2026:AHC:221696-DB

Reserved on 09.10.2026
Delivered on 26.10.2026

HIGH COURT OF JUDICATURE AT ALLAHABAD

FIRST APPEAL No. - 895 of 2024

Priti Sharma

.....Appellant(s)

Versus

Praveen Prakash Sharma

.....Respondent(s)

Counsel for Appellant(s) : Adeeb Anwar, Anuj Laloriya, Gaurav Tiwari, Pankaj Kumar Govil, Priyanka Singh, Rahil Anwar, Sanjay Chaturvedi, Santosh Kumar Tripathi

Counsel for Respondent(s) :

A.F.R.

Court No. - 40

HON'BLE SARAL SRIVASTAVA, J.
HON'BLE SUDHANSHU CHAUHAN, J.

(Delivered by Hon'ble Sudhanshu Chauhan, J.)

1. Heard Shri Pankaj Govil, Advocate appearing for the Appellant; and in spite of sufficient notice, no one has appeared on behalf of the Respondent.

2. The present First Appeal is preferred under Section 19 of the Family Courts Act, read with Section 47 of the Guardians and Wards Act, 1890 (hereinafter referred to as the Act, 1890), against the judgment and order dated 23.07.2024 passed by the Additional Principal Judge, Family Court No. 1, Azamgarh in Case No. 44 of 2017 (Preeti Sharma Versus Praveen Prakash Sharma) under Section 25 of the Act, 1890.

3. The admitted facts, as also evident from the records, giving rise to the present appeal are that, the marriage between the appellant and the sole respondent was solemnized on 19.02.2007 at Village Mohalla Nuaon Tandiya, Post Dafee, Tehsil and Distt. Varanasi in accordance with Hindu rituals and rites and after the marriage the parties resided at Sector-16-C, Greater Noida, in a house which according to the respondent is owned by his mother and out of wedlock of the parties, two sons were born, that is, Yathartha Sharma (23.05.2011) and Aniket @ Samartha Sharma (02.06.2013).

4. However, it has been stated that on 03.04.2016, the respondent left the appellant at her parental house at Varanasi and took away the elder son, that is, Master Yathartha Sharma, with him and as such abandoned his wife and the younger son.

5. It also transpired that within a short period, the respondent filed a divorce petition being Case No. 246 of 2016 (Praveen Vs. Preeti) and after getting the notice, it has been submitted that the appellant and her family members tried their level best to reconcile; and even filed a suit for restitution of conjugal rights; making every effort to bring the family back together.

6. However, the respondent was not willing to reconcile the differences, since he was avoiding the responsibility towards his wife and minor son; and even after the divorce petition was rejected and the suit for restitution was allowed on 15.12.2022, but the respondent did not take back his wife to her matrimonial home and as a matter of fact, it has been submitted, while placing reliance upon the identity card of Master Yathartha Sharma, that without there being a divorce between the parties, the respondent has entered into a marriage with one, Ms. Sumanlata Sharma which is not only in violation of the decree of restitution of conjugal rights but also, as a matter of fact, the said marriage is void in view of subsistence of the marriage between the parties.

7. The aforesaid fact has been pressed by the learned counsel for the appellant, to demonstrate that the respondent has no respect for law. It has further been submitted that vide the impugned judgment dated 23.04.2024, visitation rights were given to the appellant, but till date, the appellant, inspite of her best efforts, has not been permitted to meet her son.

8. It has further been submitted that the appellant had tried to meet her son at the school, and during the brief meeting, Master Yathartha Sharma informed her that he is not being treated well by the woman with whom the respondent has been living and she makes him run for daily chores and is not treating him with dignity or by way of providing a conducive environment; whereas he is staying at Gautam Budh Nagar while his father is working at Bengaluru. He also told that appellant that whenever his father-respondent comes during vacations, they regularly visit their ancestral home at Azamgarh and at that time, Ms. Sumanlata Sharma does not accompany them.

9. It has also been pointed out from the records that delaying tactics are

being adopted by the respondent, since the filing of Suit No. 44 of 2017 and eventually, when the Court had directed to proceed ex-parte on 19.01.2023, the respondent had moved a recall application and the said application was allowed with a cost of Rs. 5,000/- on 22.01.2024. Even thereafter, the respondent did not participate in the proceedings and the opportunity of the respondent to adduce evidence was once again closed vide the order dated 22.05.2024. The respodnent apart from the written statement and his affidavit has not led any evidence and did not enter the witness box for cross-examination. Hence, the impugned judgment has been passed merely on the statement made on affidavit by the respondent without there being evidence on record that the welfare of the minor was well taken care of while deciding the custody of the minor child.

