

Roxann Sharma vs Arun Sharma on 17 February, 2015

Equivalent citations: AIR 2015 SUPREME COURT 2232, AIR 2015 SC 2925 (2016) 117 ALL LR 234, (2016) 117 ALL LR 234

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Bench: C. Nagappan, Vikramajit Sen

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 1966 OF 2015
(Arising out of SLP No. 31615 of 2014)

ROXANN SHARMA

..... APPELLANT

Vs.

ARUN SHARMA

.....RESPONDENT

WITH

CIVIL APPEAL No. 1967 OF 2015
(Arising out of SLP No. 32581 of 2014)

J U D G M E N T

VIKRAMAJIT SEN, J.

1 Leave granted in both the Special Leave Petitions.

2 Civil Appeal of 2015 arising out of SLP(C) No.31615 of 2014 assails the Judgment dated 2nd August, 2014 passed by the High Court of Bombay at Goa in Writ Petition No.79 of 2014, which in turn questioned the Order dated 31.1.2014 passed by the IInd Additional Civil Judge, Senior Division at Margao, Goa (hereafter also referred to as the Civil Judge) in Matrimonial Petition No. 15/2013/II filed on 18.5.2013 before us, by the Respondent, Shri Arun Sharma (hereafter referred to

as 'Father') under Section 6 of the Hindu Minority and Guardianship Act, 1956. In this petition the Father has prayed inter alia that (a) the custody of the minor child, Thalbir Sharma be retained by him and that (b) by way of temporary injunction, the Appellant before us (hereinafter referred to as the Mother) be restrained from taking forcible possession of the minor child Thalbir from the custody of the Applicant. These proceedings were initiated and are pending in Goa at the instance of the father; at that time when all three persons were residents of Goa. After a detailed discussion of facts, as well as of law, the Hon'ble Additional Civil Judge, Senior Division Margao, Goa ordered that "pending final disposal of the petition on merits, the respondent, Roxann Sharma is granted interim custody of minor child Thalbir Sharma. The applicant shall have visitation rights to the child. He shall inform about his visit to the child in advance to the respondent upon which she shall allow applicant to visit the child". A reading of this order discloses that the learned Civil Judge favoured the opinion that the custody of Thalbir, a child of tender years should remain with the Mother and thereby the child's paramount interests would be subserved and safeguarded; that the Mother holds a Master of Arts degree from Howard University, Washington D.C. and is a Tenured College Professor in Los Angeles Mission College, California; that the allegation of her suffering from Bi-polar disorder had not been persuasively proved and in any event, did not disqualify her to the custody of her son; that the Father is allegedly an alcoholic and a drug-addict who had joined a drug rehabilitation clinic, and was also a member of Narcotics Anonymous (N.A); that Father had been previously married; and that he was not gainfully employed. The Impugned Order is also a detailed one in which the facts have been noted and the statutory laws as well as precedents, have been discussed.

3. However, in sharp divergence to the conclusion arrived at by the learned Civil Judge, the learned Single Judge of the High Court of Bombay at Goa has opined that "it cannot be disputed that for upbringing the child, love of the petitioner as well as the respondent who is the mother is very much essential for the healthy growth of such child. In such circumstances, though the custody would continue with the petitioner nevertheless, the respondent being the mother would definitely have frequent visitation rights of the minor child. Such visitation rights shall tentatively be for at least 3 days in a week. The parties are at liberty to fix such days before the learned Judge at a mutual agreeable place preferably within the jurisdiction of the Court". The Court, we must immediately underscore is located in Goa and not in Mumbai. These directions have attained finality against the Father; the Mother would have been entitled to visitation rights for at least three days and equally importantly in Goa.

4 Before us, it has been narrated by the Mother that consequent upon her frantic searches for her son, Thalbir, she had come to learn in August, 2013, that the Father along with Thalbir was in Mumbai. She filed Criminal Writ Petition No.87 of 2013 which had been disposed of by Orders dated 26.8.2013 noticing that proceedings under the Hindu Minority and Guardianship Act, 1956 (HMG Act) were pending in Goa and directing that the Mother should have access to Thalbir in Mumbai at a place near the residence of the Father. Thereafter, as already mentioned above on 31.1.2014, the Order by which the arrangement was reversed in the Impugned Order, came to be passed by the learned Civil Judge, Senior Division, Margao granting custody to the Mother and visitation to the Father in Goa.

