

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO No.1830 of 2015 (O&M)
Date of Decision: 30.05.2016

Surender

.....Appellant

Vs

Sushma

.....Respondent

CORAM: HON'BLE MR. JUSTICE M. JEYAPPAUL
HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. R.A. Sheoran, Advocate
for the appellant.

Mr. Sanjeev Kodan, Advocate
for the respondent.

1. *Whether Reporters of local papers may be allowed to see the judgment ?*
2. *To be referred to the Reporters or not ?*
3. *Whether the judgment should be reported in the Digest?*

RAJ MOHAN SINGH, J.

[1]. Appellant has assailed order dated 16.02.2015 passed by District Judge (Family Court), Bhiwani vide which petition under Section 6 of the Guardian and Wards Act, 1890 (hereinafter referred to the 'the Act') read with provisions of the Hindu Minority and Guardianship Act, 1956 for the custody of children was allowed in favour of the respondent.

[2]. Respondent sought custody of minors namely Riya daughter aged about 10 years, Himanshu son aged about 9

years and Ritesh son aged about 8 years. The petition was filed with the averment that marriage between the parties was solemnized in the year 2001, according to Hindu rites and ceremonies. Marriage was consummated and aforesaid three children took birth out of their wedlock.

[3]. Brief facts as gathered from the record are that respondent-wife alleged that on account of dowry demand, she was given beatings and was also tried to be killed by way of inflicting serious injuries upon her which ultimately entailed in lodging of criminal case bearing FIR No.272 dated 16.08.2012 under Sections 307/120-B/34 IPC against the appellant-husband and his family members. Since then the respondent-wife started living separately as there was danger to her life. Respondent-wife further alleged that minors are in the custody of the husband-appellant and they are not being looked after properly. Respondent-wife claimed that she is earning Rs.10,000/- per month from the avocation of tailoring and embroidery work. She is an educated lady having the qualification upto 10th class and can provide better education to the minor children. The welfare of the minors would be more in her company.

[4]. Appellant-husband contested the claim of the respondent-wife by alleging that she is a careless lady, who

abandoned the children. She used to quarrel on trivial matters. Appellant-husband claimed that minors are living happily and are being provided good education and proper environment in the family. He complained that he along with his family members were falsely implicated in the criminal case. He further alleged that the respondent-wife was having some extra-marital relationship with someone. Appellant-husband submitted that respondent-wife filed petition under Section 125 Cr.P.C., against him in which she admitted that the husband-appellant is having 10 acres of agricultural land and is getting income worth more than Rs.3 lac per annum. On the other hand, respondent-wife was having no source of income for her maintenance.

[5]. Both the parties went to trial on the following issues:-

- “1. Whether the petitioner is entitled to custody of minors i.e. Riya daughter, Himanshu and Ritesh sons, as prayed for? OPP*
- 2. Whether the petition is not maintainable in the present form? OPR*
- 3. Whether the petitioner has no cause of action to file the present petition? OPR*
- 4. Whether the petitioner is estopped by her own act and conduct from filing the present petition? OPR*
- 5. Relief.”*

[6]. Both the parties led their respective evidence on the aforesaid issues.

[7]. Trial Court took notice of the fact that the marriage of the petitioner was solemnized with the respondent and out of their wedlock three children took birth. Trial Court found that welfare of the children is the paramount consideration for granting custody in favour of either party. Rights of the parties are not to be considered as against the welfare of the children which is to be given precedence over any other consideration. Trial Court further found that the children are of tender age. Riya is the student of 3rd standard, Himanshu is the student of 2nd standard and Ritesh is student of 1st standard. Appellant-husband got himself examined as RW-1 and stated that his elder brother is unmarried, who is residing separately. Mother of the appellant is aged about 65-70 years. Respondent-wife got examined EHC Ram Niwas as PW-3, who proved the FIR which was registered against the husband-appellant and his family members. Husband-appellant admitted that he along with his family members are facing trial. The children are studying in the Government School of the village, where no fee is being charged. He claimed that he has sufficient income to maintain the children. The trial Court ultimately granted custody of the minors in favour of respondent-wife by concluding that the

ultimate welfare of the children would be in the hands of respondent-wife. However appellant-husband was granted visitation rights once in a month, if he so desires.

