

HIGH COURT OF CHHATTISGARH, BILASPURCivil Revision No.125 of 2017

Quaynat Anjum, W/o. Mohammad Ajaj Khan, aged about 31 years,
R/o. Chhotapara, Behind Primary School Lane, Chhotapara,
Raipur, District Raipur (CG)

--- Applicant

Versus

Asif Khan, S/o. Late Abdul Jabbar Khan, aged about 39 years, R/o.
Behind Raja Masjid, Maudahapara, Raipur, Tahsil and District
Raipur (CG)

--- Respondent

For Applicant	:	Mr.Manoj Paranjape, Advocate
For Respondent	:	Mr.D.N.Prajapati, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

11/04/2019

1. The petitioner takes exception to the order dated 17.4.2017 by which her application under Order 7 Rule 11 of the CPC has been rejected by the First Additional Principal Judge, Family Court, Raipur in Case No.289/2012.
2. The instant dispute between the parties relates to custody of the ward Master Wahid Khan, aged about 11 years. In the first round of litigation, the Family Court, Raipur directed custody of Master Wahid Khan to the respondent/father, which the petitioner challenged before the appeal Court. The Division Bench of this Court on 13th September, 2011 set-aside that order subject to certain conditions and that order has become final. Now the respondent/father again filed an application on 23.7.2012 for custody of ward Master Wahid Khan under Section 25 of the Guardians and Wards Act, 1890 (hereinafter called as 'the Act of

1890'), in which the present applicant has filed an application under Order 7 Rule 11 of the CPC. That application was rejected by the Family Court, against which, this civil revision has been preferred.

3. Mr. Manoj Paranjape, learned counsel for the applicant, would submit that the Family Court is absolutely unjustified in rejecting the application as earlier order regarding custody of ward would have the effect of res-judicata and the Family Court cannot re-examine the fact which were already examined between the parties on the issue of custody, therefore, the impugned order is liable to be set aside.
4. Mr. D. N. Prajapati, learned counsel for the respondent, would support the impugned order and submit that the Family Court is absolutely justified in rejecting the application under Order 7 Rule 11 of the CPC.
5. I have heard learned counsel for the parties and considered their rival submissions hereinabove and also went through the records with utmost circumspection.
6. In the earlier round of litigation, the Division Bench of this Court on 13.9.2011 in appeal preferred by the applicant and two others has held as under:-

“14. Consequently, the appeal is partly allowed. The order impugned dated 31-1-2011 passed by the Principle Judge, Family Court, Raipur in Civil MJC No.18/2010 is modified.

(1) Absolute custody of ward Wahid Khan shall be with appellant No.1 and she shall not part custody of the ward to appellant No.2 or to any person.

(2) The respondent is entitled to fortnightly visit his ward in the house of appellant No.1 or at the place suggested by her in writing on Sundays and in case of

willingness of the ward of his temporary visit with the respondent, then after eight months from today, after getting permission in writing from the Family court, the respondent may take the ward Wahid Khan with him on such visiting days i.e. Sunday between 8-9 a.m. till 6 p.m. and shall return back the ward to appellant No.1.

(3) If appellant No.1 fails to comply condition No. (1), the respondent is at liberty to revive the petition for custody before the Court concerned.”

7. The Supreme Court in the matter of **Dhanwanti Joshi v. Madhav**

Unde¹ has held that orders relating to custody of children are by their very nature not final, but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances and the order would operate as res-judicata. It was observed as under:-

“21. It is no doubt true that orders relating to custody of children are by their very nature not final, but are interlocutory in nature and subject to modification at an future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interests of the child (Rosy Jacob vs. Jacob a. Chakramakkal²). However, we may state that in respect of orders as to custody already passed in favour of the appellant the doctrine of res judicata applies and the family Court in the present proceedings cannot re-examine the facts which were formerly adjudicated between the parties on the issue of custody or are deemed to have been adjudicated. There must be proof of substantial change in the circumstances presenting anew case before the court. It must be established that the previous arrangement was not conducive to the child's welfare or that it has produced unsatisfactory results. Ormerod L.J. pointed out in S v. W³ [Fam Law at p. 82 (CA) that

"the status quo argument depends for its strength wholly and entirely on whether the status quo is satisfactory or not, the more satisfactory the status quo, the stronger the argument for not interfering. The less satisfactory the status quo, the less one requires before deciding to change".

1 (1998) 1 SCC 112

2 (1973) 1 SCC 840

3 (1981) 11 Fam Law 81

8. Reverting to the facts of the present case, it is quite vivid that the Division Bench of this Court has given liberty to the respondent to make an application for custody before the Court concerned if the applicant (appellant No.1 therein) fails to comply condition No.1 i.e. if she parts the custody of ward to appellant No.2 or to other person therein. In the application filed before the Family Court, there is no whisper that the applicant has either parted the custody of the ward to other person except alleging some lodgment of FIR and publication of some news and if condition No.2 has not been complied with, then remedy of the respondent is to proceed in accordance with law to get the order complied with as ordered by the Division Bench of this Court. Non-compliance of condition No.2 would not give liberty to the respondent to file an application for custody before the Family Court. Learned Family Court has proceeded on the assumption that even non-compliance of condition No.2 of the order would entitle the respondent to make an application for custody of the child.
9. In view of the above, the impugned order is set aside. The application under Order 7 Rule 11 of the CPC is restored to the Family Court for hearing and disposal in accordance with law. The Family Court would decide the application under Order 7 Rule 11 of the CPC afresh and then proceed in accordance with law on its own merit.
10. The civil revision is allowed to the extent indicated hereinabove. The matter is pending before the Family Court, Raipur

since 24.6.2012. The Family Court is directed to conclude the trial within three months from the date of receipt of copy of this order.

No cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

B/-