10. At this juncture we may also refer to the order sheet of the present appeal, a perusal of which demonstrates that this Court, vide order dated 19.09.2024, had referred the matter to the Mediation Centre and the Mediation Centre's report indicates that in spite of fixing various dates, the husband did not appear before the Mediation Centre and in the said circumstances, the Mediation Centre submitted it’s report on 08.11.2024 to the effect that the mediation has failed.

11. The appellant had even provided the alternative address, which this Court permitted to be incorporated vide order dated 12.12.2024, but subsequently the notices could not be delivered with the endorsement that the addressee lives outside. This Court had also directed the C.J.M., Gautam Budh Nagar to effectuate service, however, the report dated 07.08.2026 was sent by the C.J.M., Gautam Budh Nagar indicating that the respondent had lived at the address from 25.09.2022 to 24.12.2024 but has now left, without leaving any further address.

12. This Court finds that when the matter was referred to the Mediation Centre on 19.09.2024, the respondent was residing at the given address, and accordingly, in spite of notice by the Mediation Centre, the respondent had chosen not to appear and thereafter had left the address without providing any forwarding address.

13. Further, on an application being made by the appellant, this Court vide its order dated 07.09.2026 had also issued notice to be served through C.J.M., Azamgarh at the permanent address of the respondent; but however, a report was given by the C.J.M., Azamgarh dated 03.10.2026 wherein it was mentioned that even the father of the respondent has refused to accept the notice. Under the circumstances, this Court deemed service of notice on respondent sufficient.

14. The learned counsel for the appellant categorically submits that the appellant's father-in-law is in constant touch with the appellant and he has told her on many previous occasions that his son, regularly visits his parental house; but however, when notice was sought to be served, the father of the respondent has incorrectly informed the C.J.M., Azamgarh that he has no concern with his son.

15. It is surprising to note that the respondent as per his showing has been residing in the house of his mother at Noida purchased since the year 2016, then it is difficult to understand as to what compelled the respondent to change his address at Noida and after the service of notice issued by the Mediation Centre, the respondent again changed his address. Further the respondent originally belongs to District Azamgarh, and his father continues to reside there, as would be evident from the notices issued by this Court. The trial of the present case was conducted at Family Court, Azamgarh in which the respondent had participated, under the circumstances it is evident that the respodnent is intentionally avoiding to appear in the present appeal despite having due knowledge of the same.

16. Before proceeding with the appeal, this Court deems it appropriate to record the conduct of the respondent. The present proceedings were initiated by way of filing Suit No. 44 of 2017 and when the Trial Court could not secure his presence even after six years of filing of the aforesaid suit, had passed an order to proceed ex-parte on 19.01.2023, the respondent immediately moved an application for the recall of the said order, which was also allowed on 22.01.2023; after imposing a cost of Rs.5,000/-. Even thereafter the respondent did not enter the witness box to be cross-examined.

17. The order sheet also indicates that apart from his own statement, no other document/evidence that was produced by the respondent except for the judgment passed in Matrimonial Case No. 246/2016 filed by respondent for dissolution of marriage, the same being ultimately dismissed. Besides no evidence whatsoever was adduced by the respondent to demonstrate that the paramount interest and welfare of the child was well taken care of by the respondent. The opportunity of cross-examination of the respondent and to produce evidence was also closed by the learned Trial Court solely on account of lapses on the part of the respondent. Even though this appeal was filed in the year 2024, the respondent has managed to evade service, though this Court had made efforts to effect service upon the respondent, through C.J.M., Gautam Budh Nagar and C.J.M., Azamgarh.

18. Another aspect of the matter is that in the present proceeding, visitation rights were given to the appellant by means of the impugned judgment but till date she has not been permitted even a single visit to her son and the respondent has left the address as long back as in December, 2024 without disclosing his present address, which otherwise the respondent was required to provide, so that the condition in respect of the visitation rights of the respondent in the impugned judgment dated 23.07.2024 could be complied with in letter and spirit.

