

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No. 830 of 2006

Date of Decision: 19.2.2015

Manoj

....Appellant.

Versus

Virender and others

...Respondents.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE SNEH PRASHAR.**

PRESENT: Mr. Rakesh Nehra, Advocate for the appellant.

Mr. Silak Ram Hooda, Advocate for respondent No.1.

AJAY KUMAR MITTAL, J.

1. This appeal has been filed by the appellant against the judgment dated 13.1.2006 passed by the Additional District Judge, Sonapat whereby the petition filed by respondent No.1 for custody of the minor girl child, namely, Reena, was allowed.

2. Put shortly, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The marriage of respondent No.1 was solemnized with Sonu and out of their wedlock, a female child, namely, Reena was born. Said Sonu died in the year 2001. At the time of filing of the petition on 21.01.2005, Reena was of about six years and was living with the appellant and respondents No.2 and 3 who are maternal uncle, grandmother and aunt. According to respondent No.1, the custody of the minor with them was not safe as they had no love and affection and they were not giving proper education and other

facilities to the child. Respondent No.1 being father had much love and affection towards his own daughter and he was interested to give her better education and other modern facilities. Accordingly, he filed a petition under Section 25 of the Act for custody of minor Reena. The said petition was contested by the appellant and respondents No.2 and 3 by filing a written statement. Besides raising various preliminary objections including that the court at Sonapat had no jurisdiction to try the petition as the child was residing at Rohtak, it was pleaded that the child was residing with her maternal uncle and aunt and they were giving proper education to her. They also got admitted her in an English medium school and were keeping the child properly by giving all modern facilities of living. It was further pleaded that respondent No.1 had no source of income and was also having no love and affection for the child. Her custody with them was safe and it was not possible for a female child to remain with respondent No.1. The other averments made in the petition were denied and a prayer for dismissal of the same was made. From the pleadings of the parties, the trial court framed the following issues:-

1. Whether the petitioner is entitled for the custody of the child as alleged? OPP
2. Whether the present petition is not maintainable in the present form? OPR
3. Whether the present court has no jurisdiction to try the present case? OPR
4. Whether the present case is bad for non-joinder of necessary parties? OPR
5. Relief.

3. In support of his case, respondent No.1 appeared as PW1 and examined Jagdish as PW2 and Murti Devi as PW3. On the other hand, the appellant had examined himself as RW1 and Sanjana as RW2.

4. The trial court on appreciation of evidence led by the parties decided issue No.1 in favour of respondent No.1 holding that he is the natural guardian of the minor and had more love and affection towards his own child. Issues No.2 and 3 were decided against the appellant and respondents No.2 and 3 and issue No.4 was decided against them being not pressed. Accordingly, the trial court vide judgment dated 13.1.2006 allowed the petition and directed the appellant and respondents No.2 and 3 to hand over the custody of the minor to respondent No.1 within two months from the date of judgment. Hence, the present appeal.

5. Learned counsel for the appellant submitted that the appellant was having sound financial background and they could provide better future to the minor. It was also contended that respondent No.1 was an illiterate person and was having no source of income. He was having bad habits and used to take liquor daily and was, therefore, not able to maintain the minor child. It was pointed out that the date of birth of the child is 15.7.1998 and she would be more than 16 years now. The custody petition was decided by the trial court on 13.01.2006 whereby custody was given to respondent No.1-father. However, the operation of the said order was stayed till further orders by this Court on 9.2.2006 and the appeal was admitted on 26.2.2007. The interim order is still operational. It was urged that under the circumstances, the judgment of the trial court deserved to be set aside.

6. On the other hand, learned counsel for respondent No.1 submitted that the trial court on appreciation of evidence led by the parties granted the custody of the minor to him. It was contended that respondent No.1 being father and natural guardian of the child had got every right to keep her.

7. After hearing learned counsel for the parties, we find force in the contentions of learned counsel for the appellant.

8. The Apex Court in **Gaytri Bajaj v. Jiten Bhalla 2012(4) RCR (Civil) 603** discussing the issue relating to custody of minor child had held as under:-

“14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and

welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.”

9. No doubt, the father of the minor being the natural guardian, has the right of custody unless the Court comes to the conclusion that the father is unfit to have the custody and that it is not for the welfare of the minor that the father should be allowed to exercise his right. Guardianship is in the nature of a sacred trust and any entrustment is essentially a revocable authority. Further, the court is required to keep in mind the paramount interest and welfare of the child while deciding the issue of custody of the minor child. It is not the better right of the either party that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parties seeking custody to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court. It was not disputed that the date of birth of the girl child, Reena is 15.7.1998 and by now she had attained the age of more than 16 years. She is in the custody of the appellant and respondents No.2 and 3 at present as the operation of the judgment of the trial court dated 13.01.2006 was stayed by this Court till further orders on 9.2.2006. The minor was produced in the Court today and she had specifically stated that she is living with the appellant and

respondents No.2 and 3 and is very happy with them. On a query being put to her, she is not able to recognize her father as she had never met him. Further, the child is not only happy in the company of the appellant and respondents No.2 and 3, they also appear to be in a position to look after her, provide her with adequate educational facilities and also to maintain her in a proper and congenial manner. In such a situation, it would not be justified to displace the minor child from the custody of the appellant and respondents No. 2 and 3 especially when there is nothing to show that there has been cruel treatment to the child by the appellant or respondents No.2 and 3.

10. In view of the above, we do not find that the judgment dated 13.1.2006 passed by the trial court is legally sustainable. It would be in the fitness of things that the custody remained with the appellant and respondents No.2 and 3 till the minor child, Reena attained majority. Accordingly, the appeal is allowed and the impugned judgment is set aside and the petition filed by respondent No.1 for her custody is dismissed.

(AJAY KUMAR MITTAL)
JUDGE

February 19, 2015
gbs

(SNEH PRASHAR)
JUDGE