SYED ROSHAN ZAMIR ALI

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AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

FA(MAT) No. 167 of 2024

1. Banmali Joshi S/o Late Jeevannath Joshi Aged About 44 Years R/o Karanji, Post Muli, Tahsil Bakawand, District : Bastar(Jagdalpur), Chhattisgarh

... Appellant

versus

1. Smt. Rita Joshi W/o Shri Banmali Joshi Aged About 40 Years R/o Through Father Shri Partheswar Prasad Pandey, Village Gufni, Post Retawand, District Bastar (C.G.) Presently Residing At Kalipur, Near Atal Awas, Dhobipara, Jagdalpur, District : Bastar(Jagdalpur), Chhattisgarh

... Respondent

For Appellant	:	Mr. Praveen K Tulsiyan, Advocate with Mr. Vikas Patel, Advocate
For Respondents	:	Mr. Keshav Dewangan, Advocate

DB: Hon'ble Mr. Justice Parth Prateem Sahu, J

& Hon'ble Mrs. Justice Sushma Sawant, J

Order on Board

Per Parth Prateem Sahu, J

28.10.2026

1. This appeal on behalf of husband-appellant has been filed being aggrieved by the order dated 12.03.2024 of the Family Court Jagdalpur, District Bastar, dismissing his application

filed under Section 7 of the Guardian and Wards Act, 1890 for grant of custody of his children namely Dudhesh Joshi and Kesar Joshi.

2. Necessary facts for disposal of this appeal are that marriage of appellant-husband and respondent-wife was solemnized on 20.04.2017 as per Hindu customs and rites. Out of their wedlock, they have two sons. Respondent had developed extra-marital affair with another person and due to this reason, respondent had ousted the appellant from his own house and since then appellant is residing separately. Respondent thereafter also got transferred the land over which house is constructed and her land in the name of her mother. Appellant had filed a suit seeking dissolution of marriage. Respondent is not allowing the appellant to meet the children and spend time with them. Therefore, appellant had sent legal notice through his advocate as also lodged complaint in Police Station Karpawand in this regard, but no action has been taken. Appellant made efforts many a times to meet the children but respondent did not allow him to meet. When the appellant requested the respondent to permit him to take the children in marriage function in the family, she refused. Respondent is posted as Nurse in the Health Department and being in emergency duty, she is unable to devote adequate time and attention to proper care of the

children, which is affecting the children's mental and physical development. Whereas, appellant is a Teacher, considering his family environment, his companionship with the children will be supportive and inspirational for their overall development. Appellant is the natural guardian of the children and as he has been deprived from his legitimate right to meet the children, he has been left with no other option but to file the application for grant of custody. For the healthy growth, physical and mental, of the children, it is necessary that they get the affection and filial love of the father. However, due to stubbornness and cruel behavior of respondent coupled with unwarranted interference of her brother, is adversely affecting the welfare of children and ruining their bright future.

3. Respondent wife filed reply to application and denied the averments made therein. It was pleaded that appellant had been negligent towards the children from very beginning. She has been solely taking care of the children's till date. Applicant is a man of suspicious nature and used to suspect her character always. All the allegations levelled by appellant are false and fabricated. Appellant himself left her and she is taking care of children alone while working. Even today she is ready to live married life with appellant. Hence, the application of appellant be rejected.

4. On appreciating the pleadings as well as evidence brought on record by the parties, learned Family Court, Jagdalpur, by the impugned order, dismissed the application under Section 7 of the Act of 1890 filed by the appellant and refused to grant custody of children to appellant on the ground that he failed to establish that he is entitled to get the relief of custody of minor children. Feeling dissatisfied, appellant- husband has knocked the doors of this Court by filing instant appeal.

5. Learned counsel for appellant submits that the impugned order passed by learned family Judge denying custody of children to appellant is perverse and contrary to the materials available on record. He submits that respondent-wife is having an extra-marital affair with another person, which is the cause of acrimony between the couple, and due to which, she ousted the appellant from the house. All the attempts made by appellant to meet his children were in vain and he was not permitted to meet them by respondent, which made him to file application under Section 7 of the Act of 1890.