5 We shall consider the import and amplitude of the legal concept of Guardianship on first principles. Black Law Dictionary 5th Edition contains a definition of Guardianship which commends itself to us. It states that - "A person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self control, is considered incapable of administering his own affairs. One who legally has the care and management of the person, or the estate or both, of a child during its minority". Thereafter there are as many twelve classifications of a guardian but we shall reproduce only one of them, which reads - "a general guardian is one who has the general care and control of the person and estate of his ward; while a special guardian is one who has special or limited powers and duties with respect to his ward, e.g., a guardian who has the custody of the estate but not of the person, or vice versa, or a guardian ad litem". Black's Law Dictionary also defines 'Custody' as the care and control of a thing or person. The keeping, guarding, care, watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody. In terms of Black's Law Dictionary, Tenth Edition, 'Visitation' means a non-custodial parent's period of access to a child. Visitation right means a non-custodial parent's or grandparent's Court ordered privilege of spending time with a child or grandchild who is living with another person, usually the custodial parent. A visitation order means an order establishing the visiting times for a non-custodial parent with his or her children. Although the non-custodial parent is responsible for the care of the child during visits, visitation differs from custody because non-custodial parent and child do not live together as a family unit. In our opinion, visitation rights have been ascribed this meaning - In a dissolution or custody suit, permission granted to a parent to visit children. In domestic relations matters, the right of one parent to visit children of the marriage under order of the court.

6 Several other statutes also contain definitions of 'guardian' such as The Juvenile Justice (Care & Protection) Act, 2000 which in Section 2(j) states that - " "guardian", in relation to a child, means his natural guardian or any other person having the actual charge or control over the child and recognized by the competent authority as a guardian in course of proceedings before that authority." Since the Juvenile Act is principally concerned with the welfare of the juvenile the accent understandably and correctly is on the "person" rather than the estate. The Tamil Nadu Elementary Education Act, 1994 defines the term guardian as - "any person to whom the care, nurture or custody of any child falls by law or by natural right or by recognized usage, or who has accepted or assumed the care, nurture or custody of any child or to whom the care, nurture or custody of any child has been entrusted by any lawful authority".

7 The Guardianship postulates control over both the person as well as the assets of a minor or of one and not the other. This is obvious from a reading of the definitions contained in Section 4 (2) of the Guardians & Wards Act, 1890 (G&W Act) and Section 4(b) of the HMG Act which clarifies that "Guardian" means a person having the care of the person of a minor or of his property or of both his person and property. Section 9 contemplates the filing of an application in respect of the guardianship of the person of the minor and Section 10 specifies the form of that application. Section 12 deals with the power to make interlocutory order for protection of the minor and interim

protection of his person and property. Section 14 is of importance as its tenor indicates that these controversies be decided by one court, on the lines of Section 10 of the CPC which imparts preference of jurisdiction to the first court. Section 17 gives primacy to the welfare of the minor. Sub section 2 thereof enjoins the court to give due consideration to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor. Since Thalbir is of a very tender age, the advisability of determining his wishes is not relevant at the present stage; he is not old enough to form an intelligent reference. Section 25 covers the custody of a ward being removed from the custody of the guardian of his person, and adumbrates that if the Court is of the opinion that it will be for the welfare of the ward to return to the custody of his guardian shall make an order of his return.

8 Section 26 is of special significance in that it casts an omnibus embargo even on a guardian of a person appointed or declared by the Court from removing the ward from the limits of its jurisdiction. This is because when a dispute arises between the parents of a minor, the court steps in as *parens patriae* and accordingly appropriates or confiscates to itself the discretion earlier reposed in the natural parents of the minor. This provision appears to have been violated by the Father. These provisions continue to apply in view of the explicit explanation contained in Section 2 of the HMG Act.

9 Section 3 of the HMG Act clarifies that it applies to any person who is a Hindu by religion and to any person domiciled in India who is not a Muslim, Christian, Parsi or Jew unless it is proved that any such person would not have been governed by Hindu Law. In the present case, the Mother is a Christian but inasmuch as she has not raised any objection to the applicability of the HMG Act, we shall presume that Thalbir is governed by Hindu Law. Even in the proceedings before us it has not been contested by the learned Senior Advocate that the HMG Act does not operate between the parties. 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 over-emphasised. 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 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 the Parliament or the Legislature should not be trifled away by a curial interpretation which virtually nullifies the spirit of the enactment.

