

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FAM No. 9 of 2014****Judgment reserved on 13-09-2017****Judgment delivered on 08-11-2017**

(Arising out of order dated 10-12-2013 passed by the Additional Principal Judge, Family Court (Link Court), Bemetara, in Misc. Civil Suit No.4/11)

1. Balram S/o Adhar Verma, Aged About 32 Years R/o Bija, Tahsil Saja, District Durg, Chhattisgarh, Civil & Revenue District Durg, Chhattisgarh

---- Appellant**Versus**

1. Sushma W/o Balram Verma, Aged About 27 Years R/o Bija, Tahsil Saja, At Present Residing At Pادمي, Tahsil Khamhariya, District Durg, Chhattisgarh

---- Respondent

For Appellant
For Respondent

Ms. Sharmila Singhai, Advocate
Shri Sunil Otewani, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Arvind Singh Chandel

C A V Judgment

The following judgment of the Court was delivered by
Prashant Kumar Mishra, J.

1. This is an appeal under Section 47 of the Guardians and Wards Act, 1890 (for short 'the Act, 1890') read with Section 19 (1) of the Family Courts Act, 1984 (for short 'the Act, 1984')

challenging the order passed by the Family Court, Bemetara, allowing the respondent/wife's application/plaint for custody of minor girl Ku. Sakshi under Section 25 of the Act, 1890.

2. As pleaded in the plaint filed by the wife, the parties were married about 7 years back from the date of institution of the proceedings by the respondent/wife. Two girl child namely; Ku. Ashtha & Ku. Sakshi were born out of the wedlock. On account of giving birth to two girl child, members of her in-laws' family started torturing her and the appellant/husband started threatening the wife to perform second marriage. The wife was locked in a room from morning to evening on 30-7-2011. When the lock was opened in the evening the wife was driven out of the house. On that date Ku. Ashtha accompanied the wife, but the husband forcibly retained Ku, Sakshi in his house. Being the natural guardian of the girl child, aged about 2½ years, the application was filed for her custody.
3. The appellant/husband denied the plaint allegations, *inter alia*, stating that he is staying separately from the joint family only because of the quarrel raised by the wife and that she has left the matrimonial house on her own volition. Appellant also made allegation regarding the character of the

respondent/wife. He admitted that he is working as Shiksha Karmi. Contrary to the earlier statement, he pleaded in para 6 of the reply that he is residing with his father in the joint family, where his parents, brothers, sisters and sister-in-law (*babhi*) are present to take care of Ku. Sakshi. It was specifically stated that if the girl child stays with her mother she will also become characterless like her mother.

4. Based on the statement of the respondent/wife and her witness Bhajman and the statement of the appellant/husband and his witness Sanat Nirmalkar, the Family Court concluded that the allegation on the character of the wife is not proved. It is also held that under Section 6 of the Act, 1890 the mother is entitled to the custody of minor child. The trial Court has also considered that village Padmi is only about 9 kms. from Dewar Bija where the elder daughter Ku. Ashtha is studying, therefore, Ku. Sakshi can also get education in the same school while staying with the mother.
5. On a reading of the statement of the wife, it appears her father is an agriculturist having 30 acres of land and that her elder daughter is obtaining good education at Saraswati Gyan Mandir, Dewar Bija.

6. In course of hearing of this appeal on 21-11-2016 this Court interacted with the girl child and observed thus :

2. This matter was taken up in Chamber. We have questioned the minor girl and the parties. The young girl is intelligent. She is very communicative and was not at all nervous when she talked to us. She is a confident young child. She is living with her father for two and half years and it is apparent that she is being educated well.

3. A child should not suffer for the fault of parents. She is not an inanimate object. She is not a pen or pencil. We cannot hand over the child from one parent to another parent. Without going into the merits of the case as to whether it is the father or the mother, who is entitled the custody of the child, we are clearly of the view that the child has the right to get love and affection of both the parents. Why should a child suffer if the parents are fighting each other ? In this case, there is another important factor that one girl child is living with the mother and one with the father. Both the sisters also have a right to know and love with each other. The situation at present is that the child living (*sic* with) her father is neither permitted nor is able to meet her father (*sic* mother) or her sister. As far as the sister is

concerned, the father has not made any request that he be given visitation rights with the child, who is living with the mother.

