

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**W.P. (227) No. 87 of 2015**

1. Tanishqa Kumar, aged about 7 years, S/o Nagendra Jogi, minor, through his maternal grand mother Santrin Bai, aged about 57 years, W/o Suklal Singh,
2. Santrin Bai, aged about 57 years, W/o Suklal Singh,

Both R/o Block No. 12-E, Street No.29, Zone-2, Sector 11, Khursipar, Bhilai, P.S. Khursipar, Civil and Revenue District Durg (C.G.)

---- Petitioners**Versus**

1. Nagendra Kumar Jogi, aged about 30 years, S/o Gulab Chandra Jogi, R/o Nandni Mines Township, Qtr. No.2-A, Street No.27, P.O. & P.S. Nandni, Tah. Dhamdha, Civil and Revenue Distt. Durg (C.G.)
..... Applicant
2. Suklal Bandhe, aged about 61 years, S/o Late Bisahu Das Bandhe, R/o Block No.12-E, Street No.29, Zone-2, Sector 11, Khursipar, Bhilai, P.S. Khursipar, Civil and Revenue Distt. Durg (C.G.)
.... Non-applicant

---- Respondents

For Petitioners : Mr. Ravindra Agrawal, Advocate.
For Respondent No. 1 : Mr. B.P. Singh, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****07/09/2017**

(1) Respondent No. 1- Nagendra Kumar Jogi, plaintiff therein filed an application under Section 25 of the Guardians and Wards Act, 1890 (henceforth "Act, 1890") for appointment of guardian of petitioner No. 1 (his minor son) impleading Smt. Santrin Bai, maternal grandfather of the minor as party defendant. During pendency of the matter, on 30.10.2014, a joint application was filed by the respondents for disposing of the case on the basis of compromise arrived at between them and on the same

day, learned Principal Judge, Family Court, Durg allowed that application and directed to handover the custody of the minor to the respondent No. 1 on 10-04-2015, against which, minor (petitioner No.1) through his maternal grandmother has preferred this petition under Article 227 of the Constitution of India questioning the same.

(2) Learned counsel for the petitioner would submit that the impugned order has been passed without taking consent of the minor under Section 17(3) of the Act, 1890 as he is now 9 years old and only on the basis of compromise ignoring the welfare of minor, impugned order has been passed and, therefore, the impugned order deserves to be quashed.

(3) On the other hand, counsel for respondent No.1 would oppose the writ petition and submits that the order impugned passed by the Principal Judge, Family Court, Durg is in accordance with law, which does not call for any interference under Article 227 of the Constitution of India.

(4) I have heard learned counsel appearing for the parties and perused the order impugned with utmost circumspection.

(5) It is quite apparent that the petitioner No.1 (minor) is in custody of her maternal grandmother but she has not been impleaded as party defendant in the application; and the compromise has entered into between the respondents No.1 & 2; and the custody of the minor child is directed to be handed over by the Principal Judge, Family Court, Durg to his father respondent No. 1- Nagendra Kumar Jogi.

(6) Section 17 of the Guardians and Wards Act, 1890 states as under:-

“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 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.

(4) xxxx xxxx xxxx

(5) *The Court shall not appoint or declare any person to be a guardian against his will.*

(7) A careful perusal of the aforesaid provision would show that interest and welfare of the minor being paramount, a competent court in India is entitled and indeed duty-bound to examine the matter independently and not the rights of parents under a statute. Ability and means of person interested in custody of child and availability of conducive and appropriate environment for proper upbringing of child should be considered. (See ***Gaytri Bajaj Vs. Jiten Bhalla***¹). The consent of the minor under Section 17(3) of the Act, 1890 is undoubtedly important but that is not the be all and end all of the matter. The Court has to follow the procedure strictly.

(8) As per Section 13 of the Hindu Minority and Guardianship Act, 1956, in the appointment or declaration of any person as guardian of a Hindu

1 (2012) 12 SCC 478

Minor by a Court, the welfare of the minor shall be the paramount consideration. Under Section 17 of the Guardians and Wards Act, 1890, the Court is under a duty to appoint the most suitable person amongst the rival claimants for guardianship, although a person who under the personal law would be entitled to the custody of the child in preference to any one else. The scope of Section 17 of the Guardians and Wards Act, 1890 is that the Court has to see who of the several Applicants has a preferential right to be appointed as guardian of the minor under the personal law keeping also in view the welfare of the minor. The Court should be guided by the sole consideration of the welfare of the minor.

(9) The Supreme Court in case of **Sumedha Nagpal v. State of Delhi and Ors**² while interpreting the proviso to Section 6(a) of the Hindu Minority and Guardianship Act, held that decision on the question of custody should be made bearing in mind the welfare of the child - It cannot be made simply on the basis of right of the parties under the law, and observed in paras 4 and 5 of the judgment as under:

“4. Even at this stage, Shri D. D. Thakur, the learned Counsel for the Petitioner laid great emphasis that we should not shirk our task at least with respect to the limited question of ordering restoration of the custody of the minor child to the mother. He submitted that though Section 6 of the Act recognises guardianship of the minor child with both the parents, exclusive right of the mother is recognised in respect of the custody of a minor child below five years. This legislative recognition of the maternal instinct should be honoured by us by treating the custody of the child with the father as illegal and the custody should be handed over to the mother pending the proceedings suggested by us earlier in the course of this order.