6. He submits that there is no educational atmosphere at the place of respondent-wife and as such, she is not in a position to provide better education to the children, which would have adverse impact on the children. Appellant being a teacher by profession is well-aware about the modern and technical education and thus he is in a better position to provide the

proper and conducive educational environment. As such, overall development of the children will be conducive at the home of the appellant and he will be in a better position to take care of the children physically, mentally, spiritually and culturally and being a father,

7. This apart, respondent wife is a Nurse by profession and as such, her financial status is not good, therefore, if the children are allowed to remain in the custody of respondent and his family, then education as well as mental and physical welfare of minor child would be affected at large. Whereas, appellant is far better placed as compared to who though educated and employed, but not earning sufficient to fulfill all needs of her own and children both. Further, respondent-wife being a Nurse and always on emergency duty, therefore, she is further not in a position to provide due care and attention to the children. In these circumstances, if the custody of children is allowed to continue with respondent wife, their future would be ruined.
8. He submits that appellant has never abandoned his parental responsibilities and has, at all material times, been desirous of maintaining a meaningful relationship with his children. However, the respondent-wife has consistently deprived him of the opportunity to meet and interact with the children,

thereby adversely affecting the parental bond between the appellant and the children.

9. He further submits that the paramount consideration, while dealing with cases of grant of custody of child, is the welfare and the interest of the child. In the case in hand, learned family Court overlooked the fact that interest of children can best be protected, if their custody is handed-over to appellant, being natural guardian. Appellant is ready and willing to give all his attention, love and affection to the children, education in a good school and provide all the best, for the welfare of the children.

10. On the other hand, learned counsel for the respondent submitted that the appellant always ignored his wife and minor children and abandoned them. The children are living happily and comfortably with the respondent and are being provided good education and proper environment in the family and therefore, it cannot be said that children’s stay with respondent is in any way detrimental to their development, physically and mentally. Respondent is well educated and financially sound with a decent government job as a Nurse in Health Department to take care of her sons. She is taking much care on the children's’ welfare and education and happiness as a dutiful mother. She alone could be the proper and fit person to take case of the children and to bring them

up in a good and proper manner. There is no material placed by the appellant that continuance of the custody of the children with the mother is posing grave danger to life, limb, security, health and development of the minor. The children prefer their mother's company as the bonding between them is greater than the bonding with their father. Custody and interest of welfare of child is paramount consideration, not convenience and pleasure of parties. The welfare of the children is safe under the guise of the respondent.

11. We have heard learned counsel for the parties and perused the documents available in record.

12. A perusal of the impugned order indicates that the learned Family Judge has rejected the application of appellant for grant of custody taking note of admissions made by appellant in his evidence. In Para-16 of the cross-examination appellant admitted that during the COVID-19 pandemic, when his younger son had fallen ill, he did not visit him, stating that he had preferred to maintain distance at that time. Further, when questioned by the Court as to the name of the school in which his children were studying, the appellant took considerable time to respond and ultimately admitted that he was not aware of the school in which his two sons were studying. He was also unable to disclose the amount of school fees being paid, stating that respondent did not inform in this regard.

13. In Para-19 of his cross-examination, the appellant further admitted that he had been residing separately from the respondent since the year 2019 and that, after the academic session 2020–2021, he had stopped paying the school fees of the children. However, he has not produced receipt of school fee deposit to substantiate his contention that till 2020-2021, he was paying school fees of children. He also admitted that he had not been informed about the change of school of his children. Aforesaid evidence, when considered cumulatively, establishes that the respondent-wife has been residing separately with minor children since the year 2019, and their day-to-day responsibility has primarily been shouldered by her. Appellant has not brought on record any material to demonstrate that, during this period, he made any sincere efforts, either at the family or social level, to resolve the matrimonial discord and restore the family relationship. Nor has he been able to demonstrate his active involvement in the educational and other developmental activities of the children, such as attending parent-teacher meetings, participating in school functions or maintaining regular communication with their educational institutions. The record is also conspicuously silent as to any consistent arrangement made by him towards their maintenance and other essential needs. The appellant further failed to establish that, from the

year 2019 till date, he has made any substantial or consistent contribution towards education, upbringing or maintenance of his minor children, or that he has regularly provided financial assistance for their welfare. On the contrary, the circumstances emerging from the evidence indicate that the respondent, who is employed in Government service as a Nurse, has been discharging the responsibility of looking after both minor sons, namely, Dudhesh Joshi and Kesar Joshi, including their education, medical care, maintenance and overall development.

14. The principles in relation to the custody of minor child are well-settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" not rights of the parents under a statute for the time being in force. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its *parens patriae* jurisdiction arising in such cases.

15. In the matter of **Thrity Hoshie Dolikuka vs. Hoshiam Shavaksha Dolikuka** reported in **(1982) 2 SCC 544**, Hon'ble Supreme Court reiterated that only consideration of the Court in deciding the question of custody of minor should be welfare and interest of the minor, and it is the special duty and responsibility of the Court. Mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.

