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**(1981) 09 RAJ CK 0017**

**Rajasthan High Court**

**Case No:** Civil Miscellaneous Appeal No. 124 of 1979

Smt. Pushpa Devi

APPELLANT

Vs

Kishanlal

RESPONDENT

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**Date of Decision:** Sept. 4, 1981

**Acts Referred:**

- Guardians and Wards Act, 1890 - Section 19, 25, 47
- Hindu Marriage Act, 1955 - Section 13, 25
- Hindu Minority and Guardianship Act, 1956 - Section 13, 6

**Citation:** (1981) WLN 304

**Hon'ble Judges:** S.K. Mal Lodha, J

**Bench:** Single Bench

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**Judgement**

S.K. Mal Lodha, J.

This is an appeal by mother of" the minor Om Prakash u/s 47 of the Guardian and Wards Act (No. viii of 1890) (for short "the Act") against the order dated September 4, 1979 of the District Judge, Jodhpur by which he accepted the father"s petition u/s 25 of the Act.

2. The respondent will hereinafter be referred to as the petitioner and the appellant as the non-petitioner.

3. The petitioner was married with the non-petitioner and out of this wedlock a son was born on December 1, 1969. The relations between the petitioner and the non-petitioner became strained when the son Om Prakash was of less than 5 years of age. According to the petitioner, the non-petitioner left the matrimonial home on September 10, 1974 along with the minor son Om Prakash. A notice is said to have been issued on March 24, 1976, by the petitioner for handing over the custody of the minor son Om Prakash but that notice was refused by the non-petitioner. The petitioner filed the petition on May 1, 1976 u/s 25 of the Act praying therein that the custody of minor Om Prakash may be returned to him as at the time of the filing of

the petition, he was in the custody of the non-petitioner. The petition was contested by the non-petitioner on various grounds by filing reply on November 12, 1976. On January 31, 1977, the learned District Judge records that points for determination are not necessary. The petitioner examined himself as PW 1 and PW 2 Chhailaram in support of his petition. In rebuttal, non-petitioner examined herself as DW 1. The learned District Judge accepted the petition by his order dated September 4, 1979 and ordered that custody of minor Om Prakash be delivered to the petitioner within 10 days from the date of the order, failing which a warrant, as provided u/s 25 of the Act, be issued. Feeling dissatisfied with the aforesaid order of the learned District Judge, the non-petitioner has filed this appeal.

4. I have heard Mr. S.S. Purohit for the appellant and Mr. M.L. Kala for the respondent and have carefully perused the record of the case. Mr. S.S. Purohit learned Counsel for the appellant contended that the finding of the learned District Judge that it is in the welfare of the minor Om Prakash to order return of his custody to the petitioner, is erroneous. Mr. Kala has supported the order under appeal.

5. Learned Counsel for the appellant also submitted that by the order dated December 8, 1980 passed by this Court in S.B. Civil Misc. Appeal No. 68 of 1980, the order of the learned District Judge passed in Civil Misc. Application No. 1-39-K/78 has been maintained. The petition is that the order between the parties (that the petitioner has obtained the decree for divorce) u/s 13(1)(a) of the Hindu Marriage Act has become final.

6. Material portion of Section 25 of the Act is as under:

25(1): If a ward leaves or is removed from the custody of a guardian or 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 the 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) ...

(3) ...

For determining the welfare of the minor, the questions that can be posed are: What order would be best for securing the welfare of the minor? With whom the minor will be happy? Who is most likely to contribute to his well-being and look after his health and comfort? The interest, well being, health, education and happiness of the minor ought to be the sole and paramount consideration for the Court in selecting the guardian of the person of a minor.

7. In [Rosy Jacob Vs. Jacob A. Chakramakkal](#), their Lordships of the Supreme Court observed as under:

In our opinion. Section 25 of the Guardian and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and the purpose of this provision being ex-facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian to properly look after the ward's health, maintenance and education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian of the necessary assistance from the court in effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare. If the Court under the Divorce Act cannot make any order with respect to the custody of Ajiji alias Andrew and Maya alias Marry and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children u/s 19 during his lifetime; if the Court does not consider him unfit, then the only provision to which the father can have resort for his children's custody in Section 25.