10 We shall now consider the relevance of the precedents cited before us by the learned Senior Counsel for the Father. In *Sarita Sharma vs. Sushil Sharma* (2000) 3 SCC 14, in defiance of the orders passed by the Jurisdictional Court in the 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.

11 Learned Senior Counsel has next drawn our attention to Mausami Moitra Ganguli vs. Jayant Ganguli, (2008) 7 SCC 673. In this case also, this Court was confronted with the custody conflict over 10 year male child. We must be quick to point out that the Court did not consider Section 6 of the HMG Act after detailing the factors which were indicative of the position that the welfare of the child lies with continuing the custody with the father, this Court dismissed the mother's appeal. The facts are totally distinguishable. The ratio continues to be that it is the welfare of a minor which has paramount importance.

12 The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardised if the custody retained by the mother. Section 6(a) of HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this Section or for that matter any other provision including those contained in the G&W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years.

13 We must not lose sight of the fact that our reflections must be restricted to aspects that are relevant for the granting of interim custody of an infant. The Trial is still pending. The learned Single Judge in the Impugned Order has rightly taken note of the fact that the Mother was holding a Tenured College Professorship, was a post-graduate from the renowned Haward University, receiving a regular salary. Whether she had a Bi-polar personality which made her unsuitable for interim custody of her infant son Thalbir had not been sufficiently proved. In the course of present proceedings it has been disclosed that the Father has only passed High School and is not even a graduate. It has also not been denied or disputed before us that he had undergone drug rehabilitation and that he was the member of Narcotics Anonymous. This is compounded by the fact that he is not in regular employment or has independent income. As on date he is not an Income tax

assessee although he has claimed to have earned Rupees 40,000 to 50,000 per month in the past three years. We must again clarify that the father's suitability to custody is not relevant where the child whose custody is in dispute is below five years since the mother is per se best suited to care for the infant during his tender age. It is for the Father to plead and prove the Mother's unsuitability since Thalbir is below five years of age. In these considerations the father's character and background will also become relevant but only once the Court strongly and firmly doubts the mother's suitability; only then and even then would the comparative characteristic of the parents come into play. This approach has not been adopted by the learned Single Judge, whereas it has been properly pursued by the learned Civil Judge.

14 In the course of the hearings before us temporary visitation rights were granted to the Mother under the provision of a social worker who had been appointed by the Maharashtra State Legal Service Authority. We have had the advantage of perusing her very diligent and detailed Reports which vividly recount the initial reluctance and antipathy of Thalbir to his Mother, which very quickly came to be naturalised because of the maternal affection of the Mother. The Reports of the Social Worker lucidly indicate that at present Thalbir is extremely comfortable and happy in the company of his Mother but becomes agitated at the sight of his Father when he has to return to him. The Social Worker has also fervently pleaded that her Reports should be kept sealed for fear of the Father. This is extremely disturbing to us just as we expect it should be to the Father also.

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15 After the passing the Impugned Order in WP 79 of 2014, the Mother

filed an application dated 20.08.2014, for grant of visitation rights. Her suggestion was that she should have custody of Thalbir from Monday to Friday at Dona Paula, Goa, to be returned to the Father on Fridays at 5.00 pm; thereafter, custody of Thalbir be restored to the Mother at 10.00 A.M. on Monday morning in the Trial Court. The Father resisted the application by stating that he had no objection to the Mother visiting the child on three continuous days in each week between 4.00 p.m. and 5.00 p.m. However, he pleaded that since June, 2013, he along with Thalbir were residing in Flat No.2, Aashirvad Building, Sidhi Sadan Colony, Borivali West, Mumbai. By Orders dated 6.9.2014, the Trial Court ordered that Thalbir should be brought to the Court every Saturday at 9.30 A.M. to be handed over to the Mother who would in turn produce the child in the Court at 5.00 p.m. on the following Monday. It is this Order which was challenged in W.P.No. 576 of 2014. The second learned Single Judge has undertaken a discussion on meaning of 'frequent', concluding that it cannot be continuous; that the previous Order could not have meant that Thalbir would remain exclusively with his Mother for three days. On this dialectic the second learned Single Judge found error in the Trial Court's Orders dated 6.9.2014. The Impugned Order goes on to note that the Mother has no permanent residence in India and that she had not disclosed any fixed address in Goa and the Mother was suffering from Bi-polar disorder. Inexplicably, the second learned Single Judge found fault with the Order granting weekend visitation to the Mother, ignoring the reality that Trial Court was only implementing the directions given by the previous learned Single Judge. It seems plain to us that it was not open to the Trial Court to venture afresh on the question of the

