

318

SUPREME COURT CASES

(2015) 8 SCC

(2015) 8 Supreme Court Cases 318

(BEFORE VIKRAMAJIT SEN AND CHOCKALINGAM NAGAPPAN, JJ.)

ROXANN SHARMA . . . Appellant; a

Versus

ARUN SHARMA . . . Respondent.

Civil Appeals No. 1966 of 2015[†] with No. 1967 of 2015[‡],
decided on February 17, 2015

A. Family and Personal Laws — Hindu Minority and Guardianship Act, 1956 — Ss. 6(a), proviso thereto and 13 — Custody of a Hindu child aged below 5 yrs — Entitlement of father vis-à-vis mother in respect of — Determination — Approach to be adopted — Governing principles — Burden of proof — Proviso to S. 6(a) of HMG Act prescribing that custody of a minor who has not completed the age of 5 yrs shall ordinarily be with the mother — Applicability of — Use of word “ordinarily” therein — Significance of b

— Held, custody of a child aged below 5 yrs should be given to his/her mother unless father discloses cogent reasons that are indicative of likelihood of welfare and interest of child being undermined or jeopardised if custody is retained by mother — Use of word “ordinarily” in proviso to S. 6(a) of HMG Act ordains a presumption, albeit a rebuttable one, in favour of mother — Said proviso places onus on father to prove that it is not in welfare of child to be placed in custody of his/her mother — Father’s character and background in case of a child below 5 yrs would be relevant only after the court strongly and firmly doubts the mother’s suitability — Even in such a case the comparative characteristic of the parents would come into play — S. 6(a) of HMG Act preserves the right of father to be guardian of property of minor child but not the guardian of their person whilst the child is below 5 yrs of age — Said provision carves out the exception of interim custody, in contradistinction of guardianship — However clarified, S. 6(a) of HMG Act or for that matter any other provision including those contained in Guardians and Wards Act, 1890 does not disqualify the mother to custody of child even after the latter crosses the age of 5 yrs c

— In present case, considering that: (i) mother was a postgraduate from a renowned foreign University and was holding a tenured College Professorship in foreign country, (ii) allegation of her suffering from bipolar disorder had not been persuasively proved and in any event, did not disqualify her to custody of her son *T* (aged below 5 yrs), (iii) father was allegedly an alcoholic and a drug-addict and was not gainfully employed, trial Judge opining that custody of *T* should remain with his mother — But High Court taking a contrary view and shifting burden on mother to show her suitability for temporary custody of infant *T* — Held, judgment of High Court was contrary to provisions contained in S. 6 of HMG Act — Hence, set aside — Temporary custody of *T* transferred to mother (appellant herein) — Father d

[†] Arising out of SLP (C) No. 31615 of 2014. From the Judgment and Order dated 2-8-2014 of the High Court of Bombay at Goa in WP No. 79 of 2014 e

[‡] Arising out of SLP (C) No. 32581 of 2014 f

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a given visitation rights, as specified herein, in relation to *T* — Orders passed herein temporary in nature — Trial Judge to decide the petition pending before it expeditiously without being influenced by any observations made herein — Guardians and Wards Act, 1890 — Ss. 7 and 17 — Evidence Act, 1872 — Ss. 101 to 103 — Words and Phrases — “Ordinarily”

(Paras 10 to 24)

Sarita Sharma v. Sushil Sharma, (2000) 3 SCC 14 : 2000 SCC (Cri) 568; *Mausami Moitra Ganguli v. Jayant Ganguli*, (2008) 7 SCC 673, *distinguished of facts*

b *Arun Sharma v. Roxann Sharma*, 2014 SCC OnLine Bom 866 : (2014) 5 AIR Bom R 818, *reversed*

Roxann Sharma v. Arun Sharma, WP (Cri) No. 87 of 2013, order dated 26-8-2013 (Bom), *referred to*

c **B. Family and Personal Laws — Hindu Minority and Guardianship Act, 1956 — Ss. 3 and 6 — Applicability of HMG Act, 1956 to child involved in present case — Mother of child, a Christian while father was a Hindu — Effect of — Since mother not raising any objection to applicability of HMG Act, presumed that said child was governed by Hindu Law (Para 9)**

C. Interpretation of Statutes — Internal Aids — Proviso — Nature and scope of — Reiterated, a proviso is in the nature of an exception to what has earlier been generally prescribed (Para 10)

d **D. Interpretation of Statutes — Basic Rules — Generally — Curial interpretation virtually nullifying the spirit of the enactment — Must be avoided (Para 10)**

E. Courts, Tribunals and Judiciary — Judicial Process — Judicial discipline, accountability and comity — Judgments of coordinate Benches — Duty of court to respect prior order passed by a coordinate Bench

e — Present Single Judge of High Court vide impugned order nullifying directions previously passed by a coordinate Bench of High Court — Present Single Judge giving his own understanding and meaning to previous order of coordinate Bench — This was diametrically opposite to what stood articulated by High Court in previous writ proceedings — On that basis, present Single Judge finding fault with trial court’s order granting weekend visitation rights to mother in respect of her child, ignoring the reality that trial court was only implementing the directions given by previous Single Judge — Present Single Judge adding word which was not even used in previous order of coordinate Bench — Hence held, the impugned order of present Single Judge was not in consonance with previous order of coordinate Bench — It in fact severely nullified the directions of earlier coordinate Bench — Consequently, set aside — Precedents — High Courts — Coordinate Bench — Practice and Procedure — Forum shopping/Court shopping (Paras 16 to 20 and 24)

