AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FA (M) No. 163 of 2015

1. Smt. Kamla Bai Dansena W/o Subran Dansena, aged about 30 years, R/o Village Katanpali, Post Boda, Sariya, District Raigarh (C.G.).
2. Minor Yashwant Kumar S/o Subran Dansena, aged about 7 years, Guardian through natural mother Kamla Bai Dansena, R/o Village Katanpali, Post Boda, Sariya, District Raigarh (Chhattisgarh).
3. Jashwant Kumar S/o Subran Dansena, aged about 6 years, Guardian through natural mother Kamla Bai Dansena, R/o Village Katanpali, Post Boda, Sariya, District Raigarh (Chhattisgarh)

---- Appellants

Versus

- Subran Dansena S/o Bharat Dansena, aged about 38 years, Occupation Labourer, R/o Urja Nagar, Jhilkha Bahar, Basanpali, Indra Nagar, Tamnar, District Raigarh (Chhattisgarh).

---- **Respondent**

For Appellants :- Shri N. K. Chatterjee, Advocate
For the Respondent :- Shri Saleem Kazi, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board By
Prashant Kumar Mishra, J.

25-09-2017

1. Appellant is aggrieved by the order passed by the Family Court, Raigarh, allowing the respondent/father's application under Section 25 of the Guardians and Wards Act, 1890 whereby the custody of minor Yashwant Kumar, aged about 7 years and Jashwant Kumar, aged about 6 years has been directed to be handed over to the respondent.

2. The parties were married on 25.03.2005. Thereafter, minor Yashwant Kumar was born on 24.11.2007 and Jashwant Kumar was born on 23.02.2009.

3. It is averred by the respondent that during stay of the appellant No. 1 at the Matrimonial house, the wife used to address his parents as Tonhi (persons practicing witchcraft) and raises quarrel on trivial issues. On her persuasion, the respondent started residing separately from his parents, but still the wife's behavior did not improve, therefore, they went to village Regaon (Tamnar) but here also the wife's behavior did not improve despite persuasion by the elderly members of the society. The husband, thereafter, moved an application for grant of divorce which was rejected by the Family Court. The appellant No. 1/wife is separately living with minor sons namely; Yashwant Kumar & Jashwant Kumar, however, she has no means to take care of their up-bringing including education, therefore, the respondent/father sought custody of the minors.

4. The appellant/wife denied the plaint averments and submitted that the children did not want to go to their father.

5. The trial Court has noticed the poor financial conditions of the appellant/wife to conclude that the welfare of the minors lies in the hands of the respondent/father. The respondent/father has a grocery shop and sufficient income to take care of the life including the education of the minors.

6. While recording the finding in favour of the respondent, the Family Court has referred the appellant/wife's statement on admission where she has admitted that she is a poor person and does not have sound earnings. She has categorically admitted that she is somehow maintaining herself and her children out of the maintenance amount, which is not sufficient, therefore, she is dependent on her parents.

7. When the respondent's financial condition is considered in contradiction to the appellant's status, it appears that the respondent/father owns a grocery shop at village Basanpali, Indira Nagar Post- Jorekela, Tah. Tamnar,

District- Raigarh(C.G.). In paragraph 5 of his statement, he has shown his monthly income at Rs. 15,000/- to 20,000/-. On this point, there is no cross-examination by the appellant..

8. 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 a recent decision rendered 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.

9. In yet another recent judgement rendered in **Roxann Sharma v. Arun Sharma**[2] the Supreme Court has held thus :

> 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

[1](2017) 8 SCC 819
[2](2015) 8 SCC 318

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.

10. Shri Chatterjee, learned counsel for the appellant has tried to impress upon us by arguing that minors Yashwant Kumar and Jashwant Kumar are not willing to reside with the respondent as they are deeply attached to the

mother, therefore, their wish should also be taken note of while deciding the welfare of the minors. Shri Chatterjee has also argued that while the minors can be kept under the custody of the mother, the father can be granted visitation rights.

11. Despite anxious consideration, we are not persuaded to accept the submissions made by Shri Chatterjee because the welfare of the minors depend on their proper upbringing including proper education, which is a part of their right to life and decent living. Merely on account of their attachment with the mother, their future cannot be destroyed. In today's competitive world, the children need better education to survive and earn livelihood in future. Motherly love and affection should not be blindly accepted to ruin the minors' future. If the mother has true love and affection for the children, she should first secure their future rather than leaving them on their own fate by not providing proper education.

12. Considering the entire facts and situation of the case, we feel that the converse is more appropriate. In other words, while handing over the custody of the minors to the father, who is otherwise their natural guardian, in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956, the mother can be granted visitation rights. While the respondent is residing at Jhilkabhar Post Basanpali, District- Raigarh the appellant is residing at Katang, Post Office Boda Sariya District- Raigarh. It is informed that the distance between the two stations is about 45 kms. Therefore, while maintaining the order passed by the Family Court, we allow visitation rights to the appellant to meet both the sons once in a week either on Saturday or Sunday, according to her choice. She shall be allowed to meet her sons between 11.00 am to 5.00 pm for a minimum duration of 2 hours. As and when she visits the sons, the respondent shall pay a conveyance allowance of Rs. 200 per visit to the appellant. The visitation rights would not mean

that if on any other occasions the appellant wants to meet her sons, the respondent would not allow her to do so. We also direct that on the occasion of important festivals, once in a year, the appellant can bring the minor sons to reside with her at her parental house, if she so desires.

13. The appeal stands disposed of with the above observations.

Sd/-
JUDGE
(Prashant Kumar Mishra)

Sd/-
JUDGE
(Arvind Singh Chandel)

amita