4. Keeping in view the aforesaid facts, we, as an interim measure, direct that on and w.e.f. 27th November (Sunday) and on every Sunday thereafter the father will drop the child – Ku. Sakshi, who is in his custody, at the house of the respondent – mother by 9.30 AM in the morning. The child will remain with the mother till 5.30 PM in the evening and then the father will go back to the house of the mother and get her back to his house. Once the mother has gained confidence of the child, we will permit the child to stay overnight at the house of the mother from Saturday after school hours till the late in the evening of Sunday. On every Sunday, the father must comply with the aforesaid directions, otherwise we shall vacate the stay order.

7. The respondent complained to this Court that the order dated 21-11-2016 is not complied with in its letter and spirit, therefore, the parties were directed to file affidavits. In his affidavit the husband provided date wise explanation for not taking the child to the house of the wife.

8. Considering the explanation, this Court on 25-1-2017 observed thus :

To say least, this shows the defiant attitude of the husband to the Court. He does not want to comply with the orders of the Court on one pretext or the other. The order was passed in the Court and despite this, now the appellant/husband has temerity and audacity to say that because he did not have the certified copy of the order, he could not take the child to the house of the wife on 27.11.2016 and 04.12.2016.

We do not understand that what was the requirement of having certified copy when the order was pronounced in Court for the benefit of minor child. How could the husband totally disobey the orders of the Court in not taking the child thereafter.

It is stated that on 11.12.2016 the child was brought to the house of the respondent/wife, the child stayed there for 20 minutes and returned back to the appellant's house on her own wish. Similarly, on 18.12.2016, it is stated that the child was escorted by the village Kotwar and brought her to the respondent's house where the child stayed for 45 minutes. With regard to 25.12.2016 to 01.01.2017, it is

stated that since child refused to go to the respondent's house, she was not taken there. This also is totally contemptuous of the orders of the Court. On 08.01.2017, it is stated that the child was taken along with Kotwar of the village but came back after 45 minutes. On 15.01.2017, it is stated that one police personnel escorted the child. Under whose authority, this police personnel was sent along with the child is not clear. This Court had not directed that the child should go with the police personnel. We are dealing with the child and we do not want that the child should feel that she is some sort of criminal. The husband has given no explanation why he had asked for police to escort the child. On 22.01.2017, it is stated that the child was dropped to the house of the respondent where she stayed there for 30 minutes and came back.

As far as the presence of the child for particular time is not disputed by the wife though, according to the wife, on 11.12.2016 and 08.01.2017, the child was escorted by one lady and the child was taken back after 15 minutes. The case of the wife is that the child was taken back.

As we have already observed, the child is human being and she is not inanimate object.

Our purpose of giving visitation rights to the wife is that by use of these visitation rights, the child would become familiar with the mother, but it appears that the father does not want this to happen. We were, in fact, inclined to dismiss this appeal only on this ground but we are giving him one more chance to rectify his mistake.

We, therefore, direct that on or w.e.f. Sunday, the father will ensure that the child is taken by him and nobody else, to the house of the respondent/wife and leave there at 9.30 AM and thereafter he will collect the child at 5.30 PM. If the child cries or refuses, is no excuse. For the first 2–3 visits, the child is bound to refuse to go to the mother, the child is bound to cry and the child is bound to say that she does not want to go to the mother because by now she has been tutored against the mother fully. The mother has also right to get the child, and therefore, by interim order, these visitation rights shall continue for a period of 6 weeks w.e.f. 29th January, 2017.

We make it clear that if the husband does not comply with the order of the Court, we shall dismiss his appeal for non-prosecution.

9. The respondent thereafter claimed increase in frequency of visits as also for allowing the girl to stay overnight in her house. We, therefore, directed for production of the girl child for interaction with her before passing any further order. On 12-9-2017 this Court interacted with Ku. Sakshi for sometime. During interaction, considering the rural background in which she is living, we found her to be quite smart and communicative. When we specifically asked her about her wishes to stay overnight with her mother she stated that she is willing to go to her mother, but not immediately. We asked her about the cordiality of atmosphere when she visits her mother to which she replied positively and affirmatively. To the question as to by what means her elder sister Ku. Astha goes to school she informed that she goes in a school bus, therefore, it appears proper educational facility is provided to the elder daughter which can also be extended to Ku. Sakshi.
10. In course of hearing it was informed to us that the husband has already filed a divorce petition against the wife, therefore, the wife apprehends that if the husband performs second marriage, her daughter Ku. Sakshi would be left at the mercy of the stepmother. Therefore, considering the Indian system of family life and particularly the relation between the

stepmother and stepchildren, it may not augur well for Ku. Sakshi's future to allow her to stay with her father throughout the life. In any case, Ku. Sakshi is deprived of the love and affection of her natural mother.

