

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

FAO No.9328 of 2014.

DATE OF DECISION: February 10, 2015.

KAJAL

....APPELLANT.

VERSUS

RAJESH RANA

....RESPONDENT.

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

Present: Mr. Munish Kumar Garg, Advocate for the appellant.

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-Kajal claiming custody of her minor son Surya Rana from respondent Rajesh Rana. The petition was dismissed by learned District Judge, Family Court, Gurgaon, vide judgment dated 13.08.2014 passed in petition no.19 of 20.07.2012, assailing which the instant appeal was filed.

2. Precisely the facts garnered from the record are as under:-

Appellant Kajal was married to respondent Rajesh Rana on 11.12.2009 at Bahadurgarh, according to Hindu rites and ceremonies. Out

of the wedlock, a son namely Surya Rana was born on 09.01.2011.

It was averred by petitioner Kajal that respondent Rajesh Rana and his family members were greedy people and were dissatisfied with the dowry brought by her. They constantly demanded more money and valuable articles and in order to pressurize her to bring the same, she used to be beaten and kept in a small room. She was treated like a slave and even an attempt to kill her was made. At the time of birth of her son Surya Rana, no medical facility was provided to her and the newborn child. She tolerated the atrocities to maintain peace in the family but to no avail. In July 2011, she was thrown out of the matrimonial home and the child was retained by the respondent.

The petitioner pleaded that the atmosphere in the family of the respondent was unhealthy for a growing child and he used to be left to play around. She had extreme love and affection for her minor son and was agonized to see him taken away from her. She pleaded that the child had not reached the age of seven years, therefore, she is legally entitled to keep him. She also alleged that the respondent was an alcoholic and aggressive by nature. He was also a pathological liar and was not concerned with the safety or well being of the son. Hence, she prayed that the petition be allowed and the custody of the child be entrusted to her.

3. The respondent contested the petition. In his written statement, he admitted the factum of marriage with the petitioner, but denied all allegations of demand of dowry ill treatment, cruelty etc. levelled by the petitioner. He also denied that there was an atmosphere of

disharmony in his house. He pleaded that petitioner Kajal was a lady of cruel disposition. She had never cared for the child since his birth and did not have motherly affection towards him. She had voluntarily abandoned the child when he was six months old. He tried repeatedly to bring her back but she refused to join him or take care of the child even when he was unwell. The matter was taken up by an NGO also, yet the petitioner refused to accept him or the child.

It was further pleaded by the respondent that ever since the petitioner had left the matrimonial home, he and his mother had been looking after the child. The boy is going to school and he is looking after all his needs and requirements. It was only after he had instituted a petition for divorce that the petitioner had filed the instant case for custody. Denying all remaining averments of the petitioner for being wrong, the respondent prayed for dismissal of the petition.

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

(1) Whether the petitioner is entitled for the custody of her minor son, namely, Surya Rana? OPP.

(2) Relief.

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

6. Considering the evidence adduced and arguments addressed on behalf of the parties, learned trial Court finding that the welfare of the child and his physical and mental well being lies in living with his father and there is no reason for the Court to grant custody of the child to the

petitioner-mother who never bothered about him, dismissed the petition.

7. Feeling aggrieved by the impugned judgment dated 13.08.2014 passed by learned trial Court, appellant Kajal preferred the instant appeal.

8. The submissions made by Mr. Munish Kumar Garg, learned counsel representing the appellant have been heard.

9. To begin with, learned counsel for the appellant argued that appellant is the mother and natural guardian of the minor boy who was born on 09.01.2011 and was hardly 1-1½ years old when the petition was filed. At present his age is four years and he is still so small that only a mother can properly look after him. The appellant had not left the matrimonial home and the child on her own volition. It was due to the cruelties she was facing at the hands of the respondent that she was forced to leave the matrimonial home under compelling circumstances. The petition for divorce filed by the respondent has since been dismissed, yet he is not allowing the appellant to return to the matrimonial home. Learned counsel urged that not only the appellant is suffering because of separation from the minor boy, even the child is being deprived of the love and care of the mother. As such, considering the interest of the minor, his custody should be given to the appellant.

10. It was not disputed by the petitioner-appellant that he and the respondent are living separate for the last more than 3½ years. The minor son being in custody of the respondent has also not seen his mother-petitioner since then. Considering the said facts and circumstances and the

evidence adduced by the parties, the findings of learned trial Court were as under:-

“The petitioner is seeking custody of the minor child on the grounds that being the mother she is legally entitled to the custody of a child below the age of five years and also because his physical and mental well being is not being looked after properly by the respondent and his family. This is a completely misconceived argument. No doubt, section 6 of the Hindu Minority and Guardianship Act provides that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother but this is not a mandatory requirement. The mother is a natural guardian but whether the permanent custody of a minor is to be entrusted to the mother or father shall depend solely upon the question of welfare of the child. This provision cannot by any stretch of imagination be interpreted to mean that the father can never be given custody of an infant upto the age of five years. The well being of a child being of paramount consideration is the only ground on which a court shall assess the question of custody of the child. The Apex Court has repeatedly held that the facts of each case are to be considered independently and where one parent has behaved in such a manner which is reprehensible would automatically make such parent incompetent to be given the custody of a child. The mother cannot seek to deprive the father of the child when she had herself abandoned him in the first instance.”

11. Besides the fact that learned counsel for the appellant could not point out any error of law or perversity arising from misreading/mis-

appreciation of the evidence of the parties, it is also worthwhile to note that in Para No.11 of the judgment, learned trial Court mentioned personal observations regarding the minor child when he was produced in the Court on 17.07.2014, which are as under:-

“Trial Court mentioned that the conduct and behaviour of the child towards his father (RW1) and paternal grandmother Smt. Geeta (RW2) was extremely affectionate and comfortable. The child could speak well and was well groomed and behaved in a positive manner. The petitioner showed little inclination to meet the child till she was prompted by this court. Needless to state here that the child did not know her and showed no interest in meeting her. In fact, he was quite disturbed when she forcibly tried to pick him up. This is only understandable as the child is not at all familiar with the petitioner. It may also be high lighted here that the conduct of the parties and the child shows that he is being well looked after in the house of his father.”

12. 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' must 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 have 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.”*

13. As observed above, it has come in evidence that the minor child is living with his father since the time of his birth and it is he who is taking care of him and the appellant had never bothered to know about his welfare before she filed the present petition.

In the above premises, the overall welfare including moral and ethical welfare of the child lies with the respondent-father and the appellant-mother is not entitled to his custody. Accordingly, the findings of learned trial court warrant no intervention and the appeal, being devoid of merit, is dismissed.

(AJAY KUMAR MITTAL)
JUDGE

(SNEH PRASHAR)
JUDGE

February 10, 2015.
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Note: Whether to be referred to the Reporter or not? Yes/No.