



IN THE HIGH COURT OF JHARKHAND AT RANCHI
(Civil Appellate Jurisdiction)

2023:JHHC:28910-DB

First Appeal No. 87 of 2022

1.Suman Kumari, aged about 37 years, wife of Dr. Sanjay Kumar, daughter of Shri Naresh Saw
2.Naresh Saw, aged about 64 years, son of late Khoshi Saw
3.Rupesh Kumar, aged about 38 years, son of Naresh Saw
4.Dinesh Kumar, aged about 34 years, son of Naresh Saw
All are resident of Mirzaganj, PS Jamua, PO Mirzaganj, District Giridih, Jharkhand
.....**Appellants**

Versus

Sanjay Kumar, son of late Bandhu Saw, permanent resident of village Palmarua, PO Chandouri, PS Tisri, District Giridih (Jharkhand) at present residing at Flat No. 3-C Riddhi Siddhi Apartment, PO Bariatu, PS Bariatu, District Ranchi, Jharkhand
..... **Respondent**

CORAM: HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR
HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Appellants : Mr. Akhouri Awinash Kumar, Advocate
For the Respondent : In-person

J U D G M E N T

CAV on 04th August 2023

Pronounced on 18th August 2023

Per, Shree Chandrashekhar, J.

The judgment dated 26th July 2022 in Original (Guardianship) Suit No. 5 of 2016 (in short, Guardianship case) has been challenged by the mother, maternal grandfather, and maternal uncles of Deepanshu Darshan and Shreya Kumari @ Suddhi @ Arohi by filing First Appeal No. 87 of 2022 under section 19(1) of the Family Courts Act.

2. In the judgment dated 26th July 2022 (in short, 2nd Judgment) passed in the Guardianship case, the Principal Judge, Family Court, Giridih has held as under:

“19. It is true that there is no rule of law that a child of tender years should remain with mother. Whether it is better for the child to be with the mother or the father, depends the particular circumstances of each case. After perusing of overall materials and evidence on the record, it has come out that respondent-1/wife has no personal income and she depends upon either maintenance allowance or her parents. While the petitioner/father is a Associate Professor at RIMS, Ranchi and he has possess decree of M.B.B.S M.D. It appears that the petitioner/father can give good education to the minors in a good



school at Ranchi and other places. Whereas, the mother has no secured income, dependent on the either maintenance or her parents. It is apparent that both the child have been living with the mother right from 12.07.2014 onwards. The both the children have now attend the age of about 13 years and 8 years and the fact that they have remained with the mother for last 7 years at village- Mirzaganj, PS-Jamua, District-Giridih which is 40 KM away from Giridih District Headquarter. In this connection, it is also necessary to note that the conditions available in the house of the maternal grandfather a village Mirzaganj is not claimed to be in any way detrimental to the welfare of the children. I am of the view that the children should be with the petitioner/father. The respondent no-1, mother is not in a position to look after the educational need of the son and daughter. In my opinion, looking to the peculiar facts of the case, it would be in the interest of the children that they stay with father. I am sure that the petitioner/father, who is a M.B.B.S M.D at RIMS, Ranchi is a well groomed person, with the help of his mother, namely, Kaushalya Devi, will be able to take very good care of children. Their education would not be adversely affected even in Ranchi as it would be possible for the petitioner to get them educated in a good school at Ranchi. The grand-mother of the children would also be in a position to look after the both children and infuse good culture values into them. Normally, grand-mother can spare more time with their grand children. In considering the question of the welfare of the minors due regard has of course to be paid to the right of the father to be the guardian, and also to all other relevant factors having a bearing on the minors welfare. The presumption is that a minors parent's would do their very best promote their children welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. In this case, it is crystal clear that father to be entrusted with the custody of his both minors children (son and daughter) and considerations of their welfare, the father fitness has to be considered, determine and weighed predominantly in terms of the welfare of his minors children in the context of all the relevant circumstances.

