

HIGH COURT OF CHHATTISGARH, BILASPURJudgment reserved on 19-02-2021Judgment delivered on 03-09-2021FAM No. 136 of 2018

[Arising out of judgment and decree dated 4-4-2018 passed by the Judge, Family Court, Rajnandgaon, in civil suit No.131-A/2015]

1. Kamlesh Kumar S/o Trilochan Sahu, Aged About 30 Years R/o Village Singhibhedi, Tahsil Mohala, Thana Chilhati, District Rajnandgaon, Chhattisgarh.....(Original Applicant)

---- Appellant

Versus

1. Chintaram S/o Bodhanlal Sahu, Aged About 53 Years
2. Smt. Heeramoti Sahu W/o Chintaram Sahu, Aged About 48 Years

Both R/o Village Domhatola, Near Padumtara, Thana Dhumka, Tahsil And District Rajnandgaon Chhattisgarh.....(Original Non-Applicant)

---- Respondents

For Appellant	Mr. Sachin Singh Rajput, Advocate
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For Respondents	Mr. Malay Shrivastava, Advocate
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(Proceedings through Video Conferencing)Hon'ble Mr. Prashant Kumar Mishra, Ag. CJ.Hon'ble Mrs. Rajani Dubey, J.CAV Judgment

The following judgment of the Court is delivered by ***Prashant Kumar Mishra, Acting Chief Justice.***

1. In this appeal challenge is to the judgment and decree passed by the Family Court, Rajnandgaon dismissing the appellant's

application under Section 25 of the Guardians and Wards Act, 1890 for custody of his minor daughter namely; Vaishnavi.

2. The appellant was married with Tejeshwari @ Teja Bai (since deceased), daughter of the respondents, on 11-5-2013. Daughter Vaishnavi was born out of the wedlock on 11-9-2014. The naming ceremony (*Namakarana Sanskar*) of the newly born daughter was scheduled to be held on 17-10-2014, however, the wife of the appellant Tejeshwari committed suicide the day before the function i.e. on 16-10-2014. An offence under Section 306 read with Section 34 of the Indian Penal Code was registered against the appellant and his parents, however, they were acquitted of the charge vide judgment of acquittal dated 16-6-2015 rendered by the Sessions Judge, Rajnandgaon, in ST No.89 of 2014, which is under challenge before this Court ACQA No.178 of 2015.
3. Application was moved on pleadings that the appellant is a Teacher and has 10 acres of agricultural land at Rajnandgaon, therefore, he having sufficient means to raise his daughter and secure a bright future for her and also for the fact that he has not performed second marriage, he is entitled to seek custody of his minor daughter.
4. The respondents (in-laws of the appellant) denied the allegations. According to them, before the appellant's marriage with their daughter Tejeshwari he threatened that if they were not married, he will not allow Tejeshwari to marry any other boy. Due to this threat, marriage of Tejeshwari was solemnized with the appellant. Soon after the marriage the appellant used to commit physical cruelty, which continued despite knowing that she is carrying pregnancy and he always expressed that he does not want child. Tejeshwari came to her parental house in July, 2014 for appearing in B.Sc. examination; for proper care during pregnancy; and for delivery. During this period the appellant never visited Tejeshwari

to enquire about her well being. On 9-10-2014 he forcibly took away the deceased and the newly born daughter. Thereafter, he informed them on 16-10-2014 that Tejeshwari has committed suicide. The appellant used to threaten that he will perform second marriage because Tejeshwari has failed to deliver a baby boy and that he was having an affair with the daughter of Ghanshyam Sahu of village Singabedi. He used to keep photo of that girl with him and used to bring and drop her at Dongargaon BTI. Due to this reason there was always a dispute between the appellant and the deceased. It was also specifically stated in the reply filed by the respondents that during rituals after the death of Tejeshwari, the mother of the appellant namely; Ramshila Sahu handed over the newly born daughter of the appellant to the respondent No.2 by saying that they do not have any person to take care of the child, therefore, respondent No.2 should keep the child with her.

