

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Delivered on: 9th July, 2015

+ CRL.M.C. 4661/2014 & CM. No. 15883/2014

BABA JOGINDER SINGH Petitioner

Represented by: Mr. Jaswant Singh Komal and
Mr. Maroof Ahmad, Advocates.
with petitioner in person.

Versus

AMANDEEP KAUR Respondent

Represented by: Mr. Jatin Sehgal and Harish Malik,
Advocates with respondent in
person.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

CRL.M.C. 4661/2014

1. By way of this petition filed under Section 482 of the Code of Criminal Procedure, 1973, petitioner has assailed the order dated 27.08.2014 passed by the learned Additional Sessions Judge-03, Patiala House Courts, New Delhi in Criminal Appeal No.60/2014.

2. Brief facts of the case, as averred in the present petition, are that the petitioner is a religious type of person and is running his *Dera* under the name of *Nanak Dukh Bhanjan Satsang Ghar*, Umarpura, Tehsil Raikot, District Ludhiana, Punjab, who married with the respondent on 01.03.2007 according to Sikh Rites and Ceremonies. After their marriage, the petitioner and the respondent started residing at *Dera Nanak Dukh Bhanjan Satsang Ghar*. Out

of the wedlock, a male child, namely, Jobanveer Singh was born on 20.06.2009.

3. As alleged, after marriage, behaviour of the respondent was not cordial with the petitioner, she started taunting the petitioner that she had been forced to marry with the petitioner, even otherwise she did not like him. The petitioner tried to make her understand many times but all in vain. In the month of January, 2013, the respondent left her matrimonial home with one *Sewadar* of *Dera*, namely, Gurpreet Singh @ Bittu. Thereafter, the respondent filed a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter to be referred as 'PWDV Act') against the petitioner alleging that behaviour of the petitioner was changed towards her and he started getting annoyed with her for no reason and used to taunt her. The petitioner started coming late from *Dera* and on being asked, the petitioner used to get offended. He forcibly locked the respondent in the building adjacent to *Dera*. In the month of April, 2008, the petitioner had given beating to the respondent and also abused her and told that he had married her only to get *Waris* for his *Gaddi* and immense wealth. He demanded that the respondent should give birth to a male child only. The petitioner gradually stopped meeting the respondent and used to come only to abuse and taunt her for not giving a male child. However, on 20.06.2009, the respondent gave birth to a male child named above. Despite, the petitioner never gave any money to the respondent for her well being and used to

lock her in a room and assault her sexually as well as physically. After having remaining locked in a room for five years and unable to handle her pain and misery any more, petitioner gathered all her courage and with the help of two *Sewadars*, managed to escape from the room on 23.01.2013 leaving behind everything. It came to knowledge of the respondent that the petitioner has declared her minor son Jobanveer Singh as '*Avtar of God*' and is forcibly taking him to *Satsang*, where people are touching his feet and praying him.

4. The petitioner filed the reply before the trial court denying the aforementioned allegations levelled by the respondent stating that he is a *Saint*; running a *Dera*; believes in God; always try to serve his *Sangat* upto his best ability and is also busy in meditation. He further submitted that behaviour of the respondent was not cordial with the petitioner and rather she used to taunt the petitioner and treated him with cruelty. He gave due love and affection and even the respondent was never asked to cook food, as the same was supplied by the *Dera Sewadars*. The respondent was given a separate room with all the amenities like Refrigerator and other fitting and thus, she used to enjoy the life beyond any limits. However, she left the matrimonial home in the month of January, 2013 as stated above. Thereafter, the petitioner tried to contact the respondent but she virtually refused to join the society of the petitioner and thereafter filed the petition under Section 23 of PWDV Act.

5. Learned counsel appearing on behalf of the petitioner submitted that the petitioner has been granted *ex parte* relief under Section 9 of the Hindu Marriage Act, 1955 (hereinafter to be referred as 'HMA') by the learned Additional Civil Judge, Senior Division, Jagraon, Ludhiana, vide order dated 03.12.2013. Despite, the respondent has not joined the petitioner till date.

6. Learned counsel further submitted that the petitioner is able to provide all necessities of life to the minor. It is the fundamental right of the child to be brought up in a best possible manner and be given everything needed for his mental, physical and best education to become a good citizen of the country, whereas the respondent is staying on rent. She will continue to change her address. It is apprehended that the child may be taken to an unknown place and put in the hands of strangers/criminals to avenge or blackmail the petitioner. Apparently she is staying with third person. Virtually, even her residence is not known.