20. At the time of hearing, the Id. Counsel for respondents has argued that the respondent no-1 lodged three criminal matrimonial case against the petitioner/husband and further there is several cases are pending in between the parties. Further the petitioner failed to search his son and daughter whereabouts. In this situation, the petitioner is not entitled for custody of the children. In my mind mere pendency of a criminal proceedings against the petitioner cannot be sole consideration for declaring the petitioner/father to be unfit to have the custody of his own children. No one knows at this stage as to what would be the ultimate fate of the said criminal proceeding. In the event, the said criminal proceeding is concluded by way of conviction of the petitioner/father, the respondent no-1/mother can always seeks appropriate order before the appropriate forum for the proper custody of the children, in case the custody remains with the father of the children at that point of time. Thus, I find no substances in the arguments advanced by the Id. Counsel appearing on behalf of the respondents. In the case of Jai Prakash Khadria Vs. Shyam Sundar Agarwalia and another, reported in 2001 (1) LJLR (SC) 152; 2000 (5) Supreme 79 (SC), in which the Hon'ble Apex Court held as under" the orders relating to custody of the children are by the very nature not final but are interlocutory in nature and subject to modification at any future time upon proof or change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interest of



the child." On the other hand in the case of Mausami Moitra Gonguli Vs. Jayanti Ganguli, reported in (2008) 7 Supreme Court Cases 673 As it was held by the Hon'ble Apex Court that it is true that father is presumed by the statute to be better suited to look after the welfare of the child being normally the working members and head of the family, however, that cannot be the sole determining factor. In each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations, but again that cannot be the sole determining factor for the custody of the child.

Bearing the principle of mind, I may now advert to the facts of the present case. The petitioner/father is a Doctor and has got sufficient means to lead a good life in the city. He is educated and is presently an Associate Professor at RIMS, Ranchi, there is possibility to presume that both the minors will be taken care of better by the father and present keeping the age of children, the father is most likely to contribute to the well being of the minors, which includes education, health care and development of the entire personality with a sense of security.

21. The paramount consideration of both the children, namely, Deepanshu Darshan presently aged about 13 years and Arohi @ Shreya @ Suddhi aged about 8 years has come out in this case as follows: (i) The father of both the minors is trained Doctor at RIMS, Ranchi and Post Graduate in the field of Medical Science and he possessed M.B.B.S. M.D and is employee as a Associate Professor at RIMS, Ranchi. His monthly salary more than Rs. 2.00 lacs. (ii) The spouses are living separately from last seven or eight years. (iii) Respondent no-1/wife/mother is no independent source of income. She and the minors are living with her parents as well as maternal Grand-father respectively in the remote village which is 40 KM away from the District Headquarter, Giridih (iv) The respondent no-1/wife is only graduate in Arts. (v) The petitioner/father has made attempts in the passed to keep the both minors (son and daughter above named) with him but the wife did not allow him to do so. (vi) The petitioner/father is living at Ranchi alone where good educational institutions are available. (vii) There are many good Schools at Ranchi, (viii) The interest of the children would be better protected if they are in the custody of the petitioner/father, (ix) Both the children presently are studying at Sant Joseph School, Jamua which is comes under village area.

22. In my considered opinion it will not be in the welfare of the child if they are allowed to remain with his mother who stays in a village area where are no proper facilities for educations and medical care. It is worth mentioning here that the petitioner/father is the natural guardian of both the children, namely, Deepanshu Darshan and Arohi @ Shreya @ Suddhi and he could give more care and attention to the children in the field of education, medical care than the respondent no-1/mother, Suman Kumari. Thus, the petitioner/father is entrusted to permanent custody of the children. However, the respondent no-1/mother is entrusted to visitation right over the children. The respondent no-1/mother is granted visitation right over both the children.

It is worth mentioning here that where the father and mother are not on talking terms, the bitter feelings are such, living part for several years, visiting right of respondent no-1 may serve as an opportunity to the deprived guardian to settle scores against the other and the child becomes medium.