[8]. Feeling aggrieved against the impugned judgment and decree dated 16.02.2015 passed by the District Judge (Family Court) Bhiwani, the appellant has ventured to file the present appeal.

[9]. Under Section 13 of the Hindu Minority and Guardianship Act, 1956, welfare of the minder is the paramount consideration in custody issue. Rights of the parties have to be considered on second pedestal, though in the case of a boy or a girl, the father and after him the mother are the natural guardian provided that the custody of minor who has not completed the age of 5 years shall ordinarily be with the mother. If the welfare of the child is considered viz-a-viz. rights of the respective parties, the welfare of the child has an edge over the rights of the parties, which are not absolute in nature as against the well-being of the children. In the petition under Section 6 of the Act read with provisions of the Hindu Minority and Guardianship Act, 1956 filed by the respondent, it has been claimed that respondent is doing tailoring work and used to earn Rs.10,000/- per month from this avocation. She is having sufficient income to maintain children and can provide better education as well as

proper environment to the children. She had studied upto 10th class, whereas the appellant was stated to be unemployed and a drunkard person, who was confined in District Jail, Bhiwani in the criminal case which was lodged by the respondent-wife.

[10]. In the written statement filed by the appellant-husband, he alleged that the respondent-wife was instrumental in filing false cases with wrong allegations against him and his family members. The appellant-husband referred to the application filed by respondent-wife under Section 125 Cr.P.C., wherein it was specifically pleaded that the appellant-husband was an agriculturist having 10 acres of land and was getting income of more than Rs.3 lacs per annum. On the other hand she was having no source of income for maintaining herself.

[11]. It has been further alleged that the respondent-wife has no love and affection for the minors since their birth as she always took the children as burden upon her and started hating them. Respondent-wife used to beat them on trivial issues. She has not seen the children after registration of false cases against the husband and his family members since 2012. Appellant and his brother have 22 acres of land jointly in their names. Vide Ex.R-1, the Head Master of the Government School has testified that all the three children namely Riya, Himanshu and Ritesh are studying in the school in 3rd, 2nd and

1st class respectively. Copy of *jamabandi* for the year 2008-09 has been produced as Ex.R-2 showing that the appellant along with his brother and mother Savitri wife of Banwari are owners of 171 *Kanals* 18 *Marlas* of land in the village. The copy of application under Section 125 Cr.P.C., filed by the wife at one point of time before the criminal court of competent jurisdiction has been adduced in evidence as Ex.R-3. The appellant also made reference to para No.7 and 8 of the application to contend that respondent wife has specifically admitted with regard to 10 acres of land in the name of appellant-husband from where he is earning more than Rs.3 lacs per annum. On the other hand, respondent claimed herself to be in a poor financial position being involved in an avocation of sewing and embroidery and is facing hardship and financial constraints. She also filed affidavit in support of her application under Section 125 Cr.P.C., which was ultimately withdrawn by her.

[12]. Learned counsel for the appellant relied upon the Will dated 25.04.2011 executed by his brother Kuldeep bequeathing his movable and immovable properties in favour of minors. He further contended that this registered Will was executed prior to filing of the application for custody by the respondent-wife. Learned counsel has also relied upon registered Will dated 24.08.2010 executed by the appellant vide which he

bequeathed his property in favour of his two sons Himanshu Sharma and Ritesh Sharma. The mother of the appellant Smt. Savitri was also owner of half share in the agricultural land. She had also executed a registered Will on 11.07.2001, bequeathing her property in the name of his sons Kuldeep and Surender (appellant). By relying upon these registered documents, learned counsel for the appellant contended that the entire moveable and immovable properties has to go in favour of minors and their welfare is possibly only with the appellant.

[13]. Though the reply filed by the appellant-husband to the application under Section 125 Cr.P.C. is on different connotation, but since the appellant has pleaded positive instances of his resources, therefore, the reply filed by him in the abovestated application is of no consequence. Moreover, the said application was never culminated in any logical end.

[14]. On the other hand, learned counsel for the respondent-wife contended that in the criminal case filed by the respondent-wife, the appellant along with his brother and mother are the accused. In the event of their conviction, if any, in the said case, there would be none to look after the children at home and, therefore, respondent-mother is the only person under whose custody, welfare of the children would be more. Father of the respondent-wife retired from the Army as a Sepoy and her two

brothers are serving in Army on the post of Lance Naik and Sepoy. They all collectively have 17 *Kanals* of joint land in their names. With these averments, respondent-wife sought to project a case of good financial background in her favour.

