind of child as such the child be given in custody of father. It was also alleged that she was in illicit relation with one Vivek Sharma, therefore, for the welfare of the child, the application for custody was filed.

3. The respondent Pitamber Nai examined himself as AW-1, one Ravi Prakash Pradhan was examined as AW-2, Smt. Saraswati Sharma was examined as AW-3 and Deepak Kumar Sahu was examined as AW-4. While on behalf of appellant/mother, the appellant was examined as NAW-1, one Gaurhari Kewat was examined as NAW-2 and Kamal Kishore Nayak was examined as NAW-3. Learned Family Court, Mahasamud after evaluating the evidence directed the custody of the child to be handed over to the father. Therefore, this appeal.

4. Learned counsel for the appellant would submit that the Family Court only on the statement of the third person has arrived at a conclusion that the child

documents of the study of the child would show that the welfare of the child is being taken better than that which is proposed by the father. He would further submit that without evaluating the welfare of the child, the orders have been passed only on the basis of presumption, which requires interference.

5. Per contra, learned counsel for the respondent/father would submit that the order passed by the Family Court, Mahasamund is well merited which do not require any interference. He would further submit that the evidence of the witnesses would show that the appellant/mother was indulged in relation with the other male members of the society and apart from that the evidence of wife of one Vivek Sharma, with whom the appellant was involved, would show that because of such illicit relation the dispute occurred in between Vivek Sharma and his wife, therefore, the inference can be drawn about the character of appellant and as such the welfare of the child would be better in the custody of the father. It is stated that the type of behaviour shown publicly by the mother would affect the mind of the child. He would further submit that the evidence of the parties would show that the mother is habituated to intoxication, consumes liquor and other drugs. He would further submit that moral and ethical values has to be embedded in the mind of the child, which would be missing if the child is allowed to continue in the company of the mother.

6. We have heard learned counsel for the parties and perused the documents.

the company of the father. The document filed as Ex. P/5 is a decree of divorce under Section 13B of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act, 1955') which was passed on 04.03.2013 that is much after the document of the agreement dated 05.07.2009. By such decree of divorce, the marriage which was solemnized between appellant and respondent on 05.04.2007 was dissolved. The order of divorce reflects that the parties admitted the fact that the child namely Dheeraj Kumar, who was aged about 5 years would continue to stay with the appellant/mother namely Deepa Nayak and the father will have the visiting right. The parties though agreed by way of an initial document captioned as *Talaqnama* that the child would be in the custody of the mother up till 5 years and thereafter with the father and subsequently at the time of divorce under Section 13B of the Act, 1955 it was agreed by the parties that the child would be in the company of the mother. In matter of custody of child such type of inter se agreement between the parties will not decide the fate of the child and his custody. The child cannot be treated like a commodity and by product of an agreement which can be executed shelving to look into the fact of welfare of the child. The predominant factor which would govern in respect of custody of the child is the welfare.

8. The Supreme Court in ***Mousami Moitra Ganguli v. Jayanti Ganguli AIR 2008 7 SCC 673*** at para 14 expressed the view that while deciding the issue as to which parent the care and control of a child should be committed, the first and

9. The Supreme Court further in ***Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari (2019) 7 SCC 42*** held that the Court while deciding the custody cases of the child, it is not bound by the mere legal right of the parents or guardians. It held that 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 the custody of minor child. Therefore, the paramount consideration should be the interest and welfare of the child. The Supreme Court in the aforesaid judgment reiterated the view taken in ***Nil Ratan Kundu Vs. Abhijit Kundu reported in (2008) 9 SCC 413*** and emphasized that paramount consideration should be the welfare of the child and due weight should be given to the child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings.

10. With respect to the oral and documentary evidence so created by the parties in custody matters, the Supreme Court in ***M.K. Hari Govindan Vs. A.R. Rajaram reported in 36 2003 OnLine Mad 48: AIR 2003 Mad 315*** held that the custody cases of child cannot be decided on documents, oral evidence or precedents without reference to “human touch”. It held that human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

11. Considering the aforesaid principles laid down by the Supreme Court, we

used to consume *Gutkha* and used to smoke cigarette. The husband stated that he has seen the wife consuming liquor at some place named Sankra in company of one Vivek Sharma. He further stated that he has seen his wife consuming liquor in the house of Vivek Sharma and she used to move along with him, who is the electrical contractor. The witness further stated that the wife used to work along with Vivek Sharma and used to travel for her job along with him at different places. Likewise, the statement of Ravi Prakash Pradhan (AW-2), it would show that he has stated that the mother used to work under Vivek Sharma, who is an electrical contractor used to travel along with him. He further stated that she is addicted to cigarette, liquor and *Gutka* and she has lost her character and she used to move along with other male members of the society, which is against the moral. He further has stated that she do not follow the rituals and describe her as a female don. It is further stated that the husband Pitamber Nai has not married and he is the only son but because of the arrogance of the wife the entire family is deprived of the love & affection towards the chilld. This witness has further stated that the day when the child will come to know about the character of the mother, he would be demoralized and would become pervert. Likewise the statement of one Smt. Saraswati Sharma (AW-3), who is the wife of Vivek Sharma, she has deposed because of the fact that the appellant is being kept as wife, the relation in between her and Vivek Sharma has become estranged and as such certain litigations are pending against the husband

been assigned that she used to consume liquor and is also addicted to cigarette and *Gutka,* moves along with other male members of the society in the car. As against this witnesses of the mother Deepa Nayak (NAW-1) she stated that she is presently doing a job of Rs.15000/- under a contractor. She further stated as there is no other female employee works, therefore, in order to carry out the job in the field she has to travel to the field. She further stated that she used to travel different sites in the field on the motorcycle and also at times in the car with the contractor. She further stated that at that time other supervisors also travels with her. She further stated that wherever she goes to field she wears capri and T-shirt. She denied the suggestion that she is being looked after by the contractor with whom she works as against this she performs duty from morning to evening.

