

HIGH COURT OF CHHATTISGARH, BILASPUR**Reserved on 23-2-2018****Delivered on 12-3-2018****FAM No. 180 of 2017**

Bharat Sahu S/o Kripa Ram Aged About 28 Years Street No. 5, Deepak Nagar, Durg Tahsil And District Durg, Chhattisgarh

---- Appellant**Versus**

1. Smt. Chitralekha Sahu W/o Bharat Sahu, Aged About 26 Years R/o C/o Jeevan Lal Chandrakar, R/o Behind Sahu Sadan, Kelabadi, Ward No. 40, Durg Chhattisgarh
2. Vedant Sahu Son Of Bharat Sahu, Aged About 2 and Half Years, Through Legal Guardian Father Bharat Sahu (Appellant) R/o Street No. 5, Deepak Nagar, Durg, District Durg Chhattisgarh

---- Respondents

For Appellant	:	Shri Shikhar Sharma, Advocate
For Respondents	:	Shri Praveen Dhurandhar, Advocate

Hon'ble Shri Thottathil B. Radhakrishnan, Chief Justice
Hon'ble Shri Sharad Kumar Gupta, Judge

C.A.V. JUDGMENT**Per Sharad Kumar Gupta, Judge**

1. In this appeal, the challenge levied is to the order dated 30.08.2017 passed by the First Additional Principal Judge, Family Court, Durg in Civil MJC No. 3/2016 vide Annexure A-1 whereby and whereunder she ordered that respondent No.1 – Chitralekha Sahu is entitled to get the custody of the minor son, respondent No.2 – Vedant Sahu.
2. This is admitted by the appellant that his marriage was solemnized with respondent No. 1 in Bhilai on 24.06.2009, out of their wedlock respondent No.2 was born on 03.09.2010; Respondent No.1 lived with him in his

parental house at Deepak Nagar Durg till 15.06.2010; during this period she became pregnant; he was convicted and sentenced for imprisonment for life in a murder case; he had preferred an appeal before this Court which is yet pending consideration; he has been released on bail by order of this Court, on 06.01.2013 he took respondent No.2 from the house of respondent No. 1; respondent No. 2 was living with respondent No. 1; respondent No. 1 is in service and living in Dallirajhara.

3. In brief, case of respondent No.1 is that the appellant was impeaching her character. On 06.01.2013 the appellant had not left respondent No.2 in her house, the appellant refused to send back respondent No.2 to her house.

4. In brief, case of appellant is that respondent No.1 had sent him message that she is inclined to marry with one Dilip Verma. On 7.01.2013 he had gone to the house of respondent No. 1 to leave respondent No. 2 but respondent No.1 had told that she does not want to keep respondent No.2 because he is the mark of sin. He is maintaining respondent No. 2 well. Respondent No. 1 uses to ply daily up and down from Dallirajhara to her service place, thus, respondent No. 2 would not get good education and proper maintenance.

5. The First Additional Principal Judge, Family Court, Durg decided the application of respondent No.1 filed under Section 7 of the Guardians and Wards Act, 1890 (hereinafter called as "the Act of 1890") as aforesaid. Being aggrieved the appellant preferred this appeal.

6. Shri Shikhar Sharma, counsel for the appellant argued that respondent No. 1 had refused to keep respondent No. 2 saying that he is mark of sin. Respondent No. 1 uses to travel daily up and down from Dallirajhara to her working place which is 30 km away from Dallirajhara. She had told that she will marry with some other person with whom she is in love. Thus, the order

Annexure A-1 may be set aside.

7. Shri Praveen Dhurandhar, counsel for respondent No.1 argued that the order Annexure A-1 is just and proper and does not call for interference by this Court.

8. In the case in hand a small child near about 6 and half years old is the subject matter of the big problem that has arisen between his father and mother as to who is entitled to get his custody. The innocent child who would have busy in playing, education, enjoying childhood, is travelling with his father and mother in temple of justice.

9. The company of both father and mother with child is always helpful in his/her complete development who naturally understand his/her sentiments, problems, etc. Absence of the company of any of the spouse may affect his / her life adversely.

10. In the case in hand it is not possible for the parents to live together. Thus this Court is left with option to decide the case in hand on strength of the merit.

11. Now, the considerable point for adjudication of the dispute in the case in hand is as to whether respondent No. 1 is “able and competent person” to get the custody of respondent No. 2, looking to his interest and welfare.

12. During the recording of the examination-in-chief by the Court, AW 1 Smt. Chitrlekha Sahu has stated her occupation as Shikshakarmi Class -I. She says in para 17 that she has studied upto M.Sc. Microbiology, PGDCA, B.Ed. There is no such evidence on record on the strength of which it could be said that she is not allegedly Shikshakarmi Class-I and her above-said statement is not believable. Looking to this circumstance and concerned admitted fact, this Court finds that the respondent No. 1 is in the post of

Shikshakarmi Class I and she is a highly educated lady.

13. AW 1- Smt. Chitralekha Sahu says in para 29 that her posting place is 14 km away from Dallirajhara.

14. There is no such evidence on record on the strength of which it could be said that aforesaid statement of AW 1 is not believable. Looking to this fact and concerned admitted fact, this Court finds that distance from Dallirajhara to his working place is 14 km which not too far.

15. This is not appellant's case that when respondent No. 2 was living with respondent No. 1, she was allegedly neglecting him and was not keeping him well, not providing proper maintenance to him. The appellant had not given suggestion to respondent No. 1 during her cross-examination that she has allegedly love affair with Dilip Verma. On 7-1-2013, the respondent No. 1 allegedly refused to keep the respondent No. 1 saying that respondent No. 2 is mark of sin, as per his case. More over, the appellant has not proved any letter, notice, report, document of meeting of their community in which said facts have been mentioned. For not doing so, there is no explanation from the appellant.