[15]. We have considered the rival arguments from both the sides and have also perused the material on record.

[16]. On 29.03.2016, this Court was pleased to direct the appellant to produce the minor children in Court to know their preference. In compliance to the aforesaid order, the children were produced in Court. We had chamber interaction with the children collectively as well as in the presence of respondent-wife. All the children were reluctant to identify their mother and even did not wish to go with her. The conduct of the minors at this stage of litigation may be a tutored affair, but without going into this aspect of the matter, the over all welfare of the children has to be culled out from attending circumstances of the case.

[17]. Admittedly, no divorce petition has been filed by either of the parties, nor any application for maintenance was filed by the respondent-wife except the one which was filed at the earlier stage under Section 125 Cr.P.C., which was later on withdrawn. Respondent-wife is doing tailoring and embroidery work and admittedly, she used to earn Rs.10,000/- per month. She is having the qualification upto 10th class and is living in her

parental house. Her parental family has 17 *Kanals* of joint land. Her father is retired Army personnel, her two brothers are serving in the Army. On the other hand, appellant-husband admittedly has good financial position. He along with his brother Kuldeep have inherited half share in total 171 *Kanals* 18 *Marlas* of land of their own, besides beneficiary of half share of their mother. Both of them have executed registered Will in favour of minors. The respondent-wife has admitted in the proceedings under Section 125 Cr.P.C., that the husband-appellant is having income of more than Rs.3 lacs per annum from agricultural pursuits. Appellant-husband is having the qualification of 12th class pass. The village of appellant Samaspur is located at a distance of 3-4 kms from Charkhi-Dadri township, whereas village of respondent-wife i.e. Jhavri is situated at some distance of about 15-16 kms from Dadri.

[18]. During course of hearing, learned counsel for the appellant on instructions from the appellant, who was present in Court stated at the bar that appellant is ready to deposit an amount of Rs.5 lacs each in the names of minor children in the shape of fixed deposit receipts (FDRs) which would be encashed by the minors on their attaining majority. Besides this, appellant also undertook to get the children admitted in some good school in Charkhi-Dadri.

[19]. Having considered the welfare issue of minor children, this Court feels that interest of the minors can best be protected, if the custody of the minor children remain with the appellant. Respondent-wife is living separately since 2012. The minor children even did not wish to interact with the mother during chamber interaction. If the minor children are admitted in good school in Charkhi-Dadri, their future interest and prospects would be enhanced and protected. Above all, the appellant would also create fixed deposits in a sum of Rs.5 lacs each in the names of children which would have maturity value on attaining the age of majority by the minors.

[20]. Since the appellant has agreed to execute fixed deposit receipts in the sum of Rs.5 lacs each in the name of minor children and has also agreed to get them admitted in good school in Charkhi-Dadri, therefore, he is obligated to meet the assurance given to this Court within reasonable time. As the admissions in schools are in offing, therefore, the appellant is required to take immediate steps to get the minors admitted in good school in Charkhi-Dadri and also to execute the fixed deposit receipts amounting to Rs.5 lacs each in the names of minor children within a period of two months from the date of receipt of certified copy of this order.

[21]. Looking to these factors, we are of the considered view

that the welfare of the minors can be efficiently looked into by the appellant with better financial resources at his commands. However, respondent being the natural mother is entitled to visitation rights. She can meet the children fortnightly in school premises on prior intimation to the school authorities, who would in turn provide proper opportunity to the wife to have interaction with the children.

At this stage, it is also noticed that if there comes any technical hardship in getting the minors admitted in good school in Charkhi-Dadri this year, then it would be the responsibility of the appellant to ensure their admission from next year. Copy of this order may also be supplied to the new school for ensuring visitation rights in favour of the respondent.

[22]. With the aforesaid observations, impugned judgment and decree dated 16.02.2015 passed by the District Judge (Family Court), Bhiwani is set aside. Appeal is accepted.

(RAJ MOHAN SINGH)
JUDGE

May 30, 2016

Atik

(M. JEYAPPAUL)
JUDGE