7. Learned counsel for the petitioner further submitted that considering the Guardianship Act, the Trial Court vide its order dated 11.04.2014 has ordered the custody of minor child to mother as the child was below 5 years on that date. Now, the age of the minor child is above 5 years. Since, there is change of circumstance, therefore, the aforesaid order has become *infructuous*.

8. To strengthen his case, learned counsel for the petitioner while arguing the case before the Trial Court and thereafter before the Appellate Court has relied upon a case of ***Gaytri Bajaj Vs. Jiten***

Bhalla, 2012 (12) SCC 471, wherein the Supreme Court 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.”

9. Learned counsel submitted that the parents of the respondent are staying with the petitioner and the respondent does not have any source of income. Thus, if the custody of the child goes to the respondent, then the education, upbringing and carrier of the child will certainly be get affected. Moreover, the respondent is staying with a stranger, who cannot take care of the necessities of the child. Therefore, the original order dated 11.04.2014 and the appellate order dated 27.08.2014 may be set aside and the custody of the child be not disturbed till the petition is decided by the Trial Court.

10. On the other hand, learned counsel appearing on behalf of the respondent submitted that the respondent was being kept physically locked in a building adjacent to *Dera* by the petitioner. In the month of April, 2008, she was given beating by the petitioner and stated that he had married her only to get '*Waris*' for his *Gaddi* and immense wealth. The petitioner gradually stopped meeting the respondent. She was warned by the petitioner to have a male child or else she would not live to see her kid. During pregnancy of the respondent, she was not allowed to meet her parents nor were they allowed to meet the respondent. The petitioner never cared for the well being of the respondent and used to lock her in a room, assault her sexually as well as physically. The petitioner is having adulterous relations with one girl, namely, Guddu and another Gurpreet Kaur and when the respondent asked the petitioner about the same she was abused and physically assaulted by the petitioner. After having remaining locked in a room for five years and unable to handle her pain and misery any more, the petitioner gathered all her courage and with the help of two *Sewadars*, managed to escape from the room on 23.01.2013 leaving behind everything.

11. Learned counsel further argued that the petitioner has committed wilful disobedience of the orders dated 11.04.2014 and 27.08.2014 passed by the learned Trial Court and the Appellate Court respectively. Till date custody of the child is not given to respondent.

12. In support of his submissions, learned counsel for the respondent has relied upon the case of ***Gaurav Nagpal Vs. Sumedha Nagpal, 2009 (1) SCC 42***, wherein the Supreme Court held as under:

“52. The trump card in appellants' argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments.

54. Learned counsel for the appellant submitted that the child's education is of paramount importance and the father is spending good amount of money for providing him excellent education, and the mother does not have the financial affluence as the appellant claims to have. But that can be taken care of if father is asked to pay the educational expenses of the child in addition to the maintenance being paid to the respondent. But at the same time it cannot be overlooked that the father needs to have visitation rights of the child.”

13. Also relied upon case of ***Narinder Kaur Vs. Parshottam Singh, 34 (1988) Delhi Law Times 54***, wherein the Supreme Court held as under:

“6) It was submitted by Mr. Mitra learned counsel for the father that the child would be attaining the age of five years in August next and although he had been living with the father. This argument is

not correct. After the order dated 30.1.85 was made by Mrs. Kanwal Inder, the then Guardian Judge, the mother started living with her husband along with the child. The child is too young to form any intelligent preference. I am quite satisfied on the facts of this case that the welfare of the child lies with her mother, the appellant herein. He needs motherly love and care for his proper growth. It was also contended that the child is now school going. He can be admitted in a school near the place where his mother resides. Of course, I have also no doubt in my mind that the welfare of the child is also utmost to his father. He can therefore pay the necessary expenses for the maintenance of his child to the mother if he thinks that the mother cannot bring up the child properly on account of her having no income of her own. Section 3 of the 1956 Act says that in the appointment or declaration of any person as guardian of Hindu minor by a court, the welfare of the minor shall be the paramount consideration. This has to be kept in view while ordering interim custody of the child as well.”

