IN THE HIGH COURT OF JHARKHAND AT RANCHI

F.A. No.189 of 2024

Joydeep Chakraborty, aged about 42 years, Son of Biman Bihari Chakraborty, Resident of Kalptaru Complex, 2nd floor, Upen Babu Street, Ward No.2, Munsifdanga, P.O. & P.S.-Purulia, Dist.-Purulia, West Bengal (723101)

… … Appellant/Applicant

Versus

Payal Banerjee, aged about 35 years, Daughter of Shiba Prasad Banerjee, Resident of New Riverbase Colony, Anil Surpath, P.O. & P.S.-Kadma, Town-Jamshedpur, District-East Singhbhum, Jharkhand, Pin No.-831005

… … Respondent/Respondent

CORAM: HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD
HON'BLE MR. JUSTICE ARUN KUMAR RAI

For the Appellant : Mr. Ashutosh Ranjan Kumar, Advocate
For the Respondent : Mr. Mukesh Kumar Dubey, Advocate

CAV on 20/12/2025 ***Pronounced on 20/01/2026***

Per Sujit Narayan Prasad, J.

Prayer

1. The instant appeal has been filed under Section 19(1) of the Family Courts Act, challenging the legality and propriety of impugned judgment dated 07.06.2024 and decree signed and sealed dated 13.06.2024 by the learned Addl. Principal Judge, Family Court-II, East Singhbhum at Jamshedpur in Original Suit No.210 of 2023 filed by the petitioner/appellant herein under Section 7 and 17 read with Section 25 of the Guardianship and Ward Act, 1890 for custody and visitation rights of his minor son Aalap Chakraborty, has been dismissed.

Factual Matrix

2. The brief facts of the case, as per the petition, which required to be enumerated, needs to be referred as under:

3. It is the case of the petitioner-husband (appellant herein) that the marriage of the petitioner and respondent-wife (respondent herein) was solemnized as per the Special Marriage Act on 03.02.2016 at Purulia West Bengal. From the happy wedlock, a son, namely, Master Aalap Chakraborty was born on 11.11.2017. The differences arose between the parties and they amicably decided to resolve their dispute by filing a petition under Section 28 of the Special Marriage Act.

4. The marriage was eventually dissolved, vide judgment dated 01.10.2021 passed by the Court of Principal Judge, Family Court, Jamshedpur in Original Suit No. 486 of 2021 and a decree was drawn accordingly.

5. However, the petitioner being the biological father of the issue born from the said wedlock sought intervention of the Court for allowing him to visit and take custody of the minor son Aalap Chakraborty. The petitioner has been trying to communicate with the respondent and her family members but they have been incommunicado and therefore, having failed to take the custody or even visit his minor son, the petitioner has no remedy accordingly preferred the suit for custody and visitation right of his son.

6. It has further been stated that the petitioner having failed to even speak to the respondent, served the respondent with a legal notice dated 04.01.2023, wherein, the petitioner also demanded that the minor son may be allowed to at least meet the petitioner. The respondent, thereafter,

replied to the said legal notice through her lawyer refusing to let the petitioner to meet his minor son.

7. It has been stated that the petitioner had first contacted the respondent in December 2021 after the grant of divorce to allow him to meet his minor son. The cause of action further arose on 16.01.2023 when the respondent in reply to the legal notice categorically denied the visitation rights of the petitioner to meet his minor son.

8. Accordingly, prayer had been made before the learned Family Court to allow the suit and grant the petitioner (appellant herein) to enjoy visitation rights towards his minor son, Aalap Chakraborty and/or to allow the minor son of the parties to travel to the house of the petitioner in Purulia during his vacations and/or allow the petitioner to meet his minor son until the final disposal of the present case and/or allow the petitioner to meet his minor son twice every month and also allow him to stay with his son for 2 days once every 15 days and pass any other order.

9. To secure the appearance of the respondent-wife, the notice was issued through post and notice was also published in the newspaper but as the respondent-wife did not appear in spite of service of notice, accordingly suit was proceeded *ex-parte* vide order dated 14.12.2023 and the case was fixed for *ex-parte* evidence.

