

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

**FAO No.5626 of 2014.
DATE OF DECISION: February 19, 2015.**

ARVINDER SINGH
SARABJIT KAUR

VERSUS

....APPELLANT.
....RESPONDENT.

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

Present: Mr. Rajkaran Singh Brar, Advocate
for the appellant.

Mr. P.S. Dhaliwal, Advocate
for the respondent.

SNEH PRASHAR, J.

1. A petition under Section 25 of Guardian and Wards Act, 1890 (for short “the Act of 1890”) was filed by appellant-Arvinder Singh claiming custody of his minor son Sukhvir Singh from respondent Sarabjit Kaur. The petition was dismissed by learned Civil Judge (Senior Division), SAS Nagar, Mohali, vide judgment dated 26.02.2014 passed in petition no.14 of 2013, assailing which the instant appeal was filed.

2. In precise, the facts extracted from the record are as under:-

Appellant Arvinder Singh was married to respondent Sarabjit Kaur on 15.05.2001 at Kharar, by way of Anand Karaj. Out of the wedlock, a son namely Sukhvir Singh was born on 24.01.2002.

It was averred by petitioner Arvinder Singh that due to temperamental differences between the parties and due to interference of the respondent's parents in their matrimonial affairs, the marriage became unsuccessful. Ultimately, on mutual consent, both the parties filed a divorce petition before the Additional Civil Judge (Senior Division), Kharar, which was allowed on 19.01.2008 and the marriage was annulled by a decree of divorce. At the time of filing of the said petition, it was agreed between them that the custody of minor son Sukhbir would remain with the respondent as she was the mother and the natural guardian. Subsequently, the respondent married Gurpreet Singh Virdhi on 09.02.2011 and left the minor son in the custody of her brother at Mohali, thus depriving him of motherly affections. Such conduct amounted to neglect on her part and he (petitioner) being the father and natural guardian was entitled to take custody of his son.

It was further averred that Gurpreet Singh Virdhi was settled in Australia and that the respondent planned to live with him in Australia. If the child was to be left in India, he would be deprived of love and affection and if he was taken to Australia, he would be placed in the custody of his step father, which was not in his interest and welfare. The appellant pleaded that he had filed the instant petition to protect the interest and welfare of the minor child as the same was at stake. The respondent had failed to fulfill her duties as the natural guardian of the minor, whereas he was ready and willing to shoulder the responsibility. He was in a position to provide the minor child with a better atmosphere

socially, economically and financially.

3. Respondent contested the petition and a written reply was filed by her raising preliminary objection with regard to maintainability and estoppel etc. She alleged that the petition was barred under Order II Rule 2 of the Code of Civil Procedure, 1908 as the appellant had previously filed a suit for permanent injunction against her in the court of Learned Additional Civil Judge (Senior Division), Mohali wherein she had appeared and had filed a written reply. Because of concealment of material facts by the appellant he was estopped from filing the present petition.

She further pleaded that the marriage between the parties stood dissolved by a decree under section 13-B of the Hindu Marriage Act on 19.01.2008. At that time, the age of the minor son was 5 years 11 months. It had been agreed between the parties that the custody of the minor son would remain with her as she was a qualified lady and had sufficient means to take care of him whereas the appellant did not have the same. The minor son Sukhbir was studying in St Stephen's School, Sector 45-B, Chandigarh which was a well renowned English medium school and all the expenses were being borne by her. She had working knowledge of computers and was employed with Shri G.S. Narindera Builders Pvt Ltd, Kharar and was earning Rs.15,000/- per month. In case she takes the minor child to Australia, the Australian Government would give 700 Australian Dollars as education fee for the minor child and it would be a better place for her son to live than a small village in Mundi

Kharar. Her allegation was that she had deposited Rs.1,20,000/- in the name of the minor child and had obtained various insurance policies for him with various companies and the appellant only wanted to get hold of the FDRs and other amount in the name of the minor under the garb of this petition.

Replying on merits, it was alleged by the respondent that although it was not mentioned in the divorce petition filed by the parties but the appellant's parents had treated her with cruelty and it had become very difficult for her to live with them. She disclosed that in 2006, when the minor child was studying in Henderson Jubilee School, Kharar in LKG, the appellant along with his brother had attempted to kidnap the child from the said school, but the principal of the school had refused to hand over the custody of minor child to him. Ultimately, the marriage stood dissolved and she retained the custody of the child voluntarily. Admitting her marriage with Gurpreet Singh Virdhi, she pleaded that it would help her to broaden the career prospects of the minor child and his welfare would be taken care of in Australia. Her husband had 1,12,129 Australian Dollars and had no other liability. He had orally adopted the minor child. Her parents in law were getting pension. Her own parents were also financially sound and were running a business of property dealing. Denying the right of appellant to claim custody of the minor, a prayer for dismissal of the petition was made.