19. This Court finds that immediately after passing of the order dated 23.07.2024, the conduct of the respondent to leave his address without providing his present address was nothing but an effort to circumvent the condition giving visitation rights to the appellant, and depriving the appellant from meeting her son. This Court also finds that after the dismissal of the divorce petition and grant of decree for restitution of conjugal rights, the respondent is also guilty of not complying with the decree of the Court. Hence, it is beyond doubt that the respondent is intentionally and wilfully flouting directions of the learned Courts below.

20. Though in the impugned order, the learned Trial Court had noted that Case No. 246 of 2016 filed under Section 13 of the Hindu Marriage Act, 1955 was dismissed vide order dated 15.12.2022 and the suit filed by the appellant under Section 9 was decreed, and the respondent has not adhered to or complied with the said decree, but still the learned Trial Court had not returned any finding on the issue of the respondent not having complied with the directions of the Court in proceedings under Section 9, which would have been a necessary consideration to examine the welfare of the child vis-a-vis the conduct of his father.

21. It has also been vehemently argued by Shri Pankaj Govil, Advocate appearing on behalf of the appellant, that till date not even a single penny has been given by the respondent towards the maintenance of the wife and the second son, who is living with the appellant, and in the opinion of the Court, this also demonstrates a circumstance which ought to have been considered by the learned Trial Court while determining the welfare of the child.

22. It is no doubt that this Court has time and again emphasized that proceedings under Section 25 of the Act is not per se about the physical custody of the minor, but it is about the protection of the right of the ward's health, maintenance and education, but at the same time, when the contentious issues are there between both the parents themselves, the conduct of the parties and their behaviour assumes importance, when the

ward is a minor, with an impressionable mind.

23. For ready reference, Section 25 is reproduced below:

> *"**25. Title of guardian to custody of ward:***
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> *(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.*
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> *(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 [Code of Criminal Procedure, 1882 (10 of 1882)] [Now see Section 97, Criminal Procedure Code, 1973 (2 of 1974).].*
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> *(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."*

24. The very words in which the aforesaid Section is couched with the "welfare of the ward", which indicates the intent that the *sine qua non* for determination of the custody is the "welfare of the child"; and not rights of the parents, under the statute for the time being in force.

25. It is not only a holistic view which is required to be taken by the Cou rts but a mature thinking is necessary in a situation as to what will ensure the welfare of the child; and simply because either of the parents love his child and the other is not able to demonstrate the same, on account of a protracted custody with one of the parents, the said situation must yield to the consideration primarily of the welfare of the child, as to whether in whose custody the child may grow in a normal balanced manner. The dispute between the parents may not affect his immediate environmental growth, which is conducive for minor children with an impressionable mind.

26. The Apex Court in **Mausami Moitra Ganguli v. Jayant Ganguli (2008) 7 SCC 673** held that no statute, in case of custody of minor child, can ignore, eschew or obliterate the vital factor of the welfare of the minor. The Court considered the *Principles as to custody and upbringing of minors* as per the *Halsbury's Laws of England* (4th Edn., Vol. 13), which states that the welfare of the minor is the first and paramount consideration, and must not take into consideration either parents claim or dwell into the question as to whether the father's claim or upbringing is superior to that of the mother , or the claim of the mother is superior to that of the father. For ready reference paragraph no. 19, 20, 21 and 22 of the judgment is quoted below:-

"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.

20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

21. In Rosy Jacob v. Jacob A. Chakramakkal [(1973) 1 SCC 840] a three-Judge Bench of this Court in a rather curt language had observed that: (SCC p. 855, para 15)

"15. … The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded 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."

22. In Halsbury's Laws of England (4th Edn., Vol. 13), the law pertaining to the custody and maintenance of children has been succinctly stated in the following terms:

"809. Principles as to custody and upbringing of minors.—Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other."

27. The Court has to give due weightage to the child ordinarily continuing health, education, intellectual, favorable surroundings as well as physical

comforts, the moral and physical values, so that he can grow in an environment which is conducive to a normal balanced human growth.

