

IN THE HIGH COURT OF ORISSA AT CUTTACK**MATA No.144 of 2022**

Sureiya Khatun Ruhi *Appellant*

-Versus-

Md. Tousif Alam *Respondent*

Advocates appeared in this case :

For Appellant : Mrs. Ruchi Rajgarhia, Advocate

For Respondent : Mr. M.K. Chand, Advocate

CORAM:

★ JUSTICE ARINDAM SINHA
★ JUSTICE SIBO SANKAR MISHRA

सत्यमेव जयते

JUDGMENT

Date of hearing and Judgment: 7th December, 2023

ARINDAM SINHA, J.

1. Mrs. Rajgarhia, learned advocate appears on behalf of appellant. She submits, the appeal has been preferred against impugned judgment dated 10th May, 2022 denying her client custody. Two grounds were held against her. Firstly, she did not have the means to support the girl child and secondly, the girl child might

have attained puberty. The financial degradation has been compounded by respondent-husband's non-compliance of order for payment of maintenance. The girl has just become ten years old and studying in class-IV.

2. She submits, though in Mahomedan law father alone is the natural guardian but the mother is entitled to custody of her female child until she attains puberty. The girl was born on 2nd November, 2013 and she has already achieved 10 years age. Any further delay in granting her client custody would defeat her claim. She refers to internal page 8 of impugned judgment dated 10th May, 2022 to submit, reason for denying her client custody was on surmise that by the end of the matrimonial dispute the minor daughter might attain her puberty. Hence, it is imperative that there be an order for granting custody of the girl child to her client.

3. Mr. Chand, learned advocate appears on behalf of respondent-husband. He submits, appellant has purported claim for custody. This has been seen through by the Court below on, inter alia, delayed approached by her. He submits, his client had come to this Court's premises, for filing affidavit. He was arrested and taken to Sambalpur for production, in a case initiated on complaint by appellant. The arrest was three months back and he was in custody for one day. He opposes the appeal.

4. We, being desirous of examining the parties and the child, all of whom live in Sambalpur, made direction in our order dated 1st December, 2023 by paragraph 4 therein, reproduced below.

“4. The Registry is directed to arrange for separate examination by Court of appellant-wife, respondent-husband and the minor daughter. The examination will be by video conference. The persons to be examined will present themselves in the District Court at Sambalpur at 3:00 P.M. on 7th December, 2023. It must be ensured that appellant-wife, respondent-husband and the minor daughter are to be separately examined without conference amongst any one of them.”

5. We examined the child and his father separately. Their depositions are reproduced below.

Examination of Alisha Fatima (child)

To Court

(i) Where are you studying?

Ans.- Vedic International School.

(ii) In which class?

Ans.- 4th Class.

(iii) How do you go to school?

Ans.- By school bus.

(iv) Who drops you at the bus stop?

Ans.- Papa.

(v) Who picks you up on return from the school?

Ans.- Papa.

(vi) What does your father do?

Ans.- He is working at office.

(vii) When do you go to school?

Ans.- 7 in the morning.

(viii) When do you return?

Ans.- 2.40 PM.

(ix) Who all are there in your home?

Ans.- Papa, Mummy and my sister.

(x) What is the name of your sister?

Ans.- Aayt Naaz. She is two years old.

(xi) Do you have any relative in Sambalpur?

Ans.- Yes, my aunt and her name is Hena.

(xii) Do you have maternal grandmother?

Ans.- Yes.

(xiii) Where does she stay?

Ans.- Balasore.

We are told, the maternal grandmother is mother of the second wife.

Examination of Md. Tousif Aslam (father)

To Court

(i) How long has the child been with you?

Ans.- Seven years.

(ii) Why have you not allowed the child to meet her natural mother?

Ans.- She did not take responsibility in the beginning.

The child has always been with me. I have looked after her.

(iii) Is the child aware that she has a natural mother?

Ans.- Yes.

6. Mrs. Rajgarhia relies on judgment of the Supreme Court in **Nil Ratan Kundu v. Abhijit Kundu**, reported in (2008) 9 SCC 413. She submits, in that case the father was denied custody. Facts were, mother of the child (a boy), had died. The death was in suspicious circumstances. There was investigation. Inter alia, the paternal grandmother had absconded on happening of the death. The child was found sick. The trial Court had directed custody to be given to the father. The High Court on appeal had confirmed the order. The maternal grandfather was appellant before the Supreme Court. In the judgment a passage from the High Court's judgment stands reproduced. We too reproduce it below.

“We have gone through the evidence adduced by both sides and also heard the child in order to decide the question of the welfare of the said child. During our conversation with the child we have observed with great anxiety that the child has been tutored to make him hostile towards his father. In this connection it is worth mentioning here that the learned Court below also held that the O.P’s wanted to wipe out the existence and identity of father from the mind of the petitioner’s son and if it so, then it may be disastrous for the future of the petitioner’s son”

In context of the judgments, both of the High Court and the trial Court having been set aside, we reproduce paragraph 84 from judgment of the Supreme Court.

“84. We have called Antariksh in our chamber. To us, he appeared to be quite intelligent. When we asked him whether he wanted to go to his father and to stay with him, he unequivocally refused to go with him or to stay with him. He also stated that he was very happy with his maternal grand-parents and would like to continue to stay with them. We are, therefore, of the considered view that it would not be proper on the facts and in the circumstances to give custody of Antariksh to his father-respondent herein.”

7. Having examined the child, we could not elicit from her that she was aware she had a natural mother or another mother.

She seemed very happy in her situation of going to school and staying with her step-mother and step-sister. Mr. Chand submits, pursuant to direction by earlier coordinate Bench, parties and the child had travelled to Cuttack and presented themselves before the Court. The child refused to even talk to appellant. Mrs. Rajgarhia submits, the child was not allowed to talk with her client, her natural mother.

8. We have put questions to respondent-husband. He was categorical in saying his daughter is aware of her natural mother yet we could not elicit it from her. It is clear, the daughter is aware and does not want to be removed from where she is. That is the impression we have got.

9. Mrs. Rajgarhia points out, according to Muslim law, minority of Muslims terminate on attainment of puberty, which according to Sunni law, is presumed on completion of the fifteenth year. Conclusion is inevitable that having been with her father for last seven years she has been in a surrounding away from her natural mother. How and why this has happened is not the question to be decided here. Result of it is the child does not know or want to acknowledge existence of her natural mother. It is a tragedy but in the facts and

circumstances we will not interfere to remove the child from where she wants to be, to give custody to the mother.

10. Reverting back to **Nil Ratan Kundu** (supra), the Supreme Court said, in deciding a complex question as to custody of minor, a Court of law should keep in mind relevant statutes and rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. Relying on said declaration, though appellant is entitled to custody till the child attains 15 years of age, we are not inclined to interfere in appeal with impugned judgment. However, the father must bear in mind that it is also to welfare of the child to be aware and understand as and when she can, she does have a natural mother, who also loves her.

11. Power of appellate Court allows for passing any order which ought to have been passed or made as well as to make such further order as the case may require. We direct for appellant to have visitation right, to be exercised on the husband bringing the child to Centre of The Child Welfare Committee Office, Sambalpur, Collectorate Building, Sambalpur to meet with appellant every Sunday between 4.00 P.M and 6.00 P.M without presence of respondent-husband in

the meeting chamber. This direction will subsist till the child achieves 15 years age. After 6 months from date appellant will be at liberty to approach the family Court for variation of the direction on basis of need arisen by compliance thereof.

12. The appeal is disposed of.

(Arindam Sinha)
Judge

(S.S. Mishra)
Judge

Jyoti

