

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**First Appeal (M) No. 12 of 2016****Order Reserved on 18.01.2017****Order Delivered on 16.02.2017**

Itwari Lal Bareth, aged about 55 years, son of Shri Rungu Ram Bareth, resident of village – Dumarpara, Tahsil Sakti Janjgir-Champa, District Janjgir-Champa, Chhattisgarh.

---- Appellant/ Non-applicant**Versus**

Mohan Bareth, aged about 35 years, son of Shri Nathu Ram Bareth, resident of village – Kumharikala, post – Sarhar, P.S. Baradwar, Tahsil – Champa, District Janjgir-Champa, Chhattisgarh.

---- Respondent/ Applicant

For the Appellant	:	Shri Malay Kumar Bhaduri, Advocate.
For the Respondent	:	Shri Ashutosh Shukla, Advocate.

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice Rajendra Chandra Singh Samant****CAV JUDGMENT****Per R.C.S. Samant, J.**

1. This appeal has been preferred against the judgment and decree dated 21.12.2015 passed by the Judge, Family Court, Korba, District Korba, Chhattisgarh in Case No. 03 of 2015, whereby the application filed by the respondent under Section 10 of the Guardians and Wards Act, 1890 (for short 'the Act') was allowed and he was declared as guardian of minor girl Kumari Asha Bareth.

2. Briefly stated facts of the case are that the respondent moved an application under Section 10 of the Act, that Smt. Monika Bareth, mother of the minor girl, murdered her husband - Mukesh Bareth, who was father of

minor girl Ku. Asha Bareth. Smt. Monika Bareth was convicted by the Sessions Court, Korba and sentenced with life imprisonment. Respondent – Mohan Bareth is elder brother of deceased Mukesh Bareth. It was also pleaded that being a close relative of the deceased, the minor child should be under the guardianship of the respondent/ applicant. It was alleged that the appellant has unauthorizedly detained the minor girl of Smt. Monika Bareth for which he has no legal entitlement. It was further pleaded that the respondent/ applicant has entitlement of being a close relative of the minor girl and in the interest of the minor girl as also for the reason that the mother of the minor girl was convicted and undergoing sentence of life imprisonment, the minor girl should be in his guardianship. On the basis of these pleadings, it was prayed that the respondent/ applicant be appointed as guardian of minor Ku. Asha Bareth.

3. Notice sent by registered post to the appellant/ non-applicant was returned unserved with a note of refusal and on this ground, *ex parte* proceedings were ordered by the court below. The appellant/ non-applicant appeared before the Court below on 17.12.2015 and filed an application under Order IX Rule 7 of the Code of Civil Procedure which was rejected by the Court below on 21.12.2015 and thereafter on the same day the impugned judgment was passed and the decree was drawn as detailed above. Against the said judgment and decree, the present appeal has been filed by the appellant/ non-applicant.

4. The grounds taken in this appeal are that the impugned judgment is perverse, bad in law and as such it is liable to be set aside. Learned Court below has failed to conduct a proper enquiry as contemplated under the

Guardians and Wards Act, 1890. No proceeding was conducted about questioning the minor girl about her wishes by the Family Court. Presently, minor Ku. Asha Bareth is residing with the appellant, who is her maternal grandfather. The order passed by the learned Family Court rejecting the application under Order IX Rule 7 of the CPC was arbitrary. On these grounds, it is prayed that the appeal be allowed and the impugned judgment and decree be set aside.

5. It is submitted by learned counsel for the appellant that the Court below has erroneously decided the case. After rejecting the application of the appellant for setting aside the *ex parte* order, the Court below has not considered the issue of guardianship in accordance with Section 17 of the Act. It is true that the interest of minor is of paramount importance, for which it is the duty of the court to ensure in all respects that the welfare of child is taken care of in all respects. In this regard, reliance has been placed on the judgments of the Apex Court in **Anjali Kapoor vs. Rajiv Baijal** reported in **2009(III) MPJR (SC) 169**, **Mohan Kumar Rayana vs. Komal Mohan Rayana** reported in **2010 AIR SCW 2504** and **Gaurav Nagpal vs. Sumedha Nagpal** reported in **2008 AIR SCW 7687**.

6. Present is a case where the question of guardianship of minor Ku.Asha Bareth has been decided *ex parte*. Firstly, it is true that the appellant/ non-applicant avoided the service of notice and then appeared before the Court below with a prayer to set aside the *ex parte* order which was rejected. The point for consideration in this appeal is whether the interest of minor has been given due consideration by the Court below in the proceeding, which was heard *ex parte*.

7. The impugned judgment has been passed only on the basis of pleadings and *ex parte* statement of respondent – Mohan Bareth. The grounds in the appeal disclose that the appellant is maternal grandfather of Ku. Asha Bareth and it is not disputed that presently minor – Asha Bareth is in fact under the guardianship and care of the appellant. By the impugned judgment and decree, simply a declaratory relief has been given that the respondent/ applicant is declared as guardian of the person of minor Ku. Asha Bareth. No order has been passed by the learned Family Court with regard to transfer of custody of the minor girl. The requirement under Section 17(1) of the Act is as follows:

1. **'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)
- (3)'

8. In the impugned judgment, the learned Family Court has only relied upon the statement of the respondent/ applicant who was not put in cross-examination and in rebuttal no opportunity was given to the appellant. It is mentioned in the impugned judgment that the appellant/ non-applicant was present in court and has stated that he has no objection in giving the minor Ku. Asha Bareth in the guardianship of the respondent. However, no such statement of the appellant was recorded or the statement of no objection was mentioned in the order-sheet of the relevant date i.e. 21.12.2015, mentioning consent of the appellant in the judgment which seems to be

contrary to the stand taken by the appellant before the learned Family Court and in this appeal.

9. The finding of the Court below had been, that the elder sister of minor Ku. Asha Bareth is already in custody of the respondent and the respondent is a close relative, it would be safe for the minor girl to be in the custody of the respondent/ applicant. It is not the question of safety which has to be appreciated by any Court while deciding any such application, but consideration has to be given to the welfare of the minor.

10. Apart from that, no effort has been made by the Court below to consider the welfare of minor girl as per the guidelines laid down under Section 17 of the Act. This provision is mandatory, which has to be strictly followed for consideration of the welfare of the minor child. The grounds taken for rejection of the application under Order IX Rule 7 of the CPC before the court below cannot be taken into consideration in this appeal. Section 96(2) of the CPC provides that an appeal may lie from an original decree passed *ex parte*. Hence, this appeal has to be decided on merits. On merits, it is found that the learned Court below has given the finding on erroneous grounds without following the guidelines laid down under Section 17 of the Act and as such the impugned judgment is bad in law.

11. In view of the above discussion, the present appeal is allowed and the impugned judgment and decree dated 21.12.2015 is set aside.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(R.C.S. Samant)
Judge