10. The petitioner, appellant herein adduced *ex-parte* evidence on his part and the evidence was closed on 16.03.2024.

11. The petitioner in order to establish his case has examined himself as P.W.1 and his father Biman Bihari Chakraborty as P.W.2.

12. True copy of Birth Certificate of Aalap Chakraborty is marked as Exhibit-1, copy of certified copy of judgment passed in O.S. No.486 of 2021 is marked as Exhibit-2, copy of certified copy of decree in O.S. No.486 of 2021 is marked as Exhibit-2, copy of legal notice dated 04.01.2023 and its postal receipt are marked as exhibit-4 and 5 respectively. The copy of reply dated 16.01.2023 of the respondent to the said legal notice of the petitioner is marked as exhibit-6.

13. After perusal of the evidence led by the petitioner, the learned Family Judge, vide order dated 07.06.2024 has dismissed the suit (decree signed and sealed on 13.06.2024), denying the custody and any visitation right of his son, against which, the present appeal has been preferred by the petitioner/appellant-husband.

Submission of the learned counsel for the appellant-husband

14. It has been contended on behalf of the appellant-husband that the factual aspect which was available before the learned Family Judge supported by the evidences has not properly been considered and as such, the judgment impugned is perverse, hence, not sustainable in the eyes of law.

15. It has been submitted by the learned counsel for the appellant-husband that he is the biological father of his minor son and has every right to visit him and take his custody.

16. It has also been submitted that he served a legal notice upon the respondent no.04.01.2023 for allowing him to meet his minor son but she has refused his request.

17. It has been contended that the appellant-husband has established his case by way of evidence which he has adduced.

18. It has been contended that the appellant-husband may be allowed to meet his son every month and allow him to stay with his son for two days every 15 days.

19. It has further been contended that the father being the natural guardian of minor child has preferential right to claim custody but the said fact has not been considered by the learned Family Court.

20. Learned counsel for the appellant-husband, based upon the aforesaid grounds, has submitted that the judgment impugned suffers from perversity, as such, not sustainable in the eyes of law.

Submission of the learned counsel for the respondent-wife

21. *Per contra*, learned counsel appearing for the respondent-wife, while defending the impugned judgment, has submitted that there is no error in the impugned judgement. The learned Family Judge has considered all aspects of the matter in right perspective and hence, decreed the suit in favour of the respondent-wife.

22. It has been contended that the petitioner-husband has sent the notice to the respondent-wife with motivated intention in utter violation of specific order passed on 01.10.2021 in Original Matrimonial Suit No.486 of 2021.

23. It has further been contended that the marriage between them has been dissolved by the mutual consent under Section 28 of the Special Marriage Act. Further, as per the condition as agreed between the parties for taking mutual divorce, as per the judgment, the minor son Aalap Chakraborty

will live with his mother and there is no such condition that his father who is the petitioner-husband in this case will have any visitation right of his son and will claim custody over his son.

24. It has been submitted that the petitioner-husband (appellant herein) is working in Bangalore as software engineer and staying alone so there is no other member to look after the minor child from morning to evening. Further, the respondent-wife is economically and financially sound to maintain her son, give him good education and provide him with all necessities of life.

25. It has also been contended that the appellant-husband has not brought any materials to show that what has been done by him for welfare of his minor child, namely, Aalap Chakraborty and he is not giving any maintenance amount to her or his minor son or for educational expenses of his minor son.

26. Learned counsel, based upon the aforesaid grounds, has submitted that the impugned judgment cannot be said to suffer from an error.

Analysis:

27. We have heard the learned counsel for the parties, gone through the Trial Court records, the impugned judgment, the testimonies of the witnesses and the documents exhibited therein.

28. The admitted fact herein is that the marriage of the petitioner (appellant herein) and respondent-wife (respondent herein) was solemnized as per the Special Marriage Act on 03.02.2016 at Purulia West Bengal. From the happy wedlock a son, namely, Master Aalap

Chakraborty was born on 11.11.2017. The differences arose between the parties and they amicably decided to resolve their dispute by filing a petition under section 28 of the Special Marriage Act.