Arun Sharma v. Roxann Sharma, 2014 SCC OnLine Bom 1111, *reversed*

h **F. Family and Personal Laws — Guardians and Wards Act, 1890 — S. 26 — Violation of — Father, without notifying or taking permission of trial Judge concerned, leaving its jurisdiction along with his minor son *T* — Said act of father, held, was violative of S. 26 of GW Act, 1890 — It prima facie undermined the authority of court — May tantamount to contempt of court — Contempt of Courts Act, 1971, S. 2(b) (Paras 9 and 19)**

G. Practice and Procedure — Forum shopping/Court shopping — Held, must be firmly dealt with (Para 19)

H. Words and Phrases — “Guardianship” — Legal concept of — Meaning and scope — Definition of “guardian” provided in various statutes — Taken note of — Hindu Minority and Guardianship Act, 1956 — S. 4(b) — Juvenile Justice (Care and Protection of Children) Act, 2000 — S. 2(j) — Education and Universities — T.N. Elementary Education Act, 1920 (8 of 1920) — S. 3(viii) — Guardians and Wards Act, 1890, S. 4(2) (Paras 5 to 8)

Black’s Law Dictionary, 5th Edn., referred to

I. Family and Personal Laws — Child custody — Matter pertaining to — Visitation order in respect of a child — Distinguished from custody or interim custody order as to that child — Words and Phrases — “Visitation right/order” (Paras 6 and 20)

Black’s Law Dictionary, 10th Edn., referred to

J. Constitution of India — Art. 21 — Life — Meaning and scope: Narrowly construed — Right to safety against crime/Police protection — Grant of police protection — Matrimonial dispute between appellant wife and respondent husband, regarding claim as to custody of their minor son — Social worker concerned who provided assistance to Supreme Court in present case, as a result of certain conversations with respondent, expressing apprehension as to risk to her and her family’s life at the hands of respondent — In this view, direction issued that in the event of social worker seeking police protection for herself and her family, the Station House Officer of police station concerned must immediately provide the same (Para 23)

Appeals allowed

W-D/54468/CV

Advocates who appeared in this case :

Colin Gonsalves, Senior Advocate (Ms Jubli Momalia and Satya Mitra, Advocates) for the Appellant;

Ms Meenakshi Arora, Senior Advocate (Rajesh Kumar, Gaurav Kr. Singh, Rakesh Chaurasiya and M/s Mitter & Mitter Co., Advocates) for the Respondent.

Chronological list of cases cited

on page(s)

1. 2014 SCC OnLine Bom 1111, *Arun Sharma v. Roxann Sharma (reversed)* 327a, 329b-c
2. 2014 SCC OnLine Bom 866 : (2014) 5 AIR Bom R 818, *Arun Sharma v. Roxann Sharma (reversed)* 320h, 321f-g, 326f, 327g, 328b, 329b-c
3. WP (Cri) No. 87 of 2013, order dated 26-8-2013 (Bom), *Roxann Sharma v. Arun Sharma* 322b
4. (2008) 7 SCC 673, *Mausami Moitra Ganguli v. Jayant Ganguli* 325c
5. (2000) 3 SCC 14 : 2000 SCC (Cri) 568, *Sarita Sharma v. Sushil Sharma* 324f-g

The Judgment of the Court was delivered by

VIKRAMAJIT SEN, J.— Leave granted in both the special leave petitions.

2. Civil Appeal No. 1966 of 2015 arising out of SLP (C) No. 31615 of 2014 assails the judgment dated 2-8-2014 passed by the High Court of Bombay at Goa in *Arun Sharma v. Roxann Sharma*¹, which in turn questioned the order dated 31-1-2014 passed by the IInd Additional Civil

¹ 2014 SCC OnLine Bom 866 : (2014) 5 AIR Bom R 818

a 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 “the 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 (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 IIInd Additional Civil Judge, Senior Division Margao, Goa ordered that

c “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”.

d 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 bipolar 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 (NA); that the 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.

f 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: (*Arun Sharma case*¹, SCC OnLine Bom para 16)

g “16. ... 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.”