28. The Apex Court in **Sheoli Hati v. Somnath Das (2019) 7 SCC 490** while considering a plethora of judgments reiterated the settled proposition that "welfare of the child" is of paramount consideration while taking a decision regarding custody or other issues pertaining to a child. Every child has a right to proper health and education; and it is the primary duty of the parents to ensure that child gets proper education. The courts in exercise of *parens patriae* jurisdiction have to decide such delicate question. For ready reference paragraph no. 17 and 18 of the judgment is quoted below:-

> "***17.*** *It is well settled that while taking a decision regarding custody or other issues pertaining to a child, welfare of the child is of paramount consideration. This Court in Gaurav Nagpal v. Sumedha Nagpal [Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42: (2009) 1 SCC (Civ) 1], had the occasion to consider the parameters while determining the issues of child custody and visitation rights, entire law on the subject was reviewed. This Court referred to English Law, American Law, the statutory provisions of the Guardians and Wards Act, 1890 and provisions of the Hindu Minority and Guardianship Act, 1956, this Court laid down following in paras 43, 44, 45, 46 and 51: (SCC pp. 55-57)*
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> *"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.*
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> *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.*
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> *45. In Saraswatibai Shripad Vad v. Shripad Vasanji Vad [Saraswatibai Shripad Vad v. Shripad Vasanji Vad, 1940 SCC OnLine Bom 77 : ILR 1941 Bom 455 : AIR 1941 Bom 103] the High Court of Bombay stated: (SCC OnLine Bom)*
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> *'… 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 of the minor alone which is the paramount consideration …'*
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> *46. In Rosy Jacob v. Jacob A. Chakramakkal [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.*
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> *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."*
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> *(emphasis in original)*
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> *18. Every child has right to proper health and education and it is the primary duty of the parents to ensure that child gets proper education. The courts in exercise of parens patriae jurisdiction have to decide such delicate question. It has to consider the welfare of the child as of paramount importance taking into consideration other aspects of the matter including the rights of parents also. In reference to custody of a minor, this Court had elaborated certain principles in Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka [Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544 : 1982 SCC (Cri) 505] , wherein this Court again reiterated that the welfare of the child is of paramount importance. In para 17, following was laid down: (SCC p. 565)*
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> > *"17. The principles of law in relation to the custody of a minor appear to be well-established. It is well-settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the court has a special responsibility and it is the duty of the court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the court has to be guided by the only consideration of the welfare of the minor."*

29. It is also not *res integra* that the Court can order the return of the child if it feels that the welfare lies with the guardian; but however, only if the Court is of the opinion that such a return is in the welfare of the ward. This Court in the case of **Mohammad Khalid versus Zeenat Praveen, AIR 1988 All 252** has held that though the father as a natural guardian has a prima facie right to minor's custody, this may be negated if welfare lies in keeping him in his mother's or grandparents' custody because the children cannot be treated as chattel or property. In **Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840** the Apex Court held that the *power* and *duty* of the court under the Act, 1890 is towards the welfare of the 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. It also held that 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.

30. In the present case, we find that the respondent has not only, not

adhered to the various orders or judgments of competent Courts of law, but there is also evidence on record that he has remarried without obtaining a decree of divorce in his favour, which can be construed to be not in the best welfare of the minor.

31. Not only in the present appeal, but while the matter was going on before the Trial Court, there is enough evidence by way of the order-sheet of the Trial Court as well as that of the present appeal, that the respondent has taken all recourse to delay the present proceeding and not submit himself to the jurisdiction of the Court, so that no adjudication could reach.

32. In view of above, if we advert to the impugned judgment, the learned Trial Court in this regard although took cognizance of the fact that despite the petition under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights having been decreed and the respondent not having complied with the directions, the learned Court did not deem it fit to take the aforesaid fact into consideration while deciding the question of custody. The learned Trial Court also overlooked the fact that the respondent was intentionally delaying the proceedings of the case.

33. Further as already held above the respondent who has kept evading the service of notice in the present appeal has also violated the impugned judgment dated 23.07.2024 by means of which full visitation right were given to the appellant, and it is amply clear from the record that the appellant has not been permitted to meet her son for the past about 10 years, as the appellant during her cross-examination in the year 2019 had admitted that she had not been permitted to meet her son after April, 2016 despite having made efforts to meet him and a complaint had also been lodged before the competent police authorities in that regard. Thus, it is beyond doubt that the respondent while violating the directions giving full visitation rights to the appellant had openly flouted judicial orders.

34. Further the finding of the learned trial court in this regard that the appellant in her cross-examination had accepted that she had not met her son for the past three and half year, and as such making it the ground for grant of custody of the minor to the respondent is not acceptable, as we are of the view that the finding is erroneous and perverse, in view of the fact that the appellant did not meet her son, not out of her own sweet will but was intentionally had wilfully prevented from doing so at the behest of the respondent.