29. It is further admitted fact that the marriage was eventually dissolved on mutual consent of the parties vide judgment dated 01.10.2021 passed by the Court of Principal Judge, Family Court, Jamshedpur in Original Suit No. 486 of 2021 and a decree was drawn accordingly wherein parties had mutually agreed that their son namely Aalap Chakraborty will live with his mother and parties will not file any case against each other.

30. However, the petitioner being the biological father of the issue born from the said wedlock sought intervention of the learned Family Court for allowing him to visit and take custody of the minor son Aalap Chakraborty.

31. Accordingly, by filing the said suit it has been prayed therein to allow the petitioner to enjoy visitation rights towards his minor son, Aalap Chakraborty and/or to allow the minor son of the parties to travel to the house of the petitioner in Purulia during his vacations and/or allow the petitioner to meet his minor son until the final disposal of the present case and/or allow the petitioner to meet his minor son twice every month and also allow him to stay with his son for 2 days once every 15 days and pass any other order.

32. The evidence has been led on behalf of the petitioner, i.e., the appellant-husband.

33. The appellant-husband has examined two witnesses, i.e., P.W.1, namely, Joydeep Chakraborty (the appellant himself) and P.W.2, father of the petitioner, appellant herein.

34. For ready reference, the evidences led on behalf of the petitioner, appellant herein, are being referred as under: -

P.W.-1 Joydeep Chakraborty, has deposed in her examination-in-chief that that his marriage with the respondent was solemnized as per the Special Marriage Act on 03.02.2016 at Purulia West Bengal. From the wedlock, a son, namely, Master Aalap Chakraborty was born on 11.11.2017 at T.M.H., Jamshedpur. Thereafter, the differences arose between the parties, so they, amicably decided to resolve their dispute by filing a petition under section 28 of the Special Marriage Act. The marriage was eventually dissolved vide judgment dated 01.10.2021 passed by the Court of Principal Judge, Family Court, Jamshedpur in Original Suit No. 486 of 2021 and a decree was drawn accordingly. However, the petitioner being the biological father of the issue born from the said wedlock is now seeking the intervention of the Court for allowing him to visit and take custody of the minor son, Aalap Chakraborty who is currently aged around 6 years. The petitioner has been trying to communicate with the respondent and her family members but they have been incommunicado and therefore having failed to take the custody or even visit his minor son. The petitioner has also been deprived of his rights as father of the minor son. The petitioner has the right to meet his son and also have custody of his son. The petitioner having failed to even speak to the respondent, served the respondent with

a legal notice dated 04.01.2023 wherein the petitioner demanded that the minor son may be allowed to at least meet the petitioner.

The respondent, thereafter, replied to the said legal notice through her lawyer refusing to let the petitioner meet his minor son. The petitioner has realized that the said issue cannot be resolved amicably and the respondent deliberately does not want the petitioner to meet his minor son which is *sine qua non* under the law and the petitioner, being the biological father of the minor son, cannot be stopped or barred from meeting him in any manner whatsoever. The petitioner has been denied of his rights to meet his son and therefore, the petitioner seeks the indulgence of the Court to allow him to meet his son. The petitioner first contacted the respondent in December 2021 after the grant of divorce to allow him to meet his minor son. The cause of action further arose on 16.01.2023 when the respondent in reply to the legal notice categorically denied the visitation rights of the petitioner to meet his minor son. The summons was duly sent to the respondent through both Speed Post as well as Nazarat, on their registered address, both of these were not accepted by the respondent. Further having no resort left the petitioner sought permission for newspaper publication to make the respondent aware of this matter so that she could make her appearance. The newspaper publication was conducted on 22.09.2023 in the newspaper 'Dainik Bhaskar'.

