

**HIGH COURT OF CHHATTISGARH, BILASPUR****FAM No. 67 of 2012**

- Shailendra Nath, S/o Swaminath, aged about 40 years, R/o Block No. 8C, Road No. Avenue A, Sector 7, Bhilai City, Tahsil and District- Durg.

---- Appellant

**Versus**

- Smt. Archana Nath, W/o Shailendra Nath, aged about 35 years, R/o Sheetla Mahamaya Mandir Road, Near NawDurga Chowk, Amin Para, Purani Basti Raipur, Tahsil and District- Raipur (C.G.).

---- Respondent

For Appellant

For Respondent

Mr. Arvind Shrivastava, Advocate

Mr. N.K. Malviya, Advocate.

Hon'ble Shri Justice Prashant Kumar MishraHon'ble Shri Justice Arvind Singh Chandel**Order On Board By****Justice Prashant Kumar Mishra****17/07/2017**

1. A short question arises for determination in this appeal as to whether an application under Section 25 of the Guardians and Wards Act, 1890 (henceforth 'the Act') is maintainable in view of an earlier decision dated 08/08/2007 between the parties, wherein, the Family Court, Durg rejected the appellant's application for custody of minor son- Aryan Shrivastava.
2. Some elemental facts are needed to be mentioned only to understand the relation and nature of dispute between the parties who were

married at Raipur on 18/11/2000. Son- Aryan was born out of the wedlock on 27/05/2003. The respondent with her minor son- Aryan are residing separately from the appellant w.e.f. 21/06/2006. When master Aryan was aged about 3 years, the appellant had moved an application under Section 25 of the Act, 1890 seeking his custody and the said application bearing Miscellaneous Civil Suit No. 40/2007 was dismissed by the First Additional Principal Judge to the Court of Family Court, Durg on 08/08/2007 (Annexure-A-2). After lapse of about 4 years, the subject application has been preferred by the appellant on the ground amongst others that the son is now aged about 8 years, therefore, the father being his natural guardian, is entitled to have the custody of his minor son.

3. The respondent moved an application under Order 7 Rule 11 C.P.C. objecting to the maintainability of the application under Section 25 of the Act on twin grounds, firstly that the application is not maintainable at Durg Court because the minor is residing at Raipur and secondly that in view of the dismissal of similar application at an earlier point of time, the present application is barred by the principle of *res judicata*.
4. The trial court dismissed the application on the ground of *res judicata* without deciding as to whether the application is maintainable at Durg Court or not.
5. Be that as it may, in this appeal, we are only concerned with the issue as to applicability of the principle of *res judicata* under Section 11 CPC to the proceedings under the Act, 1890. Section 11 of CPC provides that:

**“Res-judicata.-** No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raise, and has been heard and finally decided by such Court.”

6. A bare reading of the above provision would manifest that the principle enshrined under Section 11 CPC would apply when the matter in issue has already been finally disposed of between the parties and a subsequent suit on the same issue is moved before a Court. However, in a case, where the issue earlier decided and the judgment rendered therein is not of permanent nature, but is only temporary in nature, the principle of *res judicata* would not apply.

7. It is settled law that orders on custody of minor are considered to be temporary orders. For this proposition, we may profitably refer to the observations made by the Supreme Court in **Rosy Jacob v. Jacob Chakramakkal, AIR 1973 SC 2090**, wherein the following is held in para 17:

*“The appellant's argument based on estoppel and on the orders made by the Court under the Indian Divorce Act with respect to the custody of the children did not appeal to us. All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest*

*of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based on consent decrees, cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation.”*

8. Yet again in ***R.V. Srinath Prasad v. Nandamuri Jayakrishna & Others, AIR 2001 SC 1056***, the Supreme Court observed that custody orders by their nature can never be final.

9. It would thus clearly appear that matters concerning custody of a minor or maintenance and the mitigating factors governing such issue keep on changing from time to time inasmuch as the crucial aspect of paramount interest and welfare of the minor may keep on changing depending upon the subsequent events. Similarly, in a case of maintenance, the initial capacity or such other matters which guide the Court in awarding or continuing the maintenance in favour of one or other party having entitlement to maintenance under Section 125 Cr.PC or under Section 24 of the Hindu Marriage Act may vary after lapse of time and occurrence of subsequent events. Similarly, a suit for grant of divorce dismissed at one stage may become admissible subsequently if one of the spouse starts living in adultery or does such other thing which furnishes a new ground for seeking divorce.

10. In the case at hand, the trial Court has not at all considered the merits of allegations and the change of events after the first application was dismissed in the year 2007. In our considered view, the law laid down by the Supreme Court in ***Rosy Jacob case*** (supra) and ***R.V. Srinath***

**case** (supra) would squarely apply in the facts of the present case. Therefore, the judgment of the trial Court dismissing the application under Section 25 of the Act, at the threshold, deserves to be and is hereby set aside. The instant appeal is accordingly allowed.

11. Let the Trial Court decide the matter on its own merits. The trial court records be sent back forthwith.
12. Parties shall appear before the trial court on 22<sup>nd</sup> of August, 2017.

Sd/-  
**Judge**  
**Prashant Kumar Mishra**

Sd/-  
**Judge**  
**Arvind Singh Chandel**



**F.A. M 75 of 2012**Shailendra Nath **Versus** Smt. Archana Nath**HEADLINES**

Order passed in proceedings seeking custody of minors under the Guardians and Wards Act, 1890 is temporary in nature, therefore, the principles of *res judicata* do not apply in subsequent proceeding filed on the basis of subsequent events.

