

IN THE PUNJAB & HARYANA HIGH COURT AT  
CHANDIGARH

FAO-5925-2015(O&M)  
Date of decision : 29.10.2015

Bhateri Devi

... Appellant

Versus

Sangeeta Devi and another

... Respondents

***CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA  
HON'BLE MRS. JUSTICE REKHA MITTAL***

Present: Mr.Ashutosh Kaushik, Advocate  
for the appellant.

Mr.Lajpat Sharma, Advocate  
for the respondents.

**REKHA MITTAL, J.**

The present appeal lays challenge to the judgment dated 09.07.2015 passed by the District Judge, Family Court, Hisar whereby the petition filed by the respondent (mother) under Section 25 of the Guardian and Wards Act, 1890 for custody of her minor son Pritam has been allowed and the appellant (respondent No.1) namely Bhateri Devi, grand mother of the minor child is directed to hand over custody of the minor child to the respondent within a period of one month. The appellant (grand mother) has been allowed visitation right to meet the minor child at parental home of the respondent from 9 a.m. to 5 p.m. on the last Sunday of every month.

The present litigation is a fight between the mother and

the grand mother of the minor child namely Pritam born on 10.09.2010. The respondent lost her husband Pawan who died on 18.05.2012. The plea of the respondent is that during the life time of her husband, she was harassed and maltreated on account of demand of dowry. After death of her husband, behaviour of the appellant became more cruel and she was ultimately thrown out of the matrimonial house just after some days of the death of her husband. On 01.07.2012, the appellant forcibly snatched the minor child of the respondent and refused to return the child. A number of panchayats were convened by her family members for her rehabilitation in the matrimonial home with an intent to take care of the minor child but the respondents did not accede to her request. The child is not being looked after properly by the respondents (appellant) and she being the mother and natural guardian of the minor is the best person to look after physical, emotional and other needs and comforts of the child.

The respondents filed the written statement and in turn denied all the allegations in regard to maltreatment of the respondent during her stay in the matrimonial home either on account of demand of dowry during life time of Pawan Kumar or thereafter. After death of Pawan Kumar, the respondent hurriedly left her matrimonial home out of her own free will. She did not bother to take care of the minor child either during life time of her husband or thereafter. She

voluntarily left the minor child in the custody of the respondents (appellant) and expressed her inability to maintain the minor to whom she considered a burden upon her. She also gave in writing that after the death of her husband, she has no connection with the movable or immovable property of the respondents and that she shall not raise any dispute in regard thereto. The present petition has been filed with a clear intent to harass and humiliate the respondents and to extract money from them.

The controversy between the parties led to framing of following issues by the learned trial Court:-

1. *Whether the petitioner is entitled to get the custody of minor child namely Pritam on the grounds, as alleged in the petition?OPP*
2. *Whether the petitioner has no locus standi and cause of action to file the present petition?OPR*
3. *Whether the petition is not maintainable in the present form?OPR*
4. *Whether the petitioner has suppressed the true and material facts from the Court?OPR*
5. *Whether this Court has got no jurisdiction to try and entertain the present petition?OPR*
6. *Relief.*

The parties were permitted to lead evidence in support of their respective claims. The respondent (petitioner therein) examined herself, Karambir (her father) PW2, Hari Om PW3. To rebut

evidence of the respondent, the appellant appeared in the witness box and failed to examine any other witness despite a number of opportunities granted for the purpose and eventually evidence of the respondents was closed by order of the Court.

The learned trial Court bestowed its thoughtful consideration to the facts and circumstances relevant in the context of welfare of the minor child and came to hold that the respondent (mother) is entitled to custody of the child viz-a-viz the appellant grand mother and accordingly directed the appellant to hand over custody of the minor child to his mother. However, the appellant being the grand mother has been allowed the visitation rights referred to hereinbefore.

Feeling dissatisfied with the judgment passed by the learned trial Court, the present appeal has been preferred by Bhateri Devi, grand mother of the minor child.

To assail findings of the learned trial Court that welfare of the child lies in his custody with the mother, it is argued that the learned trial Court has not taken a practical view by ignoring one of the important considerations that the respondent (mother) has got no means and sources to provide for the needs of the child. It is argued that statement of the respondent that she is doing tailoring work and earning ₹80/- per day is falsified and belied by her father Karambir PW2 as he candidly admitted that the respondent has no source of

income to maintain herself and she is dependent on her father. On the contrary, the appellant owns 7 acres of land and is getting widow pension to the tune of ₹15,000/- per month, therefore, has sufficient income to provide for comforts rather luxuries to the minor child as the child is the only person to be maintained by the appellant.

Another submission made by counsel is that the minor child is in custody of the appellant since 01.07.2012 and thus, the child is emotionally attached with his grand mother. The respondent relinquished her claim in regard to custody of the minor child and property of her husband's family by way of writing dated 01.07.2012 Ex.R1. She did not put any effort either during pendency of the proceedings before the trial Court or prior thereto to have a meeting with the child that negatives her plea that she is really concerned about the well being of the child. In addition, it is submitted that the child would get an emotional setback in case the judgment passed by the trial Court is affirmed and as a consequence, the child is transferred from the custody of his grand mother to that of his mother with whom the child has no interaction since the age of 1 ½ years. The learned trial Court did not bother to have an interaction with the child to know his wish as to the person with whom he would like to reside. It is vehemently argued that as the child is happily residing with his grand mother and has not seen the mother since 01.07.2012, the welfare of the child certainly lies in continuation of his custody

with the grand mother.