He has further deposed that he has filed the case for taking custody of his son and for getting visitation rights of his son. Presently the child is of 6 years and 4 months and is in custody of his mother. He is a Software

Engineer in Bangalore and staying there. He is having his own house at Purulia where his parents are staying. Payal Banerjee, the respondent-wife used to work as Medical Representative but he does not know that what she is presently doing. He is not paying any maintenance allowance to his ex-wife and child. The son is studying in school in Jamshedpur but he cannot tell in which school the child is studying.

P.W.2, father of the petitioner/appellant has deposed in his examination-in-chief that he is well acquainted with the facts of the present suit. Further, he has stated that the marriage between his petitioner(son) and the respondent was solemnized as per the Special Marriage Act on 03.02.2016 at Purulia, West Bengal. Out of their wedlock, a son, namely, Master Aalap Chakraborty was born on 11.11.2017 at Tata Main Hospital, Jamshedpur. As differences arose between the parties, so they amicably decided to resolve their dispute by filing a petition under Section 28 of the Special Marriage Act. The marriage was eventually dissolved, vide judgment dated 01.10.2021 passed by the Court of Principal Judge, Family Court, Jamshedpur in Original Suit No. 486 of 2021 and a decree was drawn accordingly. However, his son being the biological father of the issue born from the said wedlock to the respondent, is now seeking the intervention of the court for allowing him to visit and take custody of the minor son Aalap Chakraborty who is currently aged about 7 years. The petitioner has been trying to communicate with the respondent and her family members but they have been incommunicado and therefore, having failed to take the custody or even visit his minor son, i.e, with his grandson Aalap Chakraborty. The petitioner has also been denied to visit his minor son

and his son (petitioner) has been deprived of his rights as father of the minor son Aalap Chakraborty. The petitioner has the right to meet his son and also have custody of his son. The petitioner having failed to even speak to the respondent, served the respondent with a legal notice dated 04.01.2023, wherein, the petitioner demanded that the minor son may be allowed to at least meet the petitioner.

The respondent thereafter replied to the said legal notice refusing to let the petitioner meet his minor son, vide reply dated 16.01.2023. The petitioner has realized that the said issue cannot be resolved amicably and that the respondent deliberately does not want the petitioner to meet his minor son which is *sine qua non* under law and that, the petitioner being the biological father of the minor son, cannot be stopped or barred from meeting him in any manner whatsoever. The petitioner has been denied of his rights to meet his son and therefore, the petitioner seeks the indulgence of the court to allow him to meet his son. The claim of the petitioner is perfect and genuine.

He has further deposed that his son has filed the case for getting custody of his son and for getting visitation rights of his son.

35. The learned Family Judge has appreciated the entire evidence as well as the documents exhibited and after formulating the specific issue ‘whether the petitioner is entitled to get the custody and visitation rights of his minor son’, has dismissed the suit filed by the husband, which is under challenge in the instant appeal.

36. This Court, while appreciating the argument advanced on behalf of the appellant on the issue of perversity needs to refer herein the interpretation

of the word “perverse” as has been interpreted by the Hon'ble Apex Court which means that there is no evidence or erroneous consideration of the evidence.

37. The Hon'ble Apex Court in ***Arulvelu and Anr. vs. State [Represented by the Public Prosecutor] and Anr., (2009) 10 SCC 206*** while elaborately discussing the word perverse has held that it is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law. Relevant paragraphs, i.e., paras-24, 25, 26 and 27 of the said judgment reads as under:

> ***“24.*** *The expression “perverse” has been dealt with in a number of cases. In Gaya Din v. Hanuman Prasad [(2001) 1 SCC 501] this Court observed that the expression “perverse” means that the findings of the subordinate authority are not supported by the evidence brought on record or they are against the law or suffer from the vice of procedural irregularity.*
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> ***25.*** *In **Parry's** (Calcutta) Employees' Union v. Parry & Co. Ltd. [AIR 1966 Cal 31] the Court observed that “perverse finding” means a finding which is not only against the weight of evidence but is altogether against the evidence itself. In Triveni Rubber & Plastics v. CCE [1994 Supp (3) SCC 665 : AIR 1994 SC 1341] the Court observed that this is not a case where it can be said that the findings of the authorities are based on no evidence or that they are so perverse that no reasonable person would have arrived at those findings.*
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> ***26.*** *In M.S. Narayanagouda v. Girijamma [AIR 1977 Kant 58] the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough [(1878) 1 LR 1r 331] the Court observed that a “perverse verdict” may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.*
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> *In Godfrey v. Godfrey [106 NW 814] the Court defined “perverse” as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct, etc.*
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> ***27.*** *The expression “perverse” has been defined by various dictionaries in the following manner:*
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> *1. Oxford Advanced Learner's Dictionary of Current English, 6th Edn.*

> *"Perverse.—Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable."*
>
> *2. Longman Dictionary of Contemporary English, International Edn.*
>
> *Perverse.—Deliberately departing from what is normal and reasonable.*
>
> *3. The New Oxford Dictionary of English, 1998 Edn.*
>
> *Perverse.—Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.*
>
> *4. The New Lexicon Webster's Dictionary of the English Language (Deluxe Encyclopedic Edn.)*
>
> *Perverse.—Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.*
>
> *5. Stroud's Judicial Dictionary of Words & Phrases, 4th Edn.*
>
> *"Perverse.—A perverse* ***verdict*** *may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence."*

38. Thus, from the aforesaid, it is evident that any order said to be perverse if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality.

39. The question of legality and propriety of the impugned judgment is the issue of consideration in the present appeal.

40. This Court before considering the aforesaid rival submission and propriety of the impugned judgment needs to discuss herein the statutory provision as provided under the Guardianship and wards Act 1890.

41. It needs to refer herein that the Section 7, section 17 and section 25 of the Guardianship and wards Act 1890 (hereinafter referred to as the Act of 1890) deals with Power of the Court to make order as to guardianship, Section 17 thereof deals with Matters to be considered by the Court in appointing guardian and Section 25 deals with the provision of Title of guardian to custody of ward. For ready reference, these provisions are quoted 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.

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.

25. Title of guardian to custody of ward.—(*1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian. (2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the 2Code of Criminal Procedure, 1882 (10 of 1882). (3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."*

42. Section 7 of the Guardians and Wards Act, 1890, empowers a Court to appoint or declare a guardian for a minor's person or property, or both, if satisfied it's in the minor's welfare, prioritizing the child's best interests (age, sex, religion, guardian's capacity/kinship, wishes of deceased parents) over others, and ensuring the child's well-being.

43. Section 17 of the Guardians and Wards Act, 1890, mandates that courts prioritize the welfare of the minor when appointing a guardian, considering factors like age, sex, religion, the proposed guardian's character, their relationship to the minor, while also giving weight to an older minor's intelligent preference. It guides courts to act consistently with personal laws but always keep the child's best interest paramount, even over parental rights.

44. Thus, it is evident from Section 17 of the Act, 1890 that while appointing any person as guardian the paramount consideration is the welfare of the minor and 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, if the court is of opinion that his or her guardianship will not be for the welfare of the minor. Section 17 of the Act of 1890 is very specific that there cannot be any compromise on the issue of the welfare of the minor even though the father is natural guardian.

45. Thus, from the aforesaid, it is evident that Provisions of Guardians and Wards Act, 1890 govern rights of guardians, however they do not bar courts from exercising *parens patriae* jurisdiction in determining rights of child considering its overall development. Purpose and object of Guardians and Wards Act, 1890 is not mere physical custody of minor but due protection of ward's health, maintenance and education. Power and duty of court under this Act is welfare of minor. Word “welfare” must be taken in its widest sense, reference in this regard be made to the judgment rendered by the Hon’ble Apex Court in the case of ***Sheoli Hati* v. *Somnath Das*, (2019) 7 SCC 490.**

46. The law, therefore, is well settled that the paramount consideration in the matter of handing over the custody of the child is welfare of the child.

