

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No. 1874 of 2013

Date of Decision: 30.1.2015

Joginder

....Appellant.

Versus

Smt. Sunita and others

...Respondents.

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

PRESENT: Mr. M.S. Kathuria, Advocate for the appellant.

None for the respondents.

AJAY KUMAR MITTAL, J.

1. This appeal has been filed by the appellant against the judgment dated 24.7.2012 passed by the Civil Judge (Senior Division), Jhajjar whereby the petition filed by him for custody of the minor daughter, namely, Pushpa Devi alias Jinnu, was dismissed.

2. Put shortly, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The marriage of the appellant with respondent No.1 was solemnized according to Hindu rites and rituals at village Humayunpur, Tehsil and District Jhajjar. The marriage was consummated and out of the said wedlock, a daughter, namely, Pushpa Devi alias Jinnu was born at village Neola. The marriage could not pull on and matrimonial disputes started between the appellant and respondent No.1. However, the said marriage was dissolved by a decree of divorce vide judgment and decree dated

20.4.2005. Since then, the appellant and respondent No.1 were living separately. Respondents No.2 and 3 are the parents of respondent No.1 whereas respondent No.4 is the second husband of respondent No.1. Respondents No.1 to 3 along with some social elements came to the house of the appellant and forcibly took away the minor daughter. The appellant being father of the minor was the lawful guardian and had every right to retain the custody of the minor. He was having sufficient income from the agriculture to bring up and to educate the minor whereas respondent No.1 was having no source of income. Moreover, respondent No.1 had contracted marriage with respondent No.4 and was not interested to bring up and to educate the minor. The appellant requested respondent No.1 to hand over the custody of the minor but to no effect. Accordingly, the appellant filed a petition seeking custody of the minor. The said petition was resisted by the respondents by filing a written statement. Besides raising various preliminary objections, it was pleaded that just after the marriage, respondent No.1 was harassed and tortured on account of demand of dowry and cash and a criminal case under Sections 498-A, 406, 506 read with Section 34 of the Indian Penal Code was also registered against the appellant and his family members. However, on feeling sorry by the appellant, a compromise was effected and the criminal case was withdrawn by respondent No.1. The marriage between the appellant and respondent No.1 was dissolved by a decree of divorce. 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 handing over the custody of minor
Pushpa Devi @ Jinu d/o Joginder petitioner is

in the welfare of minor Pushpa?OPP

2. Whether present petition is not maintainable in the present form? OPR

3. Relief.

3. In support of his case, the appellant appeared as PW1 and tendered his affidavit Ex.PW1/A in his statement and examined Sumer Singh as PW2 who also tendered his affidavit Ex.PW2/A. On the other hand, respondent No.1 examined herself as RW1 and tendered her affidavit Ex.RW1/A and examined respondent No.2 as RW2 who tendered his affidavit Ex.RW2/A.

4. The trial court on appreciation of evidence led by the parties decided issue No.1 against the appellant holding that the custody of the minor Pushpa Devi @ Jinnu in the hands of the appellant was not for the welfare of the minor. Issue No.2 was decided in favour of the respondent holding that the petition was not maintainable. Accordingly, the trial court vide judgment dated 24.7.2012 dismissed the petition. Hence, the present appeal.

5. Learned counsel for the appellant submitted that the appellant being the father of the minor had every right to claim the custody of the minor and his appointment as guardian was justified especially when the respondent had got re-married. Learned counsel further submitted that the appellant was having sound financial background and he could provide better future to the minor.

6. After hearing learned counsel for the appellant, we do not find any merit in the appeal.

7. 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.”

8. The order of custody of minor 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. In the present case, admittedly, the appellant and respondent No.1 were living separately as they have got divorced. The minor was living with her mother since birth and was studying in 9th class. The respondents had placed on record a copy of affidavit dated 23.6.2005 before the trial court in which it was clearly mentioned that the appellant would not claim the custody of the minor from respondent No.1 till she attains the age of 18 years and after majority, she would live with the appellant who would bear all the expenses. The appellant got divorce from respondent No.1 in the year 2005 and filed the petition in the year 2007 without any reason about the custody of the minor. The custody of the minor was already settled vide affidavit dated 23.6.2005. The minor being female was safe in the hands of her mother who is also capable for providing good education and protection to her. There is no justification to displace the right of the mother, that too, when the minor is in her custody, taking education and there is no proof of any cruel treatment to her by the mother. In the facts and circumstances of the case, the trial court held that the custody of the minor in the hands of the appellant was not for the welfare of the minor. The learned counsel for the appellant has not been able to dispel the findings recorded by the trial court which are based on appreciation of evidence produced on

record. We do not find any reason to differ with the findings recorded by the trial court.

10. In view of the above and the findings recorded by the trial court, no ground is made out for handing over the custody of the minor to the appellant. Accordingly, the appeal being devoid of any merit is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

January 30, 2015
gbs

(SNEH PRASHAR)
JUDGE