(Italics is mine)

8. It was further observed:

The court's power u/s 25 of the Guardians and Wards. Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in Court as is the case with all judicial discretion to be exercised judicially in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom--if ever identical. The contention that if the husband is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be some what misleading. It does not take full notice of the real case of the statutory purpose. In our opinion, the dominant consideration in making orders u/s 25 is the welfare of the minor children and in considering this question due regard, has, of course, to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare.

(Emphasis added).

Here, it will not be irrelevant to notice Section 6 of the Hindu Minority and Guardianship Act, 1956 (for short "the Act of 1956") dealing with natural guardian of a Hindu Minor, material portion of which is as under;

Section 6 Natural guardians of a Hindu Minor-

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

(a) in the case of a boy or an unmarried girl the father, and after him, the mother:

Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother:

(b) ...

(c) ...

Section 13 of the Act of 1956 deals with the welfare of minor to be paramount consideration. It read as follows:

### 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.

The learned District Judge has carefully scrutinised the evidence of the parties and, thereafter, held that it is in the interest and welfare of the minor Omprakash to order the return of his custody to his natural guardian (father Kishanlal). A perusal of the statement of PW 1 Kishanlal (petitioner) shows that he wants to obtain the custody of the minor Omprakash, that thereafter, to take steps for his future education by getting him admitted in some school, and that he possesses the means so as to defray the expenses of his education. According to him, the minor Omprakash is not properly looked after and wears torn clothes and his health is weak. In the cross-examination, the witness has stated: Men Mere Ladke-ki Jo Padahi hogi Voh Sab Karana chahata Hun.

The statement of PW 2 Chhailaram is to the effect that it is desirable to keep the son of Kishanlal with him as father can well look after his son. To a great extent Smt. Pushpa has controverted the facts deposed by PW 1 Kishanlal. In her cross-examination, she has stated that she has no independent source of income and that in all respects she is dependent on her father and uncle. It has come in her cross-examination that her father is 60 years of age and mother is 55. She has further stated that after the death of her father, her brother will take care of them and maintain them. Neither the father, nor the uncle nor the brother has been produced on behalf of the non-petitioner to support her statement to the effect that all of them or any of them will maintain her & minor Omprakash. The father is the natural guardian u/s 6 of the Act of 1956. There is nothing on the record to show that he is not a fit person to be the guardian of his minor son Omprakash. He has source of income whereas the non-petitioner has none. Nothing has been shown that by conduct, the petitioner has disentitled himself from getting the custody of minor Omprakash, who, at the time of filing of the petition u/s 25 of the Act, was 9

years of age.

9. Mr. S.S. Purohit, learned Counsel for the appellant expressed an apprehension that the non-petitioner has been divorced by the petitioner and that according to him, he has second wife and as such the minor son will not be properly looked after and, therefore, it cannot be said that the order for return of the custody of the minor to the petitioner will be in the interest of the minor. This order will, however, not prevent the non-petitioner from making further application at any later stage when she may be able to satisfy the court that it will then be in the interest and welfare of the minor to return the custody of the minor to her. The learned District Judge granted 10 days" time from the date of the order for handing over the custody of the minor Omprakash. The operation of that order was stayed by this Court untill the decision of the appeal by confirming the stay order dated January 29, 1980 on July 21, 1980. Mr. S.S. Purohit states that three months" time may be granted to him for delivering the custody of minor Omprakash to the petitioner Kishanlal.

10. Having regard to the facts and circumstances of the case, I consider it proper to grant six weeks" time from today for handing over the custody of the minor Om Prakash to the petitioner Kishanlal, In case the custody is not handed over within the time allowed by this Court, recourse will be made to Section 25(2) of the Act.

11. Except with the modification made in regard to the period for return of the custody of the minor Om Prakash, the appeal k dismissed. In the circumstances of the case, the parties are left to bear their own costs.