47. The law relating to custody of minors has received an exhaustive consideration by the Hon'ble Apex Court in a series of pronouncements. In the case of ***Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42*** the principles of English and American law in this regard were considered by Hon'ble Apex Court to hold that the legal position in India is not in any way different. Noticing the judgment of the Bombay High Court in ***Saraswatibai Shripad Ved v. Shripad Vasanji Ved, [AIR 1941 Bom 103], Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840 and Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544,*** the Hon'ble Apex eventually concluded in paras-50 which reads as under:

> *"50. [T]hat 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 Mausami Moitra Ganguli case [Mausami Moitra, 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."*

48. Thus, the Hon'ble Apex Court has categorically held that while considering the issue of custody of the minor child the court has to not only look at the issue on legalistic basis, in such matters human angles are

relevant for deciding those issues. Further, it has been held that the Court should not emphasis only on what the parties say rather the welfare of the minor should be paramount consideration. Further, the Hon'ble Apex Court has opined that 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.

49. It needs to refer herein that in child custody matters, the court's "*parens patriae*" jurisdiction empowers the Court to act as a guardian for the child, prioritizing their best interests above all else. This principle, allows the court to intervene and make decisions that to protect the child's welfare, even if it means overriding the wishes of the parents or guardians.

50. In the case of ***Nil Ratan Kundu v Abhijit Kundu, 2008 (9) SCC 413*** the Hon'ble Apex Court has held that 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, nay 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.

51. In the case of ***Yashita Sahu v State of Rajasthan, (2020) 3 SCC 67***, the Hon'ble Apex Court has propounded that the welfare of the child is paramount in matters relating to custody. In this context, we may refer to Para-22 thereof, which reads as follows:

> *"22. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what matter the custody of the child should be shared between both the parents. Even if the custody is given 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. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights."*

52. In the case of ***Gaytri Bajaj v. Jiten Bhalla, (2012) 12 SCC 471***, the Hon'ble Apex Court has observed that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody and the question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. For ready reference the relevant paragraph of the aforesaid judgment is being quoted as under:

> *"14. From the above it follows that an order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956 is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. What must be emphasised is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the court."*

53. It is settled position of law that there cannot be any straitjacket formula in the matters of custody. "Welfare of the child" is of paramount importance, reference in this regard may be taken from the judgment rendered by the Hon'ble Apex Court in the case of ***Gautam Kumar Das v. State (NCT of Delhi), (2024) 10 SCC 588.***

54. In the case of ***Shazia Aman Khan v. State of Orissa, (2024) 7 SCC 564,*** the Hon'ble Apex Court while referring the ratio of ***Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413*** has observed that welfare of the children is to be seen and not the rights of the parties, the relevant paragraph of the aforesaid judgment is being quoted as under:

> *"19. In Nil Ratan Kundu v. Abhijit Kundu [Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413] , this Court laid down the principles governing custody of minor children and held that welfare of the children is to be seen and not the rights of the parties by observing as under : (SCC pp. 428-29, paras 52 & 55) "Principles governing custody of minor children*
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> *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 minor, a court of law should keep in mind 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 well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay 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.*
>
> *55. We are unable to appreciate the approach of the courts below. This Court in a catena of decisions has held that the controlling consideration governing the custody of children is the welfare of children and not the right of their parents." (emphasis supplied) 21. This Court in Roxann Sharma v. Arun Sharma [Roxann Sharma v. Arun Sharma, (2015) 8 SCC 318 : (2015) 4 SCC (Civ) 87] , opined that the child is not a chattel or ball that it is bounced to and for the parents. Welfare of the child is the focal point. Relevant lines from para 18 are reproduced hereunder : (SCC p. 328)*
>
> *"18. ... There can be no cavil that when a court is confronted by conflicting claims of custody there are no rights of the parents which have to be enforced; the child is not a chattel or a ball that is bounced to and for the parents. It is only the child's welfare which is the focal point for consideration. Parliament rightly thinks that the custody of a child less than five years of age should ordinarily be with the mother and this expectation can be deviated from only for strong reasons."*
>
> *20. This Court has consistently held that welfare of the child is of paramount consideration and not personal law and statute. In Ashish Ranjan v. Anupma Tandon [Ashish Ranjan v. Anupma Tandon, (2010)*