35. The fact that the respondent openly flouted directions of the Court and

evaded due process of law even at the stage of trial was completely overlooked by the learned trial court while passing the impugned judgment. In this regard, the Apex Court in the case of **Gaurav Nagpal Vs. Sumedha Nagpal, 2009 (1) SCC 42** had held as under :-

> *"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.*
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> *52. The trump card in appellants' argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He can not be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments.*
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> *53. The conclusions arrived at and reasons indicated by the High Court to grant custody to the mother do not in our view suffer from any infirmity. It is true that taking the child out of the father's custody may cause some problems, but that is bound to be neutralized.*
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> *54. Learned counsel for the appellant submitted that the child's education is of paramount importance and the father is spending good amount of money for providing him excellent education, and the mother does not have the financial affluence as the appellant claims to have. But that can be taken care of if father is asked to pay the educational expenses of the child in addition to the maintenance being paid to the respondent. But at the same time it cannot be overlooked that the father needs to have visitation rights of the child. "*

36. The main ground on the basis of which the learned Trial Court had refused the custody of the minor to the appellant-mother was that the mother was having no independent income of her own and was dependent upon her father, who had already retired from service. The learned Trial Court while acknowledging the fact that the suit for maintenance filed by the appellant was pending before the Family Court, Azamgarh also overlooked the fact that it is bounden duty of the husband to maintain his wife and the children.

37. The Apex Court in the case of Gaurav Nagpal (supra) has held that the fact that father is spending good amount of money for providing him excellent education, and the mother does not have financial affluence as the appellant claims to have, but that can be taken care if father is asked to pay the educational expenses of the child in addition to the maintenance being paid to the respondent. Similarly, the Apex Court in the case of Mausami Moitra Ganguli (supra) had held that it is no doubt, true that father is presumed by the statutes to be better suited to look after the

welfare of the child, being normally the working member and head of the family, yet in each case, the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. Hence, it can be very well be concluded that the learned Trial Court could not have refused the custody of the minor to the appellant solely on account of her financial status.

38. In this regard the Apex Court in the case of **Shamima Farooqui vs. Shahid Khan, (2015) 5 SCC 705** in respect of the responsibility and duty of a husband and a father towards the welfare of his wife and children had held as under :-

> "*16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In Chaturbhuj v. Sita Bai, it has been ruled that:-*
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> > *"Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Veena Kaushal falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat."*
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> *17. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.*
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> *18. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in Chander Prakash Bodhraj v. Shila Rani Chander Prakash wherein it has been opined thus:-*
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> > *"An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."*
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> *19. From the aforesaid enunciation of law it is limpid that the obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises. When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort.*

> *Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance."*

39. The perusal of the record further reveals that there is noting on record other than the affidavit of the respondent to demonstrate that the welfare of the minor son was well taken care of, however, the learned Trial Court had blindly relied upon the affidavit. Further there was no evidence on record in respect of the income of the respondent nor was there any evidence regarding the quality of education of the minor son and his performance in school. However, the learned Trial Court completely overlooked the aforesaid vital aspects of the matter while dismissing the suit. Thus, the learned Trial Court had arrived at findings regarding better welfare of minor in the hands of the father-respondent with no evidence to support the same.

40. Moreso, as is evident from the record and as held in paragraphs above no opportunity was afforded to the appellant to cross-examine the respondent. Under these circumstances, the approach of the learned Trial Court in accepting the statements made on the affidavit by the respondent as gospel truth without affording any opportunity for cross-examination to the respondent, is not only erroneous but suffers from patent illegality.

41. It is true that the strict rules of evidence are not applicable to Family Courts by virtue of Section 14 of the Family Courts Act, 1984 as the freedom of partial departure from the Evidence Act, helps the Family Court to reconsider valuable information and materials necessary for effective adjudication of disputes. However, the same would not absolve the Family Court from observing ordinary principles of proof and rule of natural justice, even in situations where the Family Court is not bound and governed by the Evidence Act. Section 14 of the Act, 1984 is only aimed at mitigating, under certain circumstances, the rigours of sophisticated rules of relevancy and admissibility of the Evidence Act rather than annihilating the very fundamental rules of proof and natural justice inherent in an ideal legal system. We are therefore, of the view that the Family Courts, may have been absolved from observing the stringent rules of relevancy and admissibility of evidence envisaged by the Evidence Act, are nonetheless bound to adhere to the fundamental rules of evidence based on logic, fairness and expedency and also principles of natural justice.