welfare of Thalbir when the matter stood concluded against the Father who had not filed any Appeal against the Order of the previous learned Single Judge. All that the Trial Court was expected to do was to allocate three days custody for the Mother. In effect the second learned Single Judge has given his own understanding and meaning to the previous Order of a coordinate Bench of the High Court, which we find to be diametrically opposite to what stood articulated by the High Court in the previous writ proceedings. In paraphrasing the Order, the learned Single Judge in the Impugned Order has added the word "preferably" within the jurisdiction of the Court, but the word "preferably" has not been used in the previous Order. The Impugned Order also appears to lose sight of the fact that all three persons were residing in the United States and have only recently shifted to Goa which was, therefore, at that time, the only abode of the parties. It has also not given due weightage to the asseverations of the Mother that she had invested her savings in purchasing property in Goa, as well as in Mumbai in the joint names. Keeping in view the fact that Father has not been able to satisfactorily show that he had any income, prima facie, the Mother's statement has credibility. Most importantly, it was the Father who initiated proceedings in Goa, which jurisdiction has not been opposed by the Mother and, therefore, to hold against the Mother at the initial stages is neither just nor proper. Given the protracted litigation which has already transpired between the parties it seems to us that the second learned Single Judge was derelict in not deciding the issues and instead merely setting aside the Order dated 6.9.2014 assailed before him for an adjudication de novo. The directions previously passed by a coordinate Bench have been nullified and miscarriage of justice has resulted.

16 The learned Single Judge in Writ Petition 79 of 2014 has categorically ordered that whilst the custody of Thalbir shall continue with the Father, the Mother shall get "visitation rights" which he temporarily fixed at least three days in a week "at a mutual agreeable place preferably within the jurisdiction of the Court," situate in Goa; the Trial is continuing in Goa. We fail to locate or appreciate any reason or justification for the intervention of the High Court in Writ Petition 576 of 2014 which is the subject matter of Civil Appeal of 2015 arising out of SLP (C) 32581 of 2014 by a different learned Single Judge. We have already noticed the intendment of Section 14 of the G&W Act which acknowledges the salutary necessity of only one court in dealing with the guardianship or custody disputes pertaining to the minor. This petition challenged the propriety of the Order dated 6.9.2014 passed by the learned Civil Judge which in turn was in compliance with the Order dated 2.8.2014, which it may be recalled granted visitation rights to the Mother for at least three days in a week within the jurisdiction of the Court. The annals of the turbulent marriage of the parties, the IVF conception of Thalbir etc., have been duly noted by the first learned Single Judge and the learned Civil Judge. The learned Single Judge has then questioned the very applicability of HGM Act as well as G&W Act in the State of Goa, an aspect which had not been agitated by either the Mother or the Father in any of the earlier proceedings. There can be no cavil that when a Court is confronted by conflicting claims of custody there are no rights of the parents which have to be enforced; the child is not a chattel or a ball that is bounced to and fro the parents. It is only the child's welfare which is the focal point for consideration. Parliament rightly thinks that the custody of a child less than five years of age should ordinarily be with the Mother and this expectation can be deviated from only for strong reasons. The need to have a continuity in adjudication ought to have persuaded the second learned Single Judge to have recused himself in preference to his learned Brother who decided the previous Writ Petition.