16. The Supreme Court in the case of **Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari,** reported in **(2019) 7 SCC 42** has held as under:-

> “26.The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.
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> 27. After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education,

intellectual development and favourable surroundings, in Nil Ratan Kundu [Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413] , it was held as under : (SCC pp. 427-28, paras 49-52)

> "49. In Goverdhan Lal v. Gajendra Kumar [Goverdhan Lal v. Gajendra Kumar, 2001 SCC OnLine Raj 177 : AIR 2002 Raj 148] , the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

17. The Supreme Court, in the matter of **Sheoli Hati v. Somnath Das**, reported in **(2019) 7 SCC 490** has held that purpose and object of the Guardians and Wards Act, 1890 is not mere

physical custody of minor but due protection of ward's health, maintenance and education and the power and duty of the Court under this Act is welfare of minor. It has further been observed as under :-

> "17. It is well settled that while taking a decision regarding custody or other issues pertaining to a child, welfare of the child is of paramount consideration. This Court in Gaurav Nagpal v. Sumedha Nagpal3, had the occasion to consider the parameters while determining the issues of child custody and visitation rights, entire law on the subject was reviewed. This Court referred to English Law, American Law, the statutory provisions of the Guardians and Wards Act, 1890 and provisions of the Hindu Minority and Guardianship Act, 1956, this Court laid down following in paras 43, 44, 45, 46 and 51: (SCC pp. 55-57)
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> > "43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force.
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> > 44. The aforesaid statutory provisions came up for consideration before courts in India in several cases. Let us deal with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into

account their interest and well-being as paramount consideration.

45. In Saraswatibai Shripad Vad v. Shripad Vasanji Vad4 the High Court of Bombay stated: (SCC OnLine Bom) "... It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the court. It is the welfare of the minor and of the minor alone which is the paramount consideration ..."

46. In Rosy Jacob v. Jacob A. Chakramakkal, this Court held that object and purpose of the 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The power and duty of the court under the Act is the welfare of minor. In considering the 3 (2009) 1 SCC 42 4 1940 SCC Online Bom 77 5 (1973) 1 SCC 840 question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

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51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must

> also weigh with the court as well as its physical well- being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases."

18. In ***Yashita Sahu v. State of Rajasthan,*** reported in ***(2020) 3 SCC 67***, the Hon'ble Supreme Court, while reiterating that the welfare of the child is the paramount consideration in matters relating to custody, also elucidated the significance of visitation rights and the necessity of maintaining meaningful contact between the child and both parents. The relevant observations made by the Hon'ble Supreme Court are reproduced herein below:

> “20. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.
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> 21. T***he child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he***

or she alone is entitled to the custody of the child. The court must therefore be very wary of what is said by each of the spouses.

22. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent, the other parent must have sufficient visitation rights to ensure that not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

23. T*he concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.*

24. Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance

from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks and holidays. the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

19. In a very recent case, Supreme Court in this matter of S***hazia Aman Khan v. State of Orissa, (2024) 7 SCC 564*** observed as follows:-

18. This Court in Mausami Moitra Ganguli v. Jayant Ganguli [Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673] , opined that the stability and security of the child is an essential ingredient for full development of child's talent and personality. Relevant paragraph thereof is extracted below : (SCC p. 679, para 23)

"23. Having bestowed our anxious consideration to the material on record and the observations made by the courts below, we are of the view that in the present case there is no ground to upset the judgment and order [Jayant Ganguli v. Mausami Moitra Ganguli, FA No. 755 of 2005, order dated 28-2-2007 (All)] of the High Court. There is nothing on record to suggest that the welfare of the child is in any way in peril in the hands

of the father. In our opinion, the stability and security of the child is also an essential ingredient for a full development of child's talent and personality. As noted above, the appellant is a teacher, now employed in a school at Panipat, where she had shifted from Chandigarh some time back. Earlier, she was teaching in some school at Calcutta. Admittedly, she is living all alone. Except for a very short duration when he was with the appellant, Master Satyajeet has been living and studying in Allahabad in a good school and stated to have his small group of friends there. At Panipat, it would be an entirely new environment for him as compared to Allahabad."

19. In Nil Ratan Kundu v. Abhijit Kundu [Nil Ratan Kundu v. Abhijit Kundu, (2008) 9 SCC 413] , this Court laid down the principles governing custody of minor children and held that *welfare of the children is to be seen and not the rights of the parties* by observing as under : (SCC pp. 428-29, paras 52 & 55)

> 52. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to the custody of minor, a court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor

> by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. I**f the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.**
> 55. We are unable to appreciate the approach of the courts below. This Court in a catena of decisions has held that the controlling consideration governing the custody of children is the welfare of children and not the right of their parents."