42. However, in the present case as would be evident from above the findings arrived at by the learned Trial Court are based on no evidence and as such are perverse and are liable to be set aside, moreso in respect of the welfare of the minor. It is also settled that denial of the right to cross-examination is a violation of rule of natural justice. Further the examination in chief of a party cannot be relied upon in the absence of the party not presenting himself/herslf for cross-examination before the Court, as has happened in the present case. The right to cross-examination being one of the principles of natural justice, the learned Trial Court could not have relied upon the affidavit of the respondent in the absence of any opportunity being afforded to the appellant to cross-examine the respondent.

43. The Apex Court in the case of **Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra, (2013) 4 SCC 465** while considering the right to cross-examination had held as under :-

> "*Cross-examination is one part of the principles of natural justice:*
>
> *24. A Constitution Bench of this Court in State of M.P. v. Chintaman Sadashiva Vaishampayan held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: Union of India v.T.R. Varma, Meenglas Tea Estate v. Workmen, Kesoram Cotton Mills Ltd. v. Gangadhar & Ors., New India Assurance Company Ltd . v . Nusli Neville Wadia and Anr., Rachpal Singh & Ors. v. Gurmit Kaur & Ors., Biecco Lawrie & Anr. v. State of West Bengal & Anr., and State of Uttar Pradesh v. Saroj Kumar Sinha.)*
>
> ,,,
>
> *30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice. "*

44. Besides this Court cannot be oblivious of the fact that the respondent has entered into a second marriage, while the marriage between the parties continues to subsist, hence in future there is no certainty that the child will get better love and affection as well as the conducive environment from his step-mother in comparison to what would be offered by his real mother-appellant. Hence, it is on this account as well that this Court is of the view that the welfare of the minor would be better

taken care by the appellant vis-a-vis the respondent.

45 . The Supreme Court in the matter of **Athar Hussain v. Syed Siraj Ahmed and Others** has considered second marriage of father qua interim custody and held that second marriage of father is an important factor for consideration while granting custody of the child and denied the custody to the father where he has already entered into second marriage. It has been observed in paragraph 44 as under :-

> *"44. The second marriage of the appellant, though a factor that cannot disentitle him to the custody of the children, yet is an important factor to be taken into account. It may not be appropriate on our part to place the children in a predicament where they have to adjust with their stepmother, with whom admittedly they had not spent much time as the marriage took place only in March, 2007, when the ultimate outcome of the guardianship proceedings is still uncertain."*

46. Thus in view of the above, the question that remains is as to whether the father-respondent, who from the record has openly been flouting the orders passed by the learned Courts below, evading the due process of law and is in a relationship and living with another women, despite being refused divorce and no proof of income of the respondent and well being of the minor being on record, would be a suitable parent to take care of the welfare of the minor, or the mother-appellant, where the minor would grow up with his mother, younger brother and maternal grandparents, may be with lesser physical comforts but definitely better moral and ethical values. The welfare of the minor being of paramount importance while deciding the question of custody.

47. Under the circumstances, we are of the view that the welfare of the minor would be better taken care of, if his custody is granted to his mother-appellant.

48. Accordingly, the present appeal stands **allowed** and the judgment and order dated 23.07.2024 passed in Case No. 44 of 2017 (Preeti Sharma Vs. Praveen Prakash Sharma) passed by Additional Principal Judge, Family Court No. 1, Azamgarh is set aside. Further the respondent is directed to handover the custody of the minor child, Master Yathartha Sharma, to the appellant within a period of one month from this judgment.

49. However considering the fact that the respondent is father of the minor and his presence is essential for the proper growth and development of the minor, hence, the respondent would have the right to visit and meet the minor, Master Yathartha Sharma every Saturday between 3:00 P.M. to 5:00 P.M. in the premises of District Legal Services Authority (DLSA), Varanasi. Further, it shall be open for the parties to

approach the learned Trial Court in case they want any change in the visitation rights so given to the respondent.

(Sudhanshu Chauhan,J.) (Saral Srivastava,J.)

October 26, 2026
Gaurav

Digitally signed by :-
GAURAV PATEL
High Court of Judicature at Allahabad