14. Further coming to the statement further the mother/appellant has referred that while she goes out for job the boy is being looked after by her mother, who is aged about 58 years. The document produced also would show that the boy is admitted to the School, wherein he is studying. As against this, the statement of AW-1 would show that in the cross-examination he admits that till date he has not sent any money order or any financial help to the child. It was admitted that once he had written a letter to purchase some books and clothes but it was not accepted. There is no evidence on record to show the gesture that at any point of time he wanted to extend support by way of financial help. The father further

or support was ever extended. Whereas the statement of Kamal Kishore Nayak (NAW-3) he stated that the child is being looked after by the mother and the likewise statement of Gaurhari Kewat (NAW-2) also supported the fact that the appellant/mother is looking after the child very well. This witness also appears to be Secretary of the society of the appellant and the respondent and reiterated the fact that the child is being looked after by the mother very well.

15. There being total conflict between the witnesses on one side and those on other. Therefore, the evidences both pro and contra whether has a bearing upon the issue are to be examined. The evidence on behalf of father it appears that the witnesses have stated according to their own opinion and thought. If the lady is required to do a job that too in the field for her livelihood, naturally she would be required to move from one place to other and only because of the fact that she is required to rub her shoulder with public at large or male i.e. to accompany them in the car, there cannot be an inference that she has lost her chastity. Only bald oral statement is made that she is addicted to consume liquor and smoke etc. It is important to set a red line when the attack is made to assassinate character of lady. The statement of witnesses of plaintiff would show that they are largely influenced by attire of women as she wears jeans and T-shirt along with the fact that she is marching along with male members of society. We are afraid that if such ill conceived exercise is given a spot light, then to protect the right & freedom of women would be a long arduous battle. If

should have been much more & severe to hold that continuous a kind of behaviour of wife would be detrimental to the interest of child. The character certificate by few of the society members, who might have ostrich mind set, should not be allowed to decide the character of a woman and to draw an inference while deciding the custody of the child that because of the behaviour of mother it would have an adverse impact on the mind of the child. Therefore, considering the entire evidence on record we are of the view that the welfare of the child would hold the sway if the child is kept in the custody of the mother. Accordingly, the direction of the Court below to handover the custody of the child to the father is set aside.

17. Now coming to the visitation rights of the father in respect of the child is ordered to be kept in custody of the mother there is no specific visitation right has been conferred. The Apex Court in ***Yashita Sahu Vs. State of Rajasthan (2020) 3 SCC 67*** held that even after the custody wasgiven to one parent, the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. The evidence in this case does not show any extreme circumstances whereby one parent for all practical purposes can be denied to meet the child. The evidence has come on record that even though the mother and father are living separately and the children

custody to one spouse do not pass any orders granting visitation rights to the other spouse. It held that the child has a human right to have the love and affection of both the parents and Courts must pass orders ensuring that the children are not totally deprived of the love, affection and company of one of their parents.

19. In addition to "visitation rights" the court observed that the"contract rights" is also important for the development of the child specially in cases were both the parents live in different places the concept of contact rights in the modern age would be contact by telephone, e-mail or in fact we feel the best system of contact, if available, between the parties should be video calling. It observed that with the increasing availability of internet, and the Courts dealing with the issue of custody of child must ensure the parent who is denied the custody of the children should be able to talk to his/her child as often as possible. It held that the communication will help in maintaining and improving the bond between the children and the parent who is denied the custody. If that bond is maintained, the children will have no difficult in moving from one home to another during vacation or holidays. The purpose was held that the court cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each.

20. In a recent decision rendered in ***Ritika Sharan Vs . Sujoy Ghosh , 2020 SCC OnLine SC 878*** the Supreme Court held that a balance has to be drawn so as

principles laid down in ***Yashita Sahu Vs. State of Rajasthan*** (supra) and ***Ritika Sharan Vs. Sujoy Ghosh*** (supra), we hereby order to facilitate the grant of visitation and contact rights to the father. The following arrangements shall be made by both the appellant and respondent as father and mother :

(i)The respondent/father would be able to engage with the child on a suitable video conferencing platform for one hour every Saturday and Sunday and 5 – 10 minutes on other days.

(ii)Both the respondent/father and the appellant/mother in order to facilitate the video conferencing between them shall procure smart phones which would facilitate the inter-se video calling.

(iii)During long holidays/vacation covering more than 2 weeks the child will be allowed to be in the company of the father for a period of 7 days. The period shall be fixed by the father after due intimation to the mother and she will permit the child to go with the father for the aforesaid period and the mother, if so desires, may also accompany him.

(iv)Every month preferably on Saturday or Sunday the mother shall allow the child to visit his father or father may take the child in his company and leave him back in the evening of such day

(v)During festivals the father may join the company of the child at the place of the mother and spend the festival days with the child along with the mother.

21. With the aforesaid observations/direction, the appeal is disposed of.

Head Note

If the wife do not squeeze into the mold as per desire of husband, it would not be a decisive factor to lose the custody of the child by her.

यदि पत्नि, पति के इच्छा अनुरूप स्वयं को नहीं ढालती है, तो यह बच्चे की अभिरक्षा से उसे वंचित करने का निर्णायक कारक नहीं होगा।