

In the court of Principal Judge, Family Court, Gopalganj.

Guardian and Wards case No. 3/2016

C.I.S. No. 08/2016

1. Tahir Hussain son of Mahfuz Mian

Resident of vill-Hasan Pur Nawka Tola, P.S. Sidhwaliya District-Gopalganj.

.....Applicant.

Versus

1. Ajmeri Khatoon daughter of Hafiz Mian and wife of Anant Tiwary

2. Salman aged about 10 years son of Tahir Hussain.

3. Arbaz aged about 09 years son of Tahir Hussain

Resident of village- Balra, P.S. sidhwaliya, District Gopalganj.

.....O.Ps.

Counsel for the Applicants :- Sri Vijay Kumar Prasad Shahi, Advocate

Counsel for the O.Ps. :- None

**Dated the 16<sup>th</sup> day of March 2019**

Present :- Bharat Tiwary

Principal Judge, Family Court

Gopalganj.

### **Order**

1. The applicant Tahir Hussain has filed this case against the O.P. No-1 for custody of two minor male children namely Salman and Arbaz (O.P.No-2 and 3) from the custody of O.P. No-1 Ajmeri Khatoon.

2. The case of applicant in brief is that his marriage was solemnized with O.P. No-1 and after the marriage the O.P. came to the house of applicant and both the couple had been living together as husband and wife and out of the wedlock the couple was blessed with the male child aged about 10 years named Salman and another male child aged about 9 years named Arbaz. It is further alleged that after few years of the marriage O.P. No-1 established sexual relation and married with Anant Tiwary son of Girish Tiwary of village-Balara, P.S Sidhwaliya District-Gopalganj and due to this act, the applicant orally divorced the O.P. No.1 on 8-02-2014.

The further case of applicant is that he used to go several times to get his sons from the custody of O.P. No-1 for welfare and proper education of his sons but the O.P. No-1 vehemently denied the same. It is further alleged that admittedly both the sons of applicant are aged above 7 years and the applicant being the father and natural guardian entitled for custody of his both children. The applicant repeatedly knocked the door of O.P. No-1 to hand over his both sons but she refused to hand over. Thus necessity arose to file the case.

3. Notices through nazarat, registered post and through special messenger were issued up on the O.Ps for their appearance and lastly name of O.Ps was also published in news paper but they did not appear to contest the case and hence the case was heard ex-party.

5. Now the only point for consideration arises as to whether the applicant is entitled to get custody of the child from O.P.?

### **Findings**

6. The applicant has examined five witnesses in support of his case who are Apw-1 Tahir Hussain the applicant, Apw-2 Bibi Nisha Bhabhi of applicant, Apw-3 Kalawati Kahtoon mother of applicant, Apw-4 Id Mohammad brother of the applicant and Apw-5 Abdul Mian another brother of the applicant.

Apw-1 Tahir Hussain who is applicant has stated in his evidence that his marriage was solemnized with O.P. No-1 Ajmeri and after the marriage she lived 12 years with him and out of the wedlock two male children namely salman and Arbaj were born and at present both are living with O.P. No-1. He wants to take custody of his both children for better education and bright future. He has further stated that he has solemnized his 2<sup>nd</sup> marriage and prior to his 2<sup>nd</sup> marriage the O.P. No-1 had left his house. To court question he has stated that O.P. No-1 has solemnized her marriage with Anant Tiwary. Apw-2 Bibi Nisha, Apw-3 Kalawati Khatoon, Apw-4 Id Mohammad and Apw-5 Abdul Mian they all have stated that the marriage of O.P. No-1 was solemnized with applicant and out of the wedlock two children were born but after 12 years of the marriage she married with Anant Tiwary and she is living in the house of Anant Tiwary.

Apart from oral evidence the applicant has filed following documents which are marked and exhibited as follows:-

Ext-1 C.C. of order sheet dated 6-02-2014 of C.I.S. case No. 15010/2014 relating to Sidhwaliya P.S. Case No. 09-2014

Ext-2 C.C. of F.I.R. of Sidhwaliya P.S. Case No. 09/2014.

Ext-3 C.C. of statement of Azmeri Khatoon u/s 164 Cr.P.C.

Ext-4 and 5 C.C. of petitions of C.I.S. Case No. 15010/2014

Ext-6 Original birth certificate of Salman (O.P.No-1)

8. Heard ld. counsel for the applicant and perused the case record. From the oral as well as documentary evidence adduced by the applicant it is evident that marriage of applicant was solemnized with O.P. Ajmeri and she lived for 12 years with applicant and out of the wedlock two male children namely Salman and Arbaj were born. From perusal of Ext-2 which is F.I.R of Sidhwaliya P.S. Case No. 09/2014 it appears that applicant Tahir Hussain had lodged F.I.R u/s 366 and 497 of the I.P.C. against Anant Tiwary and Ext-3 which is statement of O.P. No-1 Ajmeri Khatoon u/s 164 Cr.P.C. proves this fact she has solemnized her marriage with Anant Tiwary. She has clearly stated in her statement U/S 164 Cr.P.C. that she has solemnized her 2<sup>nd</sup> marriage with Anant Tiwary and living with him along with her two children who were born from her first husband her. Thus from the Ext-1, 2, 3, 4, 5 and 6 it is crystal clear that O.P. No-1 has solemnized her 2<sup>nd</sup> marriage with Anaant Tiwary and living with him and her two children are also residing with her who were born from her 1<sup>st</sup> husband..

Now the only question before the court is that whether, the applicant has entitled for custody of said child or not?

From perusal of record it appears that all the processes have been exhausted for appearance of O.P. No-1 in this case but she did not appear to contest the claim of the petitioner.

On the other hand from the evidences of applicant and other materials available on the record, it is apparent that the applicant is earning hand and in a position to keep his sons in a healthy atmosphere.

*“In deciding the question of custody, the paramount consideration is the welfare of the minor. The expression “welfare” is wide enough to include material as well as spiritual welfare. The court has to consider as to what order would be best for securing welfare and happiness of the minor. The welfare of the child can not be same time be confined to either physical comfort or the comfort that money can secure. The child has to be properly brought up, educated in healthy surrounding in order to enable him to have the benefits of education and also to secure a footing in life later on. In such a matter, the father’s advice and guidance would be more valuable and conductive to welfare of the son rather than that of the mother. In this case the both the boys have also completed five years and normally the natural guardian- father is entitled to the custody of the minor.*

Thus from the entire facts and circumstances of the case and material available on the record, this court comes to the conclusion that the case of applicant is maintainable and applicant is entitled for custody of his both children namely Salman and Arbaj from O.P. No-1. It is therefore:-

**Ordered**

That the case be and same is allowed ex-party and the O.P. No-1 is directed to hand over the children Salman and Arbaj to the applicant within a period of 90 days from the date of this order failing which the applicant will get the same through process of the court.

(Dictated and corrected by me)

Principal Judge  
Family court, Gopalganj

Principal Judge, Family Court

Gopalganj.

16-03-2019