

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

**FAO-6336-2015 (O&M).
Date of Decision: 14.09.2016.**

Mahabir and anotherAppellants.

VERSUS

SumanRespondent.

**CORAM : HON'BLE MR. JUSTICE M. JEYAPPAUL
HON'BLE MRS. JