

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No. 6107 of 2014 (O&M)

Date of Decision: 19.2.2015

Dharampreet Kaur

....Appellant.

Versus

Mohinder Kaur

...Respondent.

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

PRESENT: Mr. D.K. Singla, Advocate for the appellant.

AJAY KUMAR MITTAL, J.

1. This appeal has been filed by the appellant against the judgment dated 19.8.2013 passed by the Additional Civil Judge (Senior Division), Khanna whereby the petition filed by her under Section 25 of the Guardian and Wards Act, 1890 (in short "the Act") for custody of the minor son, namely, Jasanpreet Singh, was dismissed.

2. A few facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The appellant is mother and the respondent is grand mother of the minor. The husband of the appellant had died on 17.12.2003 and she was turned out of the matrimonial home on 19.12.2003. The custody of the minor was retained by the respondent. The appellant was qualified having diploma of Prabhakar and studied upto B.A.II whereas the respondent was an illiterate woman. The appellant being the mother and guardian of the minor was entitled to his custody. She made repeated requests to the respondent to hand

over the custody of the minor but to no effect. Accordingly, she filed a petition under Section 25 of the Act. The said petition was contested by the respondent by filing a written statement. Besides raising various preliminary objections, it was pleaded that the appellant had already relinquished her rights as guardian of minor vide agreement dated 19.12.2003. She was not earning anything and was dependent upon her married brother and was not in a position to maintain the minor. The minor was being brought up by the respondent and other members of the family. 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 petitioner is entitled to the custody of Jasanpreet Singh from the respondent? OPA
2. Whether present petition is not maintainable in the present form? OPR
3. Relief.

3. In support of her case, the appellant appeared as PW2 and examined PW1 Avtar Singh and PW3 Jarnail Singh. On the other hand, the respondent examined herself as RW1, Baldev Singh as RW2, Mewa Singh as RW3 and Amarjit Singh as RW4.

4. The trial court on appreciation of evidence led by the parties decided issue No.1 against the appellant holding that the interest of the child would be best served if he remains with the respondent but with sufficient access to the appellant to visit the minor at frequent intervals but so as not to disturb and disrupt his normal studies and other activities. Issue No.2 was decided against the respondent. Accordingly, the trial court vide judgment dated 19.8.2013 dismissed the petition by

giving visitation rights to the appellant. Hence, the present appeal.

5. Learned counsel for the appellant submitted that the appellant being the mother of the minor had every right to claim his custody. It was further submitted that the future of the minor was dark in the hands of the respondent as she was an illiterate lady. It was urged that the appellant is an educated lady having better economic position, capacity and competency to earn. It was also contended that the alleged agreement had no value in the eyes of law as the husband of the appellant had expired on 17.12.2003 whereas the alleged agreement was executed on 19.12.2003 and at that time she was not in a fit state of mind.

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 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 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, except the statement of the appellant, there was no evidence to show that she had sufficient means to bring up the minor. The witnesses examined by her, i.e. PW1 Avtar Singh and PW3 Jarnail Singh had only stated that the minor was the only child of the appellant and his custody be handed over to her. Even the FDRs and NSCs proved on record by the appellant which related to the years

2005 to 2008 were not sufficient for upbringing the child. In her cross-examination, the appellant stated that she had not opened any tuition centre but takes tuition at her home. She had no immovable property in the village or anywhere else. Although, the appellant had challenged the alleged agreement dated 19.12.2003 but the respondent had proved the same by leading sufficient and reliable evidence. Admittedly, the child was called by the trial Judge in his chamber on 22.2.2013 to know about his wish whether he wanted to go with his mother, the child who had attained the age of 12/13 years replied in the negative. The child was happy in the company of the respondent and had been doing well in the school. He was found to be well dressed, well behaved and intelligent as well. Further, no circumstances were made out to displace the child from the custody of the respondent especially, when the minor is in her custody, taking education and there is no proof of any cruel treatment to him by the respondent. In the facts and circumstances of the case, the trial court rightly held that the custody of the minor with the respondent was in the interest of the minor. However, visitation rights were given to the mother-appellant. The relevant findings recorded by the trial court read thus:-

“9. In the present case, learned counsel for petitioner has emphasized mainly on the fact that Mohinder Kaur respondent has no property in her name and that only property under the occupation of her husband is panchayati. But, there is not even an iota of evidence to show that petitioner earns sufficient except self-serving statement of petitioner. Petitioner has examined two witnesses from her

locality, who also have stated regarding the minor being only child of petitioner and that his custody should be handed over to her. Petitioner stated that she is having Rs.2,00,000/- approximately which she deposited in the form of FDRs and NSCs as proved by her on record. But, all these documents pertain to the years 2005 to 2008 and are not to my mind sufficient for upbringing the child. Further, no document has been placed on record showing deposit of any amount thereafter or any document showing continuous and independent source of income of petitioner. During the course of cross-examination, she stated that she has not opened any tuition center but only take tuitions at her home. That she does not have any immovable property in village Pahadpur or anywhere else. Although, petitioner has challenged agreement dated 19.12.2003, but same is proved, by leading sufficient and reliable evidence, as discussed above, to prove this document. No doubt, it is settled provision of law that a statutory right cannot be given up by an agreement, but at the same time, it has also been settled by law that a child cannot be uprooted from home of his upbringing. If the minor is old enough to form an intelligent preference, the Court may consider that preference. Having regard to the complexities of the situation in which this Court has been called upon to balance the emotional

confrontation of the mother and grandmother of the minor child and the welfare of the minor, I have given anxious thought to what would be in the best interest of the minor. On 22.02.2013, a chamber meeting was held by the undersigned with Jashanpreet Singh in order to ascertain his preference in the matter. The child has attained age of about 12/13 years i.e. age of discretion. He was questioned if he wants to move with his mother-the petitioner, but he replied in negative. The child was found to be well dressed, well behaved, well brought up and intelligent enough. The child appears to be happy in the respondent's company and has also been doing consistently well in school. No circumstances is borne out from the material and facts before this Court making the respondent ineligible to take custody of Jashanpreet Singh. Under these circumstances, I am of the considered view that interest of the child will be best served if he remains with the respondent, but with sufficient access to the petitioner to visit the minor at frequent intervals but so as not to disturb and disrupt his normal studies and other activities."

10. 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.

11. 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.

12. There is a delay of 184 days in filing the appeal. CM No. 16719-CII of 2014 has been filed for condonation of 184 days' delay in filing the appeal. Since the appeal has been dismissed on merits, no further orders are required to be passed in the application for condonation of delay in filing the appeal and the same is disposed of as such.

(AJAY KUMAR MITTAL)
JUDGE

February 19, 2015
gbs

(SNEH PRASHAR)
JUDGE