14. I have heard the learned counsel for the parties.

15. The learned Magistrate, after considering the reply of the petitioner, has observed in its order dated 11.04.2014 that the petitioner has made *mala fide* allegations against the respondent without raising any cogent ground. Admittedly, petitioner is running a *Dera*. His present occupation is doing only meditation in his ‘Kutiya’. The said *Dera* has been used for spiritual and charity purpose and thus, has no market value. By making aforesaid observations, the learned Magistrate has opined that since the respondent is legally wedded wife of the petitioner, the petitioner is

liable to maintain her. Therefore, the petitioner is restrained from alienating his moveable as well as immovable assets, as detailed in the affidavit filed by him, till the disposal of the present petition.

16. On the issue relating to custody of the minor child, the learned Magistrate recorded that as submitted by the respondent, she has not met her child since January, 2013, and that the petitioner has refused to hand over the custody of the child despite every effort being made by the respondent. The learned Magistrate noted that vide order dated 11.03.2014, the petitioner was directed to produce the child in the court but he failed to comply with the said direction.

17. It was further recorded that petitioner himself admitted that he is a *Saint* and is engaged in meditation day and night in his *Kutiya* in the *Dera*. There were also allegations that the petitioner is using minor son as a source of income by portraying the child as an '*Avtar of God*'.

18. Considering the aforesaid facts, the learned Magistrate opined that future of the child is not secured with the petitioner, who does not have sufficient time to look after the minor child, who requires constant love and affection of the parents. The respondent is a natural guardian of the child and accordingly, the learned Magistrate has given the temporary custody of minor child to the respondent and directed the petitioner to hand over the custody of the child to the respondent till the disposal of the petition.

19. At that stage, it was submitted by the counsel for the petitioner, that petitioner was not able to come to Delhi due to threats to his life by some terrorists. Accordingly, the petitioner was directed to allow the respondent to enter the shared household/*Dera* for receiving the minor son and collecting her and child's belongings.

20. Accordingly, SHO Police Station Tilak Marg was directed to provide necessary security and aid to the respondent to ensure compliance of the order regarding removal of belongings and handing over of custody of minor child to the respondent. Despite, directions could not be executed.

21. Being aggrieved, the petitioner assailed the aforesaid order dated 11.04.2014 vide Criminal Appeal No.60/14.

22. After giving careful consideration to the submissions of the parties, while dismissing the appeal of the petitioner vide order dated 27.08.2014, the learned Appellate Court has passed the order as under:-

“ I have perused the impugned order dated 11.04.2004 vide which the custody of the minor was handed over to the respondent observing that “it is a settled law that in determining custody of child, the welfare of the child is the paramount consideration. In the present case, the respondent has stated himself to be a Saint and engaged in meditation day and night in his Kutiya in the Dera. There are also allegations that respondent is using minor son as a source of income by portraying him

as an Avtar of God. Thus, it is apparent that future of child is not secure with the respondent (appellant) who does not have sufficient time to look after the minor child who requires constant love and affection of parents. Even otherwise, since the child has not completed 5 years of age, therefore, as per law, applicant (respondent) is the natural guardian of the minor child Jobanveer Singh to the applicant.” Further, perusal of the impugned order reveals that no evidence has been led so far and case / complaint case has already been fixed for leading evidence by the parties. The documents relied upon by the ld. Counsel for the appellant in the form of exhibits cannot be considered in toto since, these documents are being shown in the form of exhibits without leading evidence in the case. Moreover, these exhibits do not bear any date, stamp or sign. Further, on careful perusal of the impugned order, I find that at the time of handing over the custody of the child, the age was below 5 years as per observations made in the impugned order. Therefore, the custody of minor can only be finally determined after having recorded the evidence. In view of this, I do not find any merit in the appeal to succeed at this stage. So, appeal is dismissed.”

23. It is pertinent to mention here that the respondent filed an affidavit before the learned Magistrate in C.C.No.70/1/2013, whereby stated that pursuant to directions dated 11.04.2014, the respondent along with some police officials reached the *Dera* at about 12:45 PM to take the custody of the minor child, however, the *Sewadars* of *Dera* did not allow them to enter the *Dera* and it was told that the petitioner had gone to Maharashtra along with the minor child on holidays. Even the *Sewadars* did not allow her to

take any article/bag from the *Dera* and also threatened the respondent and her counsel to face dire consequences of filing the case against the petitioner.