Taking a overall view of the circumstances on the record and bearing in mind that the order has to be passed under section 7 of the Guardians and Wards Act, 1890 for the welfare of the minors, I am



satisfied that it is in the interest both the children and it is for the welfare of the both the children that the petitioner/father, Sanjay Kumar should be appointed as a guardian of the persons of the above named both the minors. Though, I am appointed the petitioner, Sanjay Kumar as the guardian of the person of the both the children, namely, Deepanshu Darshan as well as Shreya @ Arohi @ Suddhi, while the respondent no-1/mother, Suman Kumari has visitation right.

ORDER

The petition of the petitioner, Sanjay Kumar for custody of the children is hereby allowed on contest in favour of the petitioner. The petitioner, Sanjay Kumar is hereby appointed as a guardian of both the children, namely, Deepanshu Darshan as well as Shreya @ Arohi @ Suddhi.

The petitioner/father is entitled to custody of both the children. The respondent no-1/mother, Suman Kumari, including respondents no-2 to 4 is directed to handover the custody of both the children, namely, Deepanshu Darshan as well as Shreya @ Arohi @ Suddhi to the petitioner/father. Both the minors would continue to remain in the custody of their father until they attain the age of majority. The respondent no-1, Suman Kumari respondents shall handover the custody of both above named children to the petitioner, Sanjay Kumar within a period of one month from today, failing which the petitioner/father shall be at liberty to get this order executed.

The respondent no-1/mother, Suman Kumari is granted visitation rights to meet her children as following manners:-

(1) During the three long vacation, namely, the Summer Vacation, Dusshera/Dipawali Vacation and Christmas/Winter vacation, both the children will spend half of their vacations with her mother (respondent no-1, Suman Kumari at her residence/ house, at Giridih (house of her parents or whenever she might be living). Before taking away the children, she will duly notify the petitioner/father about whereabouts and her residential address. After the period of the children's stay with her is over, she will duly reach the children to their father's house and handover to the petitioner/father. The cost of entire traveling fare will have to be paid by the petitioner/father in the respondent/wife. The directions made above must be followed strictly without the slightest breach from either side. The period of stay of the children shall be fixed by the mother/respondent no-1 after due intimation to the petitioner/ father who shall permit both the child to go with the respondent no-1/mother for the aforesaid period.

(ii) Whenever there are vacations of more than four days continuously, both the children will stay with mother/ respondent no-1 for 50% of the vacation period. This is the addition to para (i). The entire cost of the traveling, lodging and fooding will have to be paid by the petitioner/father.

(iii) In addition to the same (above two paras), twice in a month preferably on Sunday or a holiday/festival day, it will be open to the respondent no-1/mother to come/reach at Ranchi or wherever the children may be living with their father and she will take both the children from their father's house at 10.AM in the morning of the Sunday or Holidays and she may bring the children back to their house (father's house/residence) on the same day in the evening. The petitioner/father shall pay the Taxi/Car fare to respondent no-1/ mother so as to visit the children twice in a month. The petitioner/father shall also make arrangements for suitable accommodation for the respondent no-1/ mother when she comes to Ranchi to visit the children.



(iv) Apart from it, the petitioner/father is directed to make the children talk with their mother twice in a week through Mobile phone preferably video call.

(v) Further, the respondent no-1/mother can visit the children on their birthdays and parents-teacher meets conducted in their schools. The father is directed to allow the mother to meet their children as stated above and the whole expenditure of traveling, lodging and fooding of the mother will be paid by him.

It is made clear that during the meeting hours, the petitioner/father would not, in any manner, interfere in the meetings between the respondent no-1/mother and the children.

Needless to say, the respondent no-1/mother would be free to give gifts as well as food to the children of her choice and of the liking of the children.

The petitioner/father is highly educated and the wife is graduate and both of them matured enough, would understand and realize their duties and the obligations towards their children being father and mother though living separately.