4. On the pleadings of the parties, following issues were framed:-

- (1) Whether the petitioner is entitled for custody of minor Sukhbir Singh as prayed for? OPA.
- (2) Whether the petition is not maintainable? OPR.
- (3) Whether the petition is barred under Order 2 Rule 2 of the CPC? OPR.
- (4) Whether respondent is entitled for special cost of Rs.1 lac? OPR.
- (5) Relief.

5. Both the parties adduced evidence to substantiate their respective contentions.

Considering the evidence adduced and arguments addressed on behalf of the parties, learned trial Court finding that the petitioner-appellant is not entitled to the custody of the minor, dismissed the petition with costs.

6. Feeling aggrieved by the impugned judgment dated 26.02.2014 passed by learned trial Court, appellant Arvinder Singh preferred the instant appeal.

7. The submissions made by Mr. Rajkaran Singh Brar, learned counsel representing the appellant and Mr. P.S. Dhaliwal, learned counsel representing the respondent have been heard.

8. Since the marriage between the parties could not work out, they parted ways by getting their marriage dissolved by a decree of divorce by mutual consent. Admittedly, at the time of filing petition for mutual divorce, considering the interest of the minor child and his tender age it was agreed between the parties that the custody of the minor child will remain with the respondent being the mother.

9. Learned counsel for the appellant argued that the appellant was constrained to file the instant petition because the respondent had since remarried on 09.02.2011 with Gurpreet Singh Virdhi son of Hari Singh, resident of Pinjore, District Panchkula. After remarriage, she had gone to Australia and had left the minor child with her brother at Mohali. The child was being deprived not only of the love of his father but also now of his mother forcibly. He had been neglected by the respondent and therefore, the appellant, being the father, who has natural love and affection for the child and is his natural guardian in absence of the mother, is entitled to his custody.

10. From the judgment of learned trial Court, it transpires that the minor child was called in the court for personal talk. In the said context, the observations of the trial court are as under:-

“It is pertinent to mention here that minor child Sukhbir Singh was also called upon to know about his wish in whose custody he wants to remain and his statement was recorded on 09.12.2013 wherein he has deposed that he is studying in 6th class in St. Stephen School, Sector 45-B, Chandigarh and he does not know anything about the present case. The name of his mother is Sarabjit Kaur. He does not know Arvinder Singh who is stated to be present in the court. He does not want to remain with him and he is residing with his maternal uncle Narinder Singh and mother Sarabjit Kaur and he does not want to receive the items produced by the petitioner in the court.”

11. In a case of custody of a minor, the dominant factor for consideration before the Court is the 'welfare' of the child which cannot be measured by money or by physical comfort alone. The word 'welfare' has to be taken in its widest sense. The moral and religious 'welfare' of the

child as well as his physical well being and the tie of affection are not to be disregarded.

In **Gaurav Nagpal vs. Sumedha Nagpal, 2009 All India Matrimonial Law Reporter 925** holding that the paramount consideration is welfare of the child and not right of parents under a statute, the law enunciated by the Apex Court was summed up as under:-

(1) *Grant of custody of minor child by court—*

Though the provisions of the special statutes which govern the right of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases.

(2) *Father is natural guardian, but for custody of child paramount consideration is as to what is conducive to welfare of minor.*

(3) *When conflicting demands are made by parents, court then should not give emphasis on what the parties say – Court has to exercise a jurisdiction which is aimed at welfare of minor.*

(4) *Children are not mere chattels nor are they toys for their parents.*

(5) *Even if father loved the children and was not undesirable person would not necessarily lead to conclusion that welfare of children would be better promoted by granting custody of children to father.*

(6) *In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.”*

12. As observed above, in his statement recorded by the court the child had unequivocally stated that the petitioner, who was present in court, was not known to him and that he desired to live with his mother. He at that time was studying in class 6th, which means that for all these years ever since the parties separated, the appellant had never even bothered to visit the child because of which he was not able to recognize him. When this was the attachment and care of the appellant for the minor son, he certainly was not entitled to his custody. The wish of the minor child and his welfare is the paramount consideration and in the totality of the circumstances the appellant has no right to claim the custody of the minor.

12. Thus, keeping in view all facts and circumstances, there appears to be no perversity or illegality in the findings of learned trial Court. The overall welfare including moral and ethical welfare of the child lies with the respondent-mother and the appellant-father is not entitled to custody of the minor child. The findings warrant no intervention and as such, the appeal is dismissed.

(AJAY KUMAR MITTAL)
JUDGE

(SNEH PRASHAR)
JUDGE

February 19, 2015.

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Note: Whether to be referred to the Reporter or not? Yes/No.