Counsel for the respondent, on the contrary, has supported the judgment passed by the learned trial Court. It is submitted that after death of Pawan Kumar (father of the minor), the respondent is the natural guardian and is entitled to custody of the child. If the grand mother's claim for welfare of the child is genuine and bonafide, she can transfer a part of the land owned by her in the name of the child being one of the class one heirs of her only son. The father of the respondent is a government employee and is ready to provide for maintenance of the respondent and her child. The respondent is a young lady and she is prepared to work and earn livelihood for the child. The respondent was deprived of custody of her minor child when she was passing through a crisis due to untimely demise of her husband just few years after marriage of the respondent with Pawan Kumar. She was turned out of the matrimonial home a short after death of her husband and the minor child was snatched from her. The writing Ex.R1 has been forged and fabricated by using signatures of the respondent and his father obtained on a blank paper on a false pretext, with an intent to deprive the respondent of custody of the minor and claim in the property of her husband's family. The appellant has not examined any witness to prove the writing marked Ex.R1 nor the original document was produced on record. The mere fact that the respondent or her father

has admitted their signatures on Ex.R1, in the above circumstances, is not at all sufficient to prove the writing Ex.R1 in accordance with law. It is vehemently argued that had the respondent executed any such document and that too voluntarily, there was no reason for her to file the petition just three months after she was turned out of the matrimonial home. It is further argued that keeping in view the contents of Ex.R1, it is difficult to believe that this document was executed by the respondent relinquishing all her rights to claim custody of the child and in the property of her husband's family without getting anything in lieu thereof.

The last submission made by counsel is that as the respondent was not allowed to meet her child since 01.07.2012 when he was barely 1 ½ years old and thus he is residing with his grand mother, no useful purpose would have been served by holding an interview with the child.

We have heard counsel for the parties and perused the records.

There cannot be any dispute about the settled principles of law in relation to custody of a minor child. The first and paramount consideration is the welfare and interest of the child and not the rights of the parties under the statute. The question of the welfare of the minor child has to be examined in the context of relevant facts and circumstances.

In the case at hand, the dispute in regard to custody of the child, is between the grand mother and the mother. The father of the child passed away when the child was barely 1 ½ years old. The appellant has pressed into service her better financial status viz-a-viz respondent, to claim custody of the child. In a fight between the father and mother for custody of a child, the father is presumed to be better situated to look after the child being normally the working member but better financial resources of either of the parents can never be the sole determinant factor for custody of a child. Concededly, the respondent is a young widowed lady and there is nothing on record to suggest that she is suffering from any disability to work and earn for her child. The father of the respondent is in government job and he appeared in the witness box to support cause of his daughter to claim custody of the minor child. As has been rightly argued by counsel for the respondent that if the grand mother is really interested in the welfare of the minor, she can provide for maintenance of the child from her resources so that the child does not suffer for want of adequate funds. In this view of the matter, we find it difficult to prefer the grand mother over the mother in regard to custody of the child on the solitary ground that the grand mother owns land and is getting pension.

Much stress has been laid by counsel for the appellant that the respondent (mother) relinquished her claim to seek custody

of the child as she executed the writing Ex.R1. In the written statement filed by the appellant, there is reference to a writing by the respondent whereby she expressed no concern or connection with the movable or immovable properties of the respondent therein. However, it does not make reference to the date, month and year of the writing, the persons in whose presence it was executed, the scribe and the attesting witnesses thereof. The respondent was taken by surprise when during her cross-examination, she was confronted with photo copy of a document dated 01.07.2012 and marked as Ex.R1. She initially admitted her signatures on the writing Ex.R1 but in the next breath voluntarily stated that signatures on writing Ex.R1 are not her's and her signatures were obtained on a blank paper by Sandeep, son of maternal uncle of her husband on the pretext that motor cycle of the deceased was to be got released from the Police Station. Karambir PW2, father of the respondent has also admitted his signatures on Ex.R1 but explained that his and his daughter's signatures were obtained by the villagers of Chikanwas on the pretext that she would get compensation under Rajiv Gandhi Yojna. He has categorically denied that he and his daughter compromised the matter with the respondent on the basis of Ex.R1.

The question that arises for consideration is whether the writing Ex.R1 has been proved in accordance with law, if so, whether it creates estoppel against the respondent to claim custody of her

minor son.