Needless to say, both would maintain cordial relations in-front of their children and avoid happening of any kind of untoward incident or/and avoid exhibiting any kind of unpleasant behavior in their verbal exchange. Both must realize that such incident, if occurs and witnessed by the children, it would cause more harm to children and affect their innocent minds. They may even loose respect for their parents. The petitioner/father is also to provide best requisite facilities and education to the minors child for the sake of their future.

In the fact and circumstances, there will be, however, no order as to costs.

Further, it is made clear that, it is open to the respondent no-1/mother to seek for custody of the children above cited in the event of change of circumstances.

Office is directed to prepare a decree pursuant to this Judgment. Further Office Clerk is directed to supply the copy of this Judgment free of cost to the parties, ie husband and wife.”

3. This First Appeal has its genesis in the judgment dated 21st April 2022 passed in First Appeal No. 56 of 2020 which was disposed of with the following directions:

“33. In view of the aforesaid discussions, we are of the opinion that the judgment in Original (Guardianship) Suit No. 05 of 2016 cannot be sustained in law and is accordingly set aside. Original (Guardianship) Suit No. 05 of 2016 is restored to its original files. The matter is remanded back to the Family Court, Giridih for deciding the issue of shared parenting, or joint custody and guardianship of Dipanshu Darshan and Suddhi by taking evidence of the appellant and the respondent alone. Let this exercise be concluded within 60 days of appearance of the parties before the Family Court and the judgment be delivered on the above issue. The Family Court Judge shall fix a date for appearance of the parties within 30 days of receiving a copy of this judgment.

34. First Appeal No. 56 of 2020 stands disposed of in the aforesaid terms.”

4. The aforesaid directions were issued by this Court when the judgment dated 04th May 2020 (in short, 1st Judgment) passed in the



Guardianship case was brought under challenge by Sanjay Kumar who is the father of Deepanshu Darshan and Shreya Kumari. The Guardianship case has been instituted by Sanjay Kumar under section 7 read with section 25 of the Guardians and Wards Act, 1890 for return of the minor children. The Guardianship case was dismissed by 1st Judgment holding that the father (hereinafter referred to as the respondent) is not entitled to custody of the minor children. By 1st Judgment passed in the Guardianship case, the Principal Judge of Family Court at Giridih held that custody of the minor children cannot be transferred to the father because the same will impact the emotions, career and personality of the children. However, the respondent was granted visitation rights. At this stage, we may indicate that the order of remand passed in First Appeal No. 56 of 2020 was confined to the issue of “shared parenting or joint custody and guardianship” by the parents and by a specific order custody of the minor children to the respondent herein was declined.

5. However, the Principal Judge of Family Court at Giridih has now decreed the Guardianship case by 2nd Judgment. In this judgment, the trial Judge has referred to “*Sayed Sallemuddin*”¹, “*Elizabeth Dinshaw (Mrs.)*”², “*Gaurav Nagpal*”³, “*Rosy Jacobs*”⁴, “*Githa Hariharan*”⁵, “*Jai Prakash Khadria*”⁶ and “*Mausami Moitra Ganguli*”⁷. The trial Judge has also referred to various provisions under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 to consider the issue before him.

6. In the present First Appeal, this Court having regard to the bitter legal battle between the parties requested Mr. Ajit Kumar, the learned senior counsel to make an endeavour to find an amicable solution including a possibility of divorce through mutual consent. On 2nd May 2023, the following order was passed by this Court:

“I.A No. 10806 of 2022

This interlocutory application has been filed by the appellants seeking stay of the execution of the judgment dated 26th July 2022 and decree dated 10th August 2022 passed in Original (Guardianship) Suit No. 05 of 2016.

Notice.