24. It is also pertinent to mention here that in the aforesaid case bearing C.C.No.70/1/2013, the learned Magistrate has assessed the earning of the petitioner at least Rs.60,000/- per month and accordingly granted interim maintenance for the respondent at the rate of Rs.20,000/- per month from the date of filing of the petition, i.e., 13.09.2013, till she is legally entitled to receive the same or the final disposal of the case, whichever is earlier and granted Rs.10,000/- per month for minor son, which the respondent liable to get from the date she gets the custody of minor child till she is legally entitled to receive the same or final disposal of the case, whichever is earlier. The learned Judge also directed that the monthly maintenance as above shall be payable on or before 10th of each English calendar year.

25. It is pertinent to note that vide order dated 22.04.2015, this Court recorded as under:-

“ The matter has been discussed in court as well as in the chamber in the presence of parties i.e. petitioner and respondent, Smt. Gurdev Kaur, mother of petitioner and Sh. Atma Singh, son of Bua of petitioner for the purpose of settlement.

At their request, respondent is ready to join the matrimonial home within two days from today i.e. on 24th April, 2015 on

temporary basis. The petitioner, his mother and other persons present in court has assured to this Court that they would take care of the respondent and also take her to hospital for treatment as she is suffering from heart ailments. Petitioner has also handed over a sum of Rs. 5 lakhs by way of two bank drafts as arrear of maintenance. The petitioner states that as of today, the arrears payable by the petitioner is Rs. 3.60 lakhs. However, extra amount has been paid in order to show the bonafide of the petitioner. It is clarified that this Court will monitor this matter as under the impugned order, the custody of the child is to be given to the respondent.”

26. Despite aforesaid arrangement, the respondent could not stay with the petitioner, which establishes that the respondent is not comfortable with the petitioner.

27. It is an admitted fact that despite having two favourable orders, one passed by the learned Magistrate on 11.04.2014 and the other by the Appellate Court on 27.08.2014, till date, the custody of the minor child has not been handed over to the respondent.

28. It is trite that in relation to the custody of a minor child, while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not rights of the parents under a statute. The question of welfare of the minor child is to be considered in the background of relevant facts and circumstances. Each case has to be decided on its own merits. It is, no doubt, true that father is presumed by the Statute to be better

suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations, but it cannot be the sole determining factor for granting custody of the child.

29. It is true that warring parents use their children as “swords and shields” in matrimonial disputes. Whenever either of the parents, mother or father, gets the custody, they make sure the other one does not get the same.

30. In a recent case bearing Civil Appeal No.1966/2015, titled as ‘**Roxann Sharma Vs. Arun Sharma**’, decided on 17.02.2015, the Double Bench of the Apex Court has observed as under:-

“12. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardised if the custody retained by the mother. Section 6(a) of HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this

Section or for that matter any other provision including those contained in the G&W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years.

31. It is not out of place to mention here that several years ago, in the case of ***Chethana Ramatheertha Vs. Kumar V. Jahgirdar***, 2003 (3) ***KarLJ*** 530, the Karnataka High Court held that:-

“25. The role of the mother in the development of a child's personality and her ability to do so can never be doubted. In fact, a child gets the best protection and education only through the mother even in nature. It is a most natural thing for any child to grow up in the company of one's mother. In fact the question always should be as to whether a child should be deprived of the company of the mother. Company of the mother is the most natural thing for a child. That is what nature has evolved over a period of generations. So long as the mother does not suffer from any disqualification, she does not disentitle herself to bring up her child. It is only because of her own misconduct or misdeeds or when she is not in a position to take care of the child due to reasons financially or otherwise, the custody should be shifted from the mother. Neither the father nor any other person can endow the same kind of love, affection, care and sympathies to a child that as of a mother. Company of a mother may be in fact much more valuable particularly to a growing up female child and until and unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother. The question is not so much as to whether father or mother gets the custody of the child, but as to whether the child should be deprived of the

company of the mother. In fact, it can be presumed as a proposition of considerable weight and justification that the company of the mother is always in the welfare of the minor child until and unless the contrary is established. This basically we think, should be the approach of any Court while considering the question of granting the custody of a minor child to either of the parents. The mother, because of her position alone, scores over the father and to alter this position, it calls for definite material indicating the disqualification or disentitlement on the part of the mother vis-a-vis the adverse interest to the child or the welfare of the child being put to jeopardy.”