11. Reiterating the well settled legal position that while deciding the dispute pertaining to custody of minor, Courts should keep in mind the paramount interest of the minor, the Supreme Court, in a recent decision rendered in **Purvi Mukesh Gada v. Mukesh Popatlal Gada and Another**¹, has held that it was incumbent upon the High Court to find out the welfare of the children before passing the order regarding custody because the welfare of the child is the supreme consideration in such matters.
12. In yet another recent judgment rendered in **Roxann Sharma v. Arun Sharma**² the Supreme Court has held thus :

10. Section 6 of the HMG Act is of seminal importance. It reiterates Section 4 (b) and again clarifies that guardianship covers both the person as well as the property of the minor; and then controversially states that the father and after him the mother shall be the natural guardian of a Hindu. Having said so, it

¹ (2017) 8 SCC 819

² (2015) 8 SCC 318

immediately provides that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. The significance and amplitude of the proviso has been fully clarified by decisions of this Court and very briefly stated, a proviso is in the nature of an exception to what has earlier been generally prescribed. The use of the word "ordinarily" cannot be overemphasised. It ordains a presumption, albeit a rebuttable one, in favour of the mother. The learned Single Judge appears to have lost sight of the significance of the use of the word "ordinarily" inasmuch as he has observed in paragraph 13 of the Impugned Order that the Mother has not established her suitability to be granted interim custody of Thalbir who at that point in time was an infant. The proviso places the onus on the father to prove that it is not in the welfare of the infant child to be placed in the custody of his/her mother. The wisdom of Parliament or the Legislature should not be trifled away by a curial interpretation which virtually nullifies the spirit of the enactment.

11. We shall now consider the relevance of the precedents cited before us by the learned Senior Counsel for the Father. In *Sarita Sharma v. Sushil Sharma*, in defiance of the orders passed by the Jurisdictional Court in

U.S., the mother, Sarita, had returned to India with two children from their matrimonial relationship. The High Court viewed that the divorce decree and custodial directions having emanated from a competent Court deserve to be honoured, and accordingly allowed the Habeas Corpus Petition and directed the mother to return the custody of the children to the father, Sushil. This Court was not persuaded that further consideration by Courts in India as to whether the interests of the children, which were paramount, stood foreclosed and could not be cogitated upon again. As regards Section 6 of the HMG Act, it opined that although it constitutes the Father as a natural guardian of a minor son it could not be considered as superseding its paramount consideration as to what is conducive to the welfare of the minor. These observations were reiterated and this Court reversed the decision of the High Court holding that the interests and welfare of the children dictated that the custody should be with their mother. This case, therefore, militates against the legal and factual position which the Father seeks to essay before us. It is also important to underscore the fact that both the children were over the age of five, a fortiori, the custody should not have been reversed in the case in hand by the High Court

from the Mother to the Father since Thalbir was then around one year old and is presently still less than three years old.

13. In the light of what has been discussed above, it is also important to bear in mind a very germane biological aspect of the matter concerning puberty, privacy and care needed to a girl child at age between 10 to 15 years. At this juncture of life, the girl needs special care and attention of the mother. There are certain biological changes, which a girl child undergoes during this age, which cannot be taken care of by the father.
14. Thus, considering all the relevant aspects of the matter, we are of the considered view that the trial Court is fully justified in directing handing over custody of the girl child Ku. Sakshi to the mother (respondent herein).
15. As a sequel, the appeal, *sans* merit, is liable to be and is hereby dismissed, leaving the parties to bear their own cost(s).
16. A decree be drawn accordingly.

Sd/-

Judge
Prashant Kumar Mishra

Sd/-

Judge
Arvind Singh Chandel