The respondent appears in-person and waives service of

¹ Sayed Sallemuddin v. Dr. Rukhsna : (2001) 5 SCC 247

² Elizabeth Dinshaw (Mrs.) v. Arvand M. Dinshaw : (1987) 1 SCC 42

³ Gaurav Nagpal v. Sumedha Nagpal : (2009) 1 SCC 42

⁴ Rosy Jacobs v. Jacob A. Chakramakkal : AIR 1973 SC 2090

⁵ Githa Hariharan v. Reserve Bank of India : (1999) 2 MLJ (SC) 62

⁶ Jai Prakash Khadria v. Shyam Sundar Agarwalla and another : (2000) 6 SCC 598



notice.

First Appeal No. 87 of 2022

The dispute between the appellant no.1 and her husband is raging since 2011.

There have been series of cases filed by the parties against each other. Even this custody case had come to this Court on a previous occasion.

The husband of the appellant no.1 is a qualified doctor posted at RIMS, Ranchi.

The appellant no.1 is also educated but staying with her parents at Mirzaganj in the district of Giridih, allegedly since 12th July 2014.

In First Appeal No. 56 of 2020, this Court remanded the matter back to the Family Court to decide the issue of shared parenting, joint custody and guardianship of the minor children Deepanshu Darshan and Shreya.

It further appears that the previous efforts at Mediation and Conciliation have failed and the parties could not arrive at a mutual settlement.

However, there is always a glimmering ray of hope that two human beings would some day realise and understand each other's problem to come to a reasonable, viable and acceptable settlement of their dispute.

Somewhere it is well said that the Mediators are the messengers of God.

With the aforesaid in the back of our mind, we have decided to send this matter for undertaking Mediation and Conciliation efforts.

With the agreement of the learned counsel for the appellants and the respondent-in-person, Mr. Ajit Kumar, the learned Senior counsel who has been a former Advocate General for the Government of Jharkhand is requested to act as a Mediator.

It is the understanding at Bar that both parties shall endeavour to reach at an amicable solution for their and the children's future life including a possibility of divorce through mutual consent.

We would request the learned Mediator to hold a preliminary meeting with the appellant no.1 and the respondent on 13th May 2023 at his office the address of which shall be communicated by Mrs. Prema Jhunhunwala, the learned counsel for the appellants to Dr. Sanjay Kumar who is the respondent in the present proceeding.

Post this matter on 19th May 2023. ”

7. On the next date of hearing, the Court's attention was drawn to an act of the respondent who had filed I.A. No. 4616 of 2023. In view of scurrilous and disparaging statements made by the respondent imputing impropriety and judicial dishonesty to the former and sitting Judges and the former Chief Justice of this Court as also the former Judges and the Chief Justices of India, this Court was constrained to draw a contempt proceeding against the respondent. As per the roster allocation, that proceeding is pending before another Bench of this Court and the respondent made suggestions to get the said proceeding transferred before this Bench or to transfer the present First Appeal before the Bench hearing the contempt



proceeding against him. However, in the absence of a formal application by the respondent, we declined his request and as agreed by him fixed the date for final hearing of this First Appeal. On 19th May 2023, this Court passed the following order:

“6. Now I.A No.4616 of 2023 has been filed by the respondent who appears in-person, the subject-matter of which reads as under:

“IN THE MATTER OF:

An application under section 26 of Hindu Marriage Act 1955 & Under Section 19 of Family Court Act 1984 to recall or modify the next date of hearing due to changed circumstance and not to pass any interim relief to appellant for two years just like no interim relief was granted to then appellant (instant respondent) in First Appeal No. 47/ 2019 & First Appeal No. 56/ 2020 in about two years each and to conduct further proceedings of court under audio visual recording with live streaming for the purpose to ensure fairness & transparency in court proceedings OTHERWISE respondent foresee the possibility of boycott of court to raise the matter outside the court just like in the year 2018 when top 4 judges of The Supreme court had raised their genuine grievances outside the court through press conference when grievances was not heard inside the court leading to crisis in judiciary to the extent of initiated process of impeachment against then the Chief Justice of India Mr. Deepak Mishra.”