16. N.A.W. 1 Bharat Sahu himself says in para 14 that respondent No. 1 comes in his house to see respondent No. 2 in every week.

17. Looking to the above-mentioned circumstances, this Court disbelieves appellant's case that respondent No. 1 had love relation with Dilip Verma, she had allegedly refused to keep respondent No. 1 saying that he is the mark of sin.

18. This is admitted fact that respondent No. 2 was residing with respondent no. 1 before 6-1-2013. The appellant did not initiate any legal proceeding to get custody of the ward respondent No. 2 from the custody of

respondent No. 1. For not doing so, he has not given any plausible explanation.

19. This is admitted that the appellant has been convicted in a murder case and sentenced with imprisonment for life and now he has been released on bail by the order of the High Court.

20. It would be pertinent to mention the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956 (hereinafter called as “the Act of 1956”) which reads as under :-

“6. Natural guardians of a Hindu minor - The natural guardian of a Hindu minor, in respect of the minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (*vanaprastha*) or an ascetic (*yati or sanyasi*).

Explanation.—In this section, the expression “father” and “mother” do not include a step-father and a step-mother.”

21. From the plain reading of the provisions of Section 4(2) of the Act of 1890 and Section 4(b) of the Act of 1956 it is unequivocal that guardianship postulates control over both the person as well as the assets of a minor or of

one and not to the other. Section 6 of the Act of 1956 is of seminal importance. The provisions of Sections 6(a) postulates that custody of an infant or a tender aged child should be given to his/her mother unless the father proved by cogent evidence that likelihood of the welfare and interest of the child being undermined or jeopardized.

22. Appellant failed to show that why respondent No. 1 is not entitled to get preference in getting custody of the respondent No. 2.

23. In the case in hand, respondent No. 2 was two and half years old at the time of filing of the aforesaid application i.e. 18-3-2013.

24. In the case in hand, looking to the age of the respondent No. 2 it could not be said that the respondent No. 2 is old enough to form an intelligent preference, thus, this Court had not asked to the respondent No. 2 about his preference as provided in Section 17(3) of the Act of 1890.

25. In **Ram Kishore Singh -v- Nirmala Devi Kushwaha and another** [2006(3) MPHT 156] the Division Bench of High Court of Madhya Pradesh while dealing with Section 25 of the Act of 1890, held that regarding custody of minor, welfare of the minor is paramount consideration. Legal right of guardian is always subordinate to question of welfare of the minor. Claim to custody of minor is not a claim to property. It is in nature of trust for the benefit of the minor child. An order for returning of the minor to guardian cannot be passed unless it is established that he was taken away from the custody of guardian.

26. In the matter of **Bholaram -v- Parvati Sahu** [2011 CGLJ V-28 Pg. 478], in which the appellant was father of 6 years old Dhairya Kumar Sahu, his mother Smt. Yogita Sahu died of burn injuries on 28-1-2005 and a sessions trial for offence under Section 306/34, IPC was pending against the

appellant and his other family members, since then the minor was in the custody of his Nani respondent, appellant filed application under Section 25 of the Act of 1890 for custody of his son which was rejected by the trial Court, hence the appeal was filed, the Division Bench of this Court observing that the appellant had contracted second marriage and facing sessions trial, it was not shown that the minor child was not happy with maternal grand mother who was imparting his proper education, held that, no reason to disturb the custody of minor is found, and dismissed the appeal but gave visitation rights to the child to the appellant.

27. In the matter of **Shyamrao Moroti Korwate -v- Deepak Kisanrao Tekam** [2010(10) SCC 314], while dealing with Section 13 read with Section 7 of the Act of 1890, the Hon'ble Supreme Court held that welfare of the minor and not the rights of the parents or the relatives, is of paramount importance.

28. In the matter of **Gaytri Bajaj -v- Jiten Bhalla** [(2012) 12 SCC 471], while dealing with Section 7 of the Act of 1890 and Section 6 of the Act of 1956, Hon'ble Supreme Court has held that interest and welfare of the minor should be treated as being of paramount importance.

29. Looking to the above mentioned facts and circumstances of the case, concerned admitted facts where it has been earlier decided that, respondent No. 1 is a highly educated woman, she is in service as Shiksha Karmi Class 1, her place of posting is not too far from her place of residence, that is Balod, she has no love affairs with Dilip Verma, she never neglected respondent No. 2, she had never told that respondent No. 2 is the mark of sin, she never refused to keep respondent No. 2 with her, appellant is a convicted person in a murder case and sentenced with imprisonment for life, appellant did not initiate any legal proceedings to get the custody of the

respondent No. 2, earlier respondent No. 2 was in the custody of respondent No. 1, looking to the aforesaid judicial precedents and the judicial precedent laid down by Hon'ble Supreme Court in **Roxonn Sharma -v- Arun Sharma** [(2015) 8 SCC 318], this Court finds that the respondent No. 1 is able and competent to get the custody of the ward respondent No. 2 considering his welfare and interest.

30. Looking to the facts and circumstances of the case and material placed on record, this Court finds that the impugned order of the trial Court Annexure A-1 does not suffer from any illegality or jurisdictional error. Thus, we affirm the Annexure A-1.

31. In the result, the appeal being devoid of substance deserves to be and is hereby dismissed.

Sd/-
(**Thottathil B. Radhakrishnan**)
Chief Justice

Sd/-
(**Sharad Kumar Gupta**)
Judge