20. Very recently in case of ***Mohtashem Billah Malik v. Sanaa Aftab*** reported in **(2026) 7 SCC 658**, the Hon'ble Supreme Court reiterated that the welfare and best interests of minor children constitute the paramount consideration while determining the question of their custody. The Court, however, clarified that such determination cannot be made by considering the welfare of the children in isolation from the other relevant circumstances. Factors such as the conduct of

the parents, their respective financial capacities, standard of living, educational facilities and the comfort of the children are also relevant considerations which must be assessed cumulatively.

21. Keeping in view the aforesaid settled principles of law, when the facts and circumstances of present case are examined, this Court finds that the appellant has failed to establish that the welfare and best interests of the minor children would be better served by transferring their custody from the respondent-mother to him and if the children are allowed to remain under the care and custody of the respondent, some hardship would cause to them and their future will be affected and therefore, it may not be proper to entrust the custody of the children to the appellant-father.

22. Admittedly, both the sons of appellant and respondent are living with respondent-mother since the year 2019 and she has been continuously looking after their education, healthcare and other day-to-day requirements. Both the sons are studying in a convent school at Jagdalpur and in support thereof she has produced their report card for academic sessions 2022-23, perusal of which shows that the children are receiving proper education in an English Medium school and their report cards reflect that they have received ‘A’ and ‘A1’ grade respectively in all these years. According to

appellant himself, after the year 2021, he is not providing any assistance in maintaining the respondent and both their sons, except maintenance amount of Rs.3,000/- per month as ordered by the Court. Respondent being employed in government service, has a stable source of income and financial security, enabling her to take proper care and provide better education etc. to her sons. Thus, it is evident that respondent as a biological mother of the children is taking all care of their education and well-being. Whereas, appellant did not take any steps to seek custody of his sons immediately after separation from respondent on 24.12.2019 when he was allegedly not permitted to meet his sons by respondent and could file the application only on 12.4.2022, which is suggestive of the fact that he was not actively involved in the upbringing of his sons.

23. Though it has been contended on behalf of the appellant that respondent wife is employed as a Nurse and is always required to attend emergency duties and therefore, is not in a position to devote sufficient time in taking proper care of children. The paramount consideration is the overall welfare of the children, and not the professional commitments of either parent. In the present case, no cogent evidence has been brought on record to establish that the respondent's employment has adversely affected the care, education or

overall development of the children. On the contrary, the evidence indicates that she has been adequately discharging her parental responsibilities since 2019.

24. Considering the ability of means of the respondent/wife to take care of her sons; appellant father is not contributing towards educational expenses etc. of the children since 2021; it is the mother who has been taking care of the sons all alone including their educational expenses; appellant – father has filed the application for grant of custody only after lapse of more than 03 years from the date of separation and he also failed to bring on record any cogent material or specific instance to demonstrate that upbringing of the children in the custody of respondent-mother will spoil their future life, this Court finds no reason to take a view different from that taken by learned Family Court. Appellant is not entitled for custody of his sons namely Dudhesh Joshi and Kesar Joshi. At the same time, the respondent/mother is entitled to continue as guardian for the children namely Dudhesh Joshi and Kesar Joshi and their custody shall not be disturbed.

25. Indisputably, for proper upbringing of a child, he/she requires love, affection, care, company and protection of both the parents and it is not only requirement of the children but it is their basic human right. Therefore, in order to ensure that appellant’s sons keep in touch with him and does not lose

social, physical and psychological contact with any one of the two parents, appellant can be granted visitation rights to meet his sons so as to maintain parental bonding.

26. Accordingly, the appeal filed by the appellant being sans merit is hereby dismissed.

27. However, appellant/father is granted visitation rights to meet his sons namely Dudhesh Joshi and Kesar Joshi, regularly on 1st Sunday of every month at any neutral place like garden, restaurant etc. Each visit can last for a maximum period of three hours unless longer period is agreed to by respondent mother and children. The time and venue of meeting shall be fixed with the consent of both the parties and wishes of children. Appellant shall not be source of embarrassment and harassment in any manner and will behave like a responsible father while visiting the children. Respondent shall not disturb the appellant or children during the said visit.

28. A decree be drawn up accordingly.

Sd/- Sd/-

(Parth Prateem Sahu) **(Sushma Sawant)**
Judge Judge

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