5. In deciding such a question, what we have to bear in mind is the welfare of the minor child and not decide such a question merely based upon the rights of the parties under the law. In the pleadings and the material placed before us, we cannot say that there is any, much less clinching, material to show that the welfare of the minor child is at peril and calls for an interference. The trauma that the child is likely to experience in the event of change of such custody, pending proceedings before a Court of competent jurisdiction, will have to be borne in mind. We are conscious of the emphasis laid by the learned Counsel for the Petitioner that the lap of a mother is the natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same, but still we feel that at this stage of the proceedings it would not be appropriate for us to interfere in the matter and leave all matters arising in the case to be decided by an appropriate forum irrespective of whatever we have stated in the course of this order. Even though we have dealt with the contentions raised by Shri D.D. Thakur as to grant of interim custody to the Petitioner, we should not be understood as having held that a petition would lie under Article 32 for grant of custody of a minor child; we refrain from examining or deciding the same.”

(10) Similarly, the Supreme Court in the case of **Elizabeth Dinshaw (Smt.) v. Arvind M. Dinshaw and Anr.**³ while dealing with Sections 7 and 17 of the Guardians and Wards Act, 1890 has held that when a question arises before a Court pertaining to custody of a minor child, the matter has to be decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare, of the minor.

3 1987 (1)SCC 42

(11) The Supreme Court in case of **Anjali Kapoor (Smt.) v. Rajeev Baijal**⁴ relying upon the two judgments referred to hereinabove has held in para 26 that "ordinarily, under the Guardian and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute and the Courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the Appellant grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the Appellant to retain the custody of the child."

(12) The Supreme Court in Case of **Mohan Kumar Rayana v. Komal Mohan Rayana**⁵ **Gaurav Nagpal v. Sumedha Nagpal**⁶ **Athar Hussain v. Syed Siraj Ahmed and others**⁷ have also held that welfare of the child is the sole and single yardstick to assess comparative merit of the parties contesting for guardianship.

(13) The Supreme Court in case of **Mausami Moitra Ganguli v. Jayant Ganguli**⁸ has observed in paras 19 to 21 as under:

"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

4 2009 (7) SCC 322

5 2010 (5) SCC 657

6 2009 (1) SCC 42

7 2010 (2) SCC 654

8 2008 (7) SCC 673

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 relevant¹ facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

21. In ***Rosy Jacob v. Jacob A. Chakramakal***⁹ a three-Judge Bench of this Court in a rather court language had observed that:

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.

(14) The Supreme Court in case of **Athar Hussain** (supra) has held in para 44 of its judgment that "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

⁹ (1973) 1 SCC 840

the guardianship proceedings is still uncertain."

(15) Reiterating the "welfare principle" enunciated in **Gaurav Nagpal** (supra), the Supreme Court in the matter of **Ashish Ranjan Vs. Anupma Tandon & others**¹⁰ held as under:-

"18. It is settled proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of child and not the rights of the parents under the statute. Such an issue is required to be determined in the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of stare decisis remains irrelevant insofar as the factual aspects of the case are concerned. While considering the welfare of the child, the "moral and ethical welfare of the child must also weigh with the court as well as his physical well-being". The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care and caution, with love, affection and sentiments applying human touch to the problem. 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. (Vide *Gaurav Nagpal v. Sumedha Nagpal*¹¹.)

(16) Recently in the matter of **Roxann Sharma Vs. Arun Sharma**¹², the Supreme Court has held that Section 17 gives primacy to the welfare of the minor and held as under:-

"The Guardianship postulates control over both the person as well as the assets of a minor or of one and not the other. This is obvious from a reading of the definitions contained in [Section 4](#) (2) of the Guardians & [Wards Act](#), 1890 (G&W Act) and

10 (2010) 14 SCC 274

11 (2009) 1 SCC 42

12 (2015) 8 SCC 318

Section 4(b) of the HMG Act which clarifies that "Guardian" means a person having the care of the person of a minor or of his property or of both his person and property. [Section 9](#) contemplates the filing of an application in respect of the guardianship of the person of the minor and [Section 10](#) specifies the form of that application. [Section 12](#) deals with the power to make interlocutory order for protection of the minor and interim protection of his person and property. [Section 14](#) is of importance as its tenor indicates that these controversies be decided by one court, on the lines of Section 10 of the CPC which imparts preference of jurisdiction to the first court. [Section 17](#) gives primacy to the welfare of the minor. Sub [section 2](#) thereof enjoins the court to give due consideration 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.”

(17) Very recently, in the matter of ***Purvi Mukesh Gada Vs. Mukesh Popatlal Gada & another***¹³, the Supreme Court has held as under:-

“15.....As pointed out above, apart from discussing the 'welfare principle', the High Court has not done any exercise in weighing the pros and cons for determining as to which of the two alternatives, namely, giving custody to the appellant or to the respondent, is better and more feasible.”

(18) Thus, the role of the parties to the application is undoubtedly important but the role of the Court is much more important than that. The Court has to consider independently the welfare of the minor as a prime issue. The Principal Judge, Family Court, Durg on the basis of the consent of the parties have passed the order directing the custody of the minor to respondent No. 1- Nagendra Kumar Jogi (father) ignoring the mandate of Section 17 of the Act, 1890 and neither consent of minor was considered nor interest and welfare of the minor being paramount has been considered by the Principal Judge, Family Court, Durg and merely on the

basis of compromise between the parties, such order has been passed, which is arbitrary, illegal and unsustainable in law.

(19) As a fallout and consequence of the aforesaid discussions, the impugned order 30.10.2014 (Annexure P-1) is set aside. The matter is remitted back to the file of Principal Judge, Family Court, Durg for hearing afresh in accordance with law keeping in view of the observations made hereinabove.

(20) The parties are directed to appear before the Principal Judge, Family Court, Durg on **21st September, 2017**.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-