> *14 SCC 274 : (2011) 4 SCC (Civ) 948] , this Court held as under : (SCC p. 282, para 19)*
>
> *"19. The statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor."*
>
> *22. Another principle of law which is settled with reference to custody of the child is the wish of the child, if she is capable of. Reference Gowda v. State can of be made to Rohith Thammana Karnataka [Rohith Thammana Gowda v. State of Karnataka, (2022) 20 SCC 550 : 2022 SCC OnLine SC 937] case. It was held as under : (SCC para 18) "18. We have stated earlier that the question "what is the wish/desire of the child" can be ascertained through interaction, but then, the question as to "what would be the best interest of the child" is a matter to be decided by the court taking into account all the relevant circumstances. A careful scrutiny of the impugned judgment would, however, reveal that even after identifying the said question rightly the High Court had swayed away from the said point and entered into consideration of certain aspects not relevant for the said purpose. We will explain the raison d'etre for the said remark."*

55. Thus, from the aforesaid settled position of law it is evident that the consideration governing the custody of children is the "welfare of the children and not the rights of the parties." Further, the welfare of child is determined neither by economic affluence nor a deep mental or emotional concern for the well-being of the child. The answer depends on the balancing of all these factors and determining what is best for child's total well-being.

56. It is evident from the statutory provision referred herein as also the judgment passed by Hon'ble Apex Court, the consideration has been given by laying down the law that the well-being/welfare of the minor child is to be taken into consideration as per Act 1890 wherein the welfare of the minor has statutorily been provided of the paramount consideration.

57. In the backdrop of the aforesaid settled position of law, this Court is now adverting to the factual aspect of the present case in order to assess as to the whether the findings so recorded by the learned Family Judge, can be said to suffer from an error.

58. On scrutiny and appreciation of the evidence of the petitioner/appellant and his other witnesses, it is apparent that admittedly, the petitioner and respondent got married as per Special Marriage Act on 03.02.2016 in Purulia and on 11.11.2017 one son, namely, Aalap Chakraborty was born out of their wedlock and thereafter, the petitioner and the respondent has taken mutual divorce by filing a case bearing Original Suit No.486/2021 U/s 28 of the Special Marriage Act.

59. It is evident that the appellant-husband has sought custody and visitation right of children before the learned Family Court.

60. The petitioner/appellant and his witness (P.W.2, father of the petitioner/appellant) has also corroborated the averments in their evidence that the petitioner has been trying to communicate with the petitioner and her family members for meeting his son and taking his custody but they have not responded, so the petitioner has been denied the visitation right and has also been deprived of his right as a father of his minor son Aalap Chakraborty. It has further been stated that petitioner had even sent legal notice to his wife requesting her to allow him to meet his son and to have his custody but the same has been denied.

61. It is evident from record that petitioner/appellant herein has sought custody and visitation right of his minor child.

62. From perusal of the judgment dated 01.10.2021 passed in Original Suit No. 486/2021 appended as annexure-1 to the memo of appeal, it appears that marriage of the parties of the present appeal has already been dissolved by mutual consent under Section 28 of the Special Mariage Act and further, as per the condition as agreed between the parties for taking mutual divorce

as mentioned in the judgment, the minor son Aalap Chakraborty will live with his mother and there is no such condition that his father who is the petitioner in this case will have any custody/visitation right of his son and it is also an agreed condition that the parties will not file any case against each other. For ready reference, the relevant paragraph of the order/judgment dated 01.10.2021 is being quoted herein, which reads as under:

> *"In the inquiry, I find that the first motion for divorce was moved on 08.09.2021 till then they had completed separation more than three years and they have reiterated their stand of mutual consent on 01.10.2021. I also find that there is a least chance of collusion in the following circumstances*
> *1. They have been living separately for a period of more than three years or more immediately preceding the presentation of the petition.*
> *2. They have not been able to live together. Petitioners have agreed that they are blessed with a son namely Aalap Chakraborty, who will live with his mother.*
> *3. Petitioners have stated that they have mutually exchanged their respective gifts and articles lying with each other and have got no claim against each other on the said account.*
> *4. Petitioner no. 1 has stated that she will not make any claim against petitioner no. 2 on any account including his property as she is working in Tata ELXXI. Petitioners have also stated that they will not file any case against each other. Petitioner no. 2 is Software Engineer, working in Pune.*
> *5. They have mutually agreed that the marriage should be dissolved and still they have reiterated their stand of mutual consent.*
> *6. Reconciliation at every level failed between the parties for their reunion.*
>
> *ORDER*
>
> *That the suit be and the same is decreed on mutual consent of both the petitioners and the marriage solemnized on 03.02.2016 between petitioners name Smt. Payal Banerjee and Joydeep Chakraborty, u/s 28 of the Special Marriage Act, is hereby dissolved. Minor son namely Aalap Chakrabory will live with his mother. Let a decree be prepared i.e. accordingly. The divorce will take effect from the date petitioner no. of decree."*

63. Thus, it is evident from the aforesaid order that the suit before the learned Family Court has been filed in violation of condition as stipulated in the order/judgment dated 01.10.2021 passed in Original Suit No. 486 of 2021(annexure-1) wherein both the parties were mutually agreed upon the condition that the minor son Aalap Chakraborty will live with his mother(respondent herein) and the parties will not file any case against each other.

64. After appreciating the evidences available on record, this Court has gone through the impugned judgment, wherefrom, it is evident that the learned Principal Family Judge has taken into consideration the entire aforesaid fact and further taken into consideration the core of Section 7, Section 17 and Section 25 of the Act, 1890 and turned down the claim of custody of the petitioner (husband).

65. The learned Family Court while adhering the principle of the welfare of child as paramount consideration in the custody matter has observed that petitioner (appellant herein) is working in Bangalore as software engineer and staying alone, so there is no other member to look after the minor child as from morning to evening the petitioner will be in his office and his parents are staying in Purulia and they also must be old. Further admittedly, the respondent was a working as Medical Representative and she has been working in Tata ELXSI, so certainly respondent/mother must be having sufficient income to maintain herself and her minor son and further admittedly, he has relinquished his visitation right of his son and to seek his custody in the Original Suit No.486/2021.

66. Thus, from the aforesaid, it is evident that the learned Family Court has categorically observed that the petitioner, appellant herein is not entitled to get custody or visitation right his minor child particularly in view of the order dated 01.10.2021 passed in Original Suit No. 486 of 2021 on the basis of the mutual consent of both the parties, wherein, it has been amicably resolved by the parties that the minor son Aalap Chakraborty will live with his mother (respondent herein), and accordingly denied the custody and visitation right to the petitioner (appellant herein).

67. Thus, on the basis of discussions made hereinabove and also applying the ratio of the judgment rendered by the Hon'ble Apex Court referred hereinabove in the preceding paragraphs and also taking into consideration the order dated 01.10.2021 passed in Original Suit No. 486 of 2021 which has been passed on the basis of the mutual consent of both the parties, wherein, it has been amicably resolved by the parties that the minor son, namely, Aalap Chakraborty will live with his mother (respondent herein) and further, the parties will not file any case against each other and further taking into consideration the welfare of the children as paramount consideration, this Court is of the considered view that the learned Family Court has rightly denied the custody and visitation right of minor son, namely, Aalap Chakraborty to his father/appellant herein, therefore, the said finding of the learned Family Court requires no interference by this Court.

68. Accordingly, the instant appeal fails and stands dismissed.

69. Pending interlocutory applications, if any, also stand disposed of.

(Sujit Narayan Prasad, J.)

I Agree

(Arun Kumar Rai, J.)

(Arun Kumar Rai, J.)

20/01/2026

Rohit/**A.F.R.**

Uploaded on 21.01.2026