17 We also take serious note of the Father, without notifying or taking the permission of the Civil Judge, leaving its jurisdiction along with Thalbir. Prima facie this undermines the authority of the Court and it may even tantamount to contempt of court. Section 26 of the G&W Act has been violated and that too by a person who has not been appointed as the guardian. Relocation is now a well known legal concept. Since movement of persons from one place to another or one State to another State of the Country or even from one Country to another Country of the Globe is no longer a rarity. Very often it becomes necessary because the parent having custody of the child finds a more suitable employment somewhere else. The entitlement of the left behind spouse has, therefore, to be jurally investigated. The Mother may want to relocate to the United States where she can be very gainfully employed as against the Father who has not been able to disclose any income or sources of regular income. But this is not the case or stage before us. Here, the Father ought not to have left the jurisdiction of Court in Goa which was discharging its duties as *parens patriae*. This seems to have been completely lost sight of and instead the learned Single Judge has given premium to the unauthorised relocation. We have already mentioned the Criminal Petition 87/2013 which was disposed of by permitting the Mother to meet Thalbir; but keeping in view the pendency of proceedings in Goa, the Court rightly did not interfere with or alter or modify any of the Orders passed by the Court in Goa. Forum shopping or Court shopping requires to be firmly dealt with. The second learned Single Judge ought to have kept in mind that it was the Father who has started proceedings in Goa where the Mother was then also residing having, prima facie, been constrained to give up her employment in the California, U.S to be in a position to look after her infant son Thalbir. Co-ordinate Benches must respect prior orders.

18 We shall abjure for making any further observations as the Trial is still pending. Keeping in mind the facts and circumstances which have been disclosed before us, we set aside the impugned Order dated 18.09.2014. It is not in consonance with the previous order of a co-ordinate Bench and in fact severely nullifies its salient directions. We set aside the impugned Order dated 2nd August, 2014 inter alia for the reason that it incorrectly shifts the burden on the Mother to show her suitability for temporary custody of the infant Thalbir and, therefore, runs counter to the provisions contained in Section 6 of the HMG Act. We clarify that nothing presented by the Father, or placed on the record discloses that the Mother is so unfit to care for the infant Thalbir as justifies the departure from the statutory postulation in Section 6 of the HMG Act. Visitation rights succinctly stated are distinct from custody or interim custody orders. Essentially they enable the parent who does not have interim custody to be able to meet the child without removing him/her from the custody of the other parent. If a child is allowed to spend several hours, or even days away from the parent who has been granted custody by the Court, temporary custody of the child stands temporarily transferred.

19 We also have taken due note of the Reports filed by the Social Worker and have heard the Counsel for the parties in this regard. We record our appreciation for the diligence with which she has performed her duties. In the event that her fees/ expenses have not been defrayed by the Father, the remainder shall be paid by the Maharashtra State Legal Services Authority.

20 We transfer the temporary custody of Thalbir to the Appellant/Mother with the direction that both of them shall reside in the address given by her, viz, House No.80, Magnolia, Ground Floor, Bin Waddo, Betalbatim, Goa and will not leave that territorial jurisdiction of the Trial Court without

prior leave. We further direct that the Respondent/Father shall have visitation rights between 2.30 p.m. and 6.00 p.m. on every Tuesday and Thursday, and from 2.30 p.m. to 9.00 p.m. on Saturdays. These Orders are purely temporary in nature. The Civil Judge should decide the Petition/application pending before him with expedition, as directed by the High Court, without being influenced by any observations made by us hereinabove.

21 After carefully reading the Reports of the Social Worker, Mrs. Deepali Ajay Satpute, we find it necessary to direct Mr. Arun Sharma, Father to neither directly nor indirectly through any member of his family or his friends, to communicate in any manner or to meet the Social Worker, Mrs. Deepali Ajay Satpute. This is in deference to the apprehensions that she has felt and expressed to the Court as a consequence of conversations of the Respondent and his Mother with her pertaining to her as well as the safety of her own son. In the event of the Social Worker seeking Police Protection to her and family, the Station House Officer of the concerned Police Station shall immediately provide the same and we direct so. 22 The Appeals are allowed in these terms. The parties shall bear their respective costs.

.....J [VIKRAMAJIT SEN]J [C. NAGAPPAN] New Delhi;

February 17, 2015.

After the pronouncement of this Judgment it has been pointed out to us that the passports of both the parties have been deposited in this Court. The Thalbir's passport is with the Trial Court in Goa. These will not be released to any of the parties without the explicit leave of the Court. It also transpires that House No.80, Magnolia, Ground Floor, Bin Waddo, Betalbatim, Goa has been sold by the Father-Respondent. The Petitioner- Mother will, therefore, stay in Goa, as already indicated, until explicitly permitted by the Competent Court. The said address will be mentioned to the Civil Court.