First of all, the original of Ex.R1 is not produced on record. The respondent and his father have not admitted execution of Ex.R1. The mere fact that they admitted their signatures on photo copy of Ex.R1 with an explanation as to the circumstances under which their signatures were obtained, in our considered opinion, is not sufficient to prove due execution of the writing Ex.R1. The appellant Bhateri Devi is not a signatory to the document Ex.R1. The appellant despite getting a number of opportunities failed to examine the Sarpanch or any other attesting witness of Ex.R1. Under these circumstances, we have no hesitation to conclude that the document Ex.R1 has not been proved in accordance with law and therefore, reliance of the appellant on Ex.R1 to controvert claim of the respondent is misplaced. This apart, a casual reading of Ex.R1 makes it evident that the respondent relinquished all her claims in the property of her in-laws family as well as custody of her child without consideration of any kind whatsoever. The matter would have been different had she received something in lieu of relinquishment of her rights.

The respondent had a serious grievance against her in-laws family on account of demand of dowry when her husband was alive. The things became worse after his (husband) death. She did not receive anything (money or property) from the in-laws being their

widowed daughter in-law. In the face of such a situation, it is difficult to believe that the respondent executed any document relinquishing her statutory rights and surrendering completely in favour of her in-laws family members.

As a matter of fact, it appears that Ex.R1 has been prepared on blank signatures of the respondent and her father and it is for this reason that the appellant did not examine any of the attesting witnesses of the document despite repeated opportunities nor produced the original document, may be, to escape prosecution for the offence of forgery. One thing more to be added here is that had the respondent given up her claim in regard to custody of the child, there was no reason for her to file the petition in October, 2012 just three months of the writing. Taken from any angle, the appellant cannot seek resort to writing Ex.R1 to contest respondent's claim in regard to custody of her minor son, the only ray of light of her future.

Counsel for the appellant has raised another issue by arguing that as the respondent did not bother to meet the child, it renders her claim for custody of the child doubtful. The petition for custody of the child was filed just three months after the mother left the matrimonial home. She also filed an application seeking interim custody during pendency of the proceedings, disposed of by the trial Court with a direction to the appellant to produce the minor child on each date of hearing so that the mother could meet him and revive her

relationship. The zimny orders recorded by the Court did not indicate that the appellant complied with that order. It does not appear that the trial Court ensured presence of the minor on the subsequent dates of hearing. The appellant cannot be allowed to take advantage of her wrong by failing to produce the child before the trial Court, despite directions. The filing of the petition without loss of time and the application for interim custody is a positive answer to misconceived plea raised by counsel for the appellant.

This brings the Court to the question of interaction with the minor to ascertain his wish in regard to his custody. In cases where the child has attained the age of understanding, quite often if not always, it is desirable to have audience with the child to know his/her view point. Counsel for the appellant may be right in his submission that the child should have been interviewed if it really serves the purpose of giving a clue in the right direction to ascertain welfare of the minor. In the case at hand, the child has not met the mother since he was less than two years old. He is in exclusive custody of the grand mother for the past more than three years. He may not even recognize his mother. The parties along with the minor child appeared in the Court on 24.09.2015. We, in an effort to explore possibility of an amicable settlement, interacted with the parties but it did not fructify. The child was clinging to his grand mother and crying, may be, he was not comfortable with the Court environment.

We were in a predicament if the child should face an ordeal by asking him with whom he would prefer to live – mother or grand mother. Under these circumstances, we avoided to have an interaction with the child as we thought that it would be nothing but an empty formality and may further create confusion and hardship in deciding the sensitive issue of custody of the child.

The mother of the minor child is matriculate whereas the appellant (grand mother) is an illiterate lady. The child has lost his father when he was less than two years. In case the custody of the child is not given to the mother, he would be rendered orphan even during life time of his mother, who is insisting and interested in his custody. There is no disability incurred by the mother to have custody of the child. Though the grand mother may be better equipped viz-a-viz mother so far as the financial status of the parties is concerned. However, the mere fact that the grand mother has better financial backing, in our considered opinion, is not sufficient to deprive the child of his mother and the mother of her precious possession. We would hasten to add that the grand mother appeared in the witness box tendered into evidence her affidavit Ex.RW1/A wherein she deposed that she will look after the child well so that there is no break in lineage of the family. The statement of the grand mother speaks volumes about her mindset that she is more bothered about lineage of the family than welfare of the child. She has not bothered

to appreciate that by keeping the child in her custody, she would be depriving her grand son of love, affection and motherly care which cannot be purchased by any amount of money. The appellant never offered that she is ready to rehabilitate her widowed daughter in-law in her house so that she can look after the minor in her presence. It further appears that as the minor would be an heir to the property owned by the appellant, she does not wish the property of her family to be transferred to another family (maternal grand parents of the minor). We are not oblivious of the fact that the child may feel emotional set back temporarily when shifted from custody of the grand mother to that of mother but the same cannot deter us to allow the mother to have custody of her child as she would be the best person to bestow love, care, protection and guidance to her child. In view of the above, we do not find any error much less illegality in the findings recorded by the learned trial Court as would call for intervention.

For the reasons aforesaid, finding no merit, the appeal is dismissed leaving the parties to bear their own costs.

**(RAJIVE BHALLA)**  
**JUDGE**

**(REKHA MITTAL)**  
**JUDGE**

**October 29, 2015.**

*Davinder Kumar*