5. Before proceeding to deal with the merits of the case, it would be appropriate to notice the principles which govern decision on dispute concerning custody of child.
6. 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 ***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.
7. In yet another judgment rendered in ***Roxann Sharma v. Arun Sharma*²** the Supreme Court has held thus :

1 (2017) 8 SCC 819

2 (2015) 8 SCC 318

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 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.

8. While dismissing the appellant's prayer for custody of his daughter the trial Court has observed that the mother of the appellant herself handed over the child to the respondent No.2 and since thereafter neither the appellant nor his parents have ever enquired about the child nor visited her even on any singular occasion nor provided any amount of maintenance, therefore, merely because father (appellant) is the natural guardian, the custody of the minor daughter cannot be handed over to him.
9. In his statement before the Court, the appellant admits that he has never met his daughter after she was handed over in possession of the respondent No.2. He also admits that in his service book he has not entered the name of his daughter as his nominee and further that albeit he joined service in 2009, he never applied for amendment in the service book for making his daughter as nominee. Appellant's mother has not entered the witness box to controvert the pleadings in the written statement or in the deposition of the respondent No.1 Chintaram Sahu (DW-1) that

she had handed over custody of minor girl to the respondent No.2 by saying that there is no one to raise the daughter, therefore, the respondent No.2 should take care of her well being.

10. Thus, it really becomes important that when the appellant had no love and affection for his newly born daughter, who was only one month old when her possession was handed over by his mother to his mother-in-law (respondent No.2 herein), nor any effort was made by him seeking her custody soon thereafter and he waited for the criminal trial to be over. It does not impress our judicial conscience that the appellant is really interested in the well being of his daughter.
11. The learned trial Court is fully justified in observing that merely because the appellant is natural guardian of his minor daughter, the issue of custody cannot automatically be decided in his favour. The welfare of the minor is a proposition, which depends on a host of factors. Sufficient means to raise the minor is one of the factors, which governs the issue of welfare of minor, but that cannot always be the sole determining factor. If the mother or father, who is seeking custody of the minor does not have attachment with the child in real sense, it will discourage the Court to direct handing over custody to such appellant.
12. The appellant or his mother having handed over the custody of minor daughter to the respondent No.2 and thereafter never visiting his daughter, is by itself sufficient to conclude that he does not have such love and affection for his daughter, which would entitle him to seek her custody.
13. The impugned judgment and decree rendered by the trial Court is based on sound reasoning born from the facts and circumstances of the case, therefore, we are not inclined to interfere with the same.

14. Shri Sachin Singh Rajput, learned counsel for the appellant, has also argued that the Court below should have allowed visitation rights in favour of the appellant because he is the natural guardian of the minor daughter.
15. Respondents, appearing through Shri Malay Shrivastava, learned counsel, have contested this argument by saying that when the appellant has never tried to visit his daughter, he is not entitled to visit his daughter.
16. Having considered the submissions advanced by the learned counsel for the parties on the issue of allowing visitation rights and considering the facts and circumstances of the case, we are of the considered view that the appellant being the father and natural guardian is entitled to visit his daughter.
17. Accordingly, we direct that the appellant shall be allowed to meet his daughter Ku. Vaishnavi for one (01) hour between 11.00 am to 12.00 noon on first Sunday of every month at the Panchayat Bhawan of village Domhatola, Near Padumtara, Police Station Dhumka, Tahsil & District Rajnandgaon where the respondents reside. It is further directed that during such meeting the parties shall maintain amicable atmosphere and shall not raise any dispute or quarrel.
18. As an upshot, the appeal *sans* merit is liable to be and is hereby dismissed. However, the appellant is allowed the visitation rights as mentioned *supra*. No order as to cost(s).
19. A decree be drawn accordingly.

Sd/-

(Prashant Kumar Mishra)
Acting Chief Justice

Sd/-

(Rajani Dubey)
Judge

Gowri