7. In this Interlocutory Application, the respondent has made serious allegations of impropriety and judicial dishonesty against the former and sitting Judges and the former Chief Justice of this Court. He has also made scandalous and scurrilous statements against the former Judges and the Chief Justices of India and produced copies of several e-mails and other materials. Obviously, he would not have spared the counsel appearing for the appellant-wife and he has made disparaging statements against him without any basis. Since this Interlocutory Application which has been drafted by the respondent-in- person himself and contains expressions like “shamelessly, shameful stigma, lies, master or maalik, favouritism, discrimination, corruption in the Supreme Court etc.”, this must be held that his conscious and intentional acts are intended to scandalize and lower the dignity of this Court.

8. Therefore, in exercise of the powers under Article 215 of the Constitution of India read with Contempt of Courts Act, 1971, we hereby direct the Registry to issue contempt notice in Form-I to the Schedule appended to the High Court of Jharkhand Rules, 2001.

9. Rules 395 and 396 of the High Court of Jharkhand Rules, 2001 are dispense with in view of the materials before this Court, which, in fact, may constitute contempt per se.

10. The contemnor shall file his affidavit within four weeks why a charge be not framed and he be not punished for his intentional acts including his intentional act to scandalize and lower the dignity of this Court.

11. The Registry shall register a suo motu contempt case.

12. The contemnor is hereby directed to remain physically present in the Court on the next date of hearing, which is also a requirement under the Jharkhand High Court Rules once a notice in Form-1 is issued to a contemnor.

13. In the meantime, the appellants shall file an affidavit giving details of past misconduct of the respondent in the other proceedings before this Court. One such incident was indicated to us on the first occasion which this First Appeal was listed before us.



14. In view of the notice dated 1st May 2023, suo motu contempt case shall be listed before the jurisdictional Bench on 19th June 2023. ”

8. In the aforesaid background, we have heard Mr. Akhouri Awinash Kumar, the learned counsel for the appellants and the respondent-in-person. In the course of hearing, the learned counsel for the appellant tried to bring certain objectionable conduct of the respondent to the notice of the Court and stated that there is another contempt proceeding pending against the respondent. However, we refused to record the submissions in this regard because such facts are not on record. The learned counsel for the appellants has contended that the paramount consideration which the Family Court should keep in mind was overlooked and custody of the minor children has been given to the respondent. The learned counsel would submit that the Family Court has recorded a finding that no grievance has been raised that proper facility is not available at village Mirzaganj within Jamua PS and, that, the children are staying in the company of the appellant for the last about seven years, but, ignoring its own findings the Family Court has granted custody of the minor children to the respondent and, that too, on the ground that the mother has no independent source of income. The learned counsel for the appellant has further contended that the Family Court has completely ignored the fact that there are as many as three respondents in the Guardianship case who have tendered evidence in support of the mother. On the other hand, the respondent-in-person has maintained his position that there is nothing on merits to challenge 2nd Judgment rendered in the Guardianship case – inspite of opportunities granted, he did not file any counter affidavit or written submission.

9. The Guardians and Wards Act, 1890 defines the expression 'guardian' to mean a person having the care of the person of a minor or his property, or of both his person and property. The expression 'guardian' does not refer to legal guardians and anyone who has the care of a minor irrespective of the fact whether or not that person is a legal guardian is entitled to present a petition for the appointment as a guardian of the person or property, or both of the minor or for a declaration as guardian of the minor. Section 7 contains an expression “for the welfare of a minor” which signifies the paramount consideration for the appointment of a guardian. Therefore, in a petition seeking appointment or declaring the person to be a