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1 *Arun Sharma v. Roxann Sharma*, 2014 SCC OnLine Bom 866 : (2014) 5 AIR Bom R 818

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. a

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 26-8-2013² noticing that proceedings under the Hindu Minority and Guardianship Act, 1956 (the 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. b

5. We shall consider the import and amplitude of the legal concept of guardianship on first principles. *Black's Law Dictionary*, 5th Edn. contains a definition of “guardianship” which commends itself to us. It states that— c

“Guardian.—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.” d

Thereafter there are as many as twelve classifications of a guardian but we shall reproduce only one of them, which reads— e

“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*.” (emphasis in original)

Black's Law Dictionary also defines “custody” as— f

“Custody.—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.” g

6. In terms of *Black's Law Dictionary*, 10th Edn., “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 h

2 *Roxann Sharma v. Arun Sharma*, WP (Cri) No. 87 of 2013, order dated 26-8-2013 (Bom)

a 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.

b 7. Several other statutes also contain definitions of “guardian” such as the Juvenile Justice (Care and Protection of Children) Act, 2000 which in Section 2(j) states that—

c “2. (j) ‘guardian’, in relation to a child, means his natural guardian or any other person having the actual charge or control over the child and recognised 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, 1920 defines the term “guardian” as—

d “3. (viii) *Guardian*.—... any person to whom the care, nurture or custody of any child falls by law, or by natural right or recognised 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;”

e 8. 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 and Wards Act, 1890 (G and 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 f the power to make interlocutory order for production 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 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 g 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 h welfare of the ward to return to the custody of his guardian it shall make an order of his return.

9. 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. 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.

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 the 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 para 13 of the impugned order that the Mother has not established her suitability to be granted interim custody of Thalbir who at that point in time was an infant. The proviso places the onus on the father to prove that it is not in the welfare of the infant child to be placed in the custody of his/her mother. The wisdom of Parliament or the legislature should not be trifled away by a curial interpretation which virtually nullifies the spirit of the enactment.

11. We shall now consider the relevance of the precedents cited before us by the learned Senior Counsel for the Father. In *Sarita Sharma v. Sushil Sharma*³, in defiance of the orders passed by the jurisdictional court in US, 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 the courts in India as

a 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 b 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.

c **12.** The learned Senior Counsel has next drawn our attention to *Mausami Moitra Ganguli v. Jayant Ganguli*⁴. In this case also, this Court was confronted with the custody conflict over a 10-year-old 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. d The ratio continues to be that it is the welfare of a minor which has paramount importance.

e **13.** 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 likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the 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 f that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years.

g **14.** 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 h College Professorship, was a postgraduate from the renowned Howard University, receiving a regular salary. Whether she had a bipolar 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 Rs 40,000 to Rs 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.

15. 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 Services 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.

Civil Appeal No. 1967 of 2015 (arising out of SLP (C) No. 32581 of 2014)

16. After the passing of the impugned order in *Arun Sharma v. Roxann Sharma*¹, the Mother filed an application dated 20-8-2014, 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 p.m.; 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 order 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 WP No. 576 of 2014. The second learned Single Judge has undertaken a discussion

¹ 2014 SCC OnLine Bom 866 : (2014) 5 AIR Bom R 818

a on the meaning of “frequent”, concluding⁵ 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 order 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 bipolar disorder. Inexplicably, the second learned Single Judge found fault with the order granting weekend visitation to the Mother, ignoring the reality that the trial court was only implementing the directions given by the previous learned Single Judge.

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17. 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 the 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.

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18. The learned Single Judge in *Arun Sharma v. Roxann Sharma*¹ 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

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⁵ *Arun Sharma v. Roxann Sharma*, 2014 SCC OnLine Bom 1111

¹ 2014 SCC OnLine Bom 866 : (2014) 5 AIR Bom R 818

of the High Court in Writ Petition No. 576 of 2014 which is the subject-matter of Civil Appeal No. 1967 of 2015 arising out of SLP (C) No. 32581 of 2014 by a different learned Single Judge. We have already noticed the intendment of Section 14 of the G and 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 2-8-2014¹, 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 the HGM Act as well as the G and 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.

19. 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 and 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 the 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 Criminal Petition No. 87 of 2013 which was disposed of by permitting the Mother to meet Thalbir; but keeping in view the pendency of proceedings in

1 *Arun Sharma v. Roxann Sharma*, 2014 SCC OnLine Bom 866 : (2014) 5 AIR Bom R 818

a 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 also then residing having, prima facie, been constrained to give up her employment in California, US to be in a position to look after her infant son Thalbir. The coordinate Benches must respect prior orders.

b **20.** We shall abjure from 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 18-9-2014⁵. It is not in consonance with the previous order of a coordinate Bench and in fact severely nullifies its salient directions. We set aside the impugned order dated 2-8-2014¹ inter alia for the reason that it incorrectly shifts the burden on the
c 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
d 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.

e **21.** 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.

f **22.** 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
g him with expedition, as directed by the High Court, without being influenced by any observations made by us hereinabove.

h **23.** After carefully reading the reports of the social worker, Ms 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,

⁵ *Arun Sharma v. Roxann Sharma*, 2014 SCC OnLine Bom 1111

¹ *Arun Sharma v. Roxann Sharma*, 2014 SCC OnLine Bom 866 : (2014) 5 AIR Bom R 818

330

SUPREME COURT CASES

(2015) 8 SCC

Ms 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 police station concerned shall immediately provide the same and we direct so. *a*

24. The appeals are allowed in these terms. The parties shall bear their respective costs.

25. 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. 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 respondent Father. 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. *b*
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