32. So far as inherent jurisdiction under Section 482 of the Code of Criminal Procedure is concerned, in a catena of judgments, the Apex Court has discussed the nature and scope of inherent powers conferred upon this Court. As has been repeatedly stated that Section 482 confers no new powers on High Court; it merely safeguards existing inherent powers possessed by High Court to prevent abuse of the process of any Court or to secure the ends of justice. It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code. Such powers can be exercised to secure ends of justice, prevent abuse of the process of any court and to make such orders as may be necessary to give effect to any order under this Code, depending upon the

facts of a given case. Court can always take note of any miscarriage of justice and prevent the same by exercising its powers u/s 482 of Cr.P.C. These powers are neither limited nor curtailed by any other provisions of the Code. However such inherent powers are to be exercised sparingly and with caution.

33. Coming back to the case in hand, perusal of the record shows that there are allegations of adultery against each other. The respondent, after coming out of the clutches of the petitioner, made allegations against him, whereas her parents are still with the petitioner. Since the respondent was not comfortable with her parents, who are followers of the petitioner, she even left them and started living in a rented accommodation in Delhi. The petitioner also made akin allegations against the respondent in its reply filed before the trial court. This Court is not making any opinion qua the allegations made against each other.

34. It is important to note that during the pendency of the case before the Ld. Metropolitan Magistrate, the petitioner got admitted the minor child in a school in LKG class, as is evident from letter dated 21.04.2014 of the school which is at page 150 of the petition. Whereas, vide order dated 11.04.2014, the said MM granted custody of the child to the respondent. Thus, petitioner cannot take benefit of the same at this stage.

35. The appropriate forum to decide what is in the interest of the child and then decide to whom the custody of the child should be given, is the Family Court, which in fact, can be decided only after leading evidence by both the sides. Thus, the custody of the child

to mother has been granted by the learned Judge as an interim measure.

36. While dealing with the issue qua custody of the child, the Court has to consider the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comforts only. The word "welfare" must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well being.

37. No doubt, in the instant case, the child is a minor. Love and affection of the mother is generally high towards the child. The level of care and protection which the child can get from the mother, who is fully devoted towards the child, cannot be got from the petitioner, who stated himself to be a Saint, running a *Dera*, preaching and doing meditation day and night. No doubt, the petitioner can give better comforts to the child than the mother, but the proper care and guidance is also material for the development of the child. Proper attention has to be given to the child on each and every stage and that can be done effectively especially in the case in hand only by the mother.

38. Moreover, the approach of the petitioner and atmosphere of the *Dera*, by any stretch of imagination, cannot be considered healthy for a child of tender age. It is noted that the petitioner has not denied the photograph filed by the respondent in C.C. No.70/1/2013 depicting the child with a gun, which itself shows the callous approach of the petitioner.

39. The Supreme Court of India has consistently held that in deciding cases of child custody *'the first and paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute'*.

40. It is not in dispute that child is not borne out of the wedlock of the petitioner and the respondent and if the petitioner feels that the respondent does not have sufficient means to properly look after the child, it is the duty of the petitioner to provide appropriate accommodation and make proper arrangement for the well being of the child as well as the respondent. The petitioner should provide all the facilities whatever he claimed to be provided at his place.

41. Therefore, keeping in view the law discussed above and the facts and circumstances of the case and that the present arrangement qua the custody of the child is a temporary one, I do not find any discrepancy in the orders passed by the courts below.

42. It is pertinent to mention here that considering the seriousness of allegations levelled against the petitioner qua the child, no visitation rights were granted to the petitioner by the learned Magistrate.

43. However, considering the submissions made by counsel for the respondent, on instructions, that the respondent has no objection if the petitioner visits the respondent to meet the minor child, this Court directs as under:-

(i) The petitioner is permitted to meet the child twice in a month for five hours on any Saturday, Sunday, holiday, or any other day with the consent of the respondent.

(ii) The petitioner shall not take the child alone without the consent of the respondent.

(iii) The petitioner shall not take the child out of the jurisdiction of this Court.

44. I hereby make it clear that the aforementioned arrangement is interim in nature and will be effective only till the disposal of the petition pending before the Trial Court.

45. It is further clarified that the Trial Court will not get influenced by the observations made by this Court in the present order and shall decide the case on its merits.

46. In view of the above discussion, the present petition is dismissed.

CM. No. 15883/2014 (for stay)

With the dismissal of the petition itself, the instant application has become infructuous. The same is accordingly dismissed.

**SURESH KAIT
(JUDGE)**

JULY 09, 2015
Sb/RS