legal guardian of the minor the Court is required to keep in mind that the minor's interest is of paramount consideration. Section 17 again uses the expression “the welfare of the minor” and provides that the Court shall have regard to the age, sex and religion of the minor in considering what will be for the welfare of the minor. It further provides that the character and capacity of the proposed guardians and their nearness to the minor can also be a guiding factor while considering the petition by a person seeking his appointment as a guardian or a declaration as to the guardianship of a minor. The attachment and sentiments of the parties towards the minor children or capacity to provide comfortable living therefore cannot be a overwhelming consideration overriding the welfare of the minor. The respective rights of father and mother regarding custody of their children do not permit them to claim an indefeasible right and therefore if custody of one spouse cannot promote the welfare of the minor that person's desire to see the minor well-groomed and educated or his attachment for the minor cannot be the main consideration. Moreover, there is a presumption that father and mother both may be equally affectionate towards their children. Therefore, the Guardian Court in a case of a dispute between the mother and father is expected to strike just and proper balance between the requirements of welfare of the minor children and the other attending circumstances. In “*Mausami Moitra Ganguli*”⁷ the Hon'ble Supreme Court has observed as under:

“19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It

⁷ *Mausami Moitra Ganguli v. Jayant Ganguli* : (2008) 7 SCC 673



is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.”

10. As to 2nd Judgment passed in the Guardianship case which is under challenge, we have no hesitation to hold that the Principal Judge of Family Court at Giridih exceeded his jurisdiction in going into the merits of the matter. As we have noticed, the Guardianship case was dismissed by 1st judgment and this Court also declined to grant custody of the minor children to the respondent. Notwithstanding that, the Guardianship case now stands allowed by virtue of 2nd judgment and custody of the minor children has been given to the respondent. To recapitulate, in First Appeal No. 56 of 2020, this Court held that the minor children are deprived of the company of their father without any just cause and therefore the judgment in the Guardianship case was vitiated on account of the irrelevant considerations and non-consideration of the evidence of the minor children which revealed their true feelings to remain in the company of their parents. However, this Court did not grant custody of the minor children to the respondent and remanded the matter to the Family Court for deciding the issue of “shared parenting or joint custody and guardianship” of Deepanshu Darshan and Shreya Kumari by taking evidence of the father and mother.

11. This is also very relevant to indicate that in 1st Judgment passed in the Guardianship case the Principal Judge, Family Court, Giridih had declined custody of the minor children to the respondent for the following reasons:

“20. It is also pertinent to mention here that the plaintiff has filed a written argument on 18/11/2019, wherein he stated that he is competent and sound economic position and being a legal father of child. He further given the proposal of in his own writing that “I hereby give proposal as molding of relief that custody of both children, both being more than 5 year of age, should be given to me and visitation right should be given to mother of children. If mother (Suman) agrees to live in Ranchi along with her parents, I shall bear these expenses up to Rs.25,000/- per month. I shall live in separate house. Wife Suman Kumari along with her parents shall live in separate house. I shall not live with wife. Children will live with me, but they can go to their mother as and when required. But the defendant is not ready with this proposal and she clearly stated that if the plaintiff will keep her with him, then he will go to Ranchi along with their children, otherwise she is not ready to go to Ranchi”.

The documentary evidences as X and X/1 (marked as identification) which are the xerox copy of marksheet and Ext-C which is progress report of Dipanshu Darshan, the minor son, produced by defendants itself reveals that both the minors are



studying in Mirjaganj with their mother and in my opinion, transfer of custody will disturb their studies and irrupt their mental status.

On critical analysis of the material available on record, it is very much clear from the record that the plaintiff is a very busy person having no time for children and he clearly admitted that he is living alone and his duty hours is 9 am to 5 pm and he also serve his duty at night also, so it is very much difficult to take care of children.

.....
22. So, in context of the above judicial pronouncement and analysis of the evidence on record, it is very much clear that though the plaintiff has sound economic strength, but at the same time, his work schedule is not defined and both children are living since long with their mother and the Dipanshu Darshan who is age of 10 has clearly stated that he does not want to go with his father and want to live with his mother and if his mother will go there, then he is ready to go and daughter Arohi is a child of 4-5 age and she also requires the mother protection and her over all developments.

So in my view, in contest the custody cannot be transferred to the father as being a natural guardian, because it will impact the emotions, career and personality of the children, which is against the welfare of the children.”

12. However, in 2nd Judgment, in the opinion of the trial Judge, the grandmother of the children would be in a position to look after them and infuse good cultural values in them. In this round, the appellant made a specific allegation that the respondent has solemnized second marriage with Preeti Kumari, resident of Itkhorri within the district of Chatra, on 13th March 2019. This allegation was however denied by the respondent in his cross-examination and he once again renewed his offer to keep the appellant in his company if she withdraws all the cases filed by her. Alternatively, he made an offer that if the appellant agrees to live at Ranchi in a separate house with her parents he was ready to pay Rs. 25,000/- per month for her expenses. The respondent claimed that his monthly salary is Rs. 2,00,000/- and this is his desire that both his children become doctors. The trial Judge observed that the appellant has no secured income of her own whereas the respondent can give good education to the minor children. The trial Judge finally concluded that it shall not be in the welfare of the children if they are allowed to remain in the company of their mother who lives in a village which lacks proper educational and medical care facilities.

13. The adjudication of a dispute between the parties is the primary function of the Court and, therefore, discipline in the administration of justice is important for maintaining faith of the litigants in the system. Therefore, the adherence to judicial discipline is *sine qua non* for sustaining the judicial system. This is the duty of every member of the District



Judiciary to maintain judicial discipline. In “*K’ A Judicial Officer*”⁸ the Hon'ble Supreme Court has observed that the Judges must be circumspect and self-disciplined in the discharge of their judicial functions. In our legal system which is based on the hierarchy of Courts, the District Judiciary functions under the administrative and disciplinary control of the High Court. The orders/judgments passed under the Family Courts Act are challenged under section 19(1) before the High Court and the appeals are heard by a Division Bench of the High Court. Article 235 of the Constitution provides ample indication and it is well settled that the High Court shall have superintendence over all Courts subordinate to it and the power of superintendence extends both to administrative and judicial functions of the subordinate Courts.

14. As noticed above, the direction to decide the issue of “shared parenting or joint custody and guardianship” did not confer jurisdiction in the Family Court to decide the custody claim of the respondent. It was not an open remand as envisaged under Rule 23 of Order 41 of the Code of Civil Procedure, and setting aside of the judgment in First Appeal No. 56 of 2020 was meant only for the purpose of remanding the matter for limited purpose as aforementioned. This is also admitted at the Bar that the judgment in First Appeal No. 56 of 2020 was not taken in appeal before the Hon'ble Supreme Court. Furthermore, there is a clear direction by this Court in First Appeal No. 56 of 2020 that for deciding the issue of “shared parenting or joint custody and guardianship” the Family Court was required to take evidence of the mother and father only and that has been done by the trial Judge. Now, what the Family Court was required to do is to record a finding that the parties did not arrive at a settlement and remained adamant sticking to their respective stands. Plainly speaking, the question of “custody” of the minor children which was decided by 1st judgment and to that extent this issue stands concluded by virtue of the judgment in First Appeal No. 56 of 2020 was not before the Family Court. Therefore, the issue which was decided by the Court between the same parties could not have been re-opened by the trial Judge in 2nd Judgment. However, an issue that was not open to challenge has been re-opened and decided by the Family Court contrary to the direction in First Appeal No. 56 of 2020.

⁸ “*K’ A Judicial Officer v. Registrar General, High Court of A.P.* : (2010) 11 SCC 722



15. Following the aforesaid discussions, 2nd Judgment in the Guardianship case is set aside and First Appeal No. 87 of 2022 is allowed. Consequently, the Guardianship case being Original (Guardianship) Suit No. 5 of 2016 stands dismissed.

16. I.A No. 10806 of 2022 for stay stands disposed of.

17. I.A No. 4616 of 2023 also stands disposed of.

(Shree Chandrashekhar, J.)

I agree

(Anubha Rawat Choudhary, J.)

(Anubha Rawat Choudhary, J.)

Jharkhand High Court, Ranchi
Dated: 18th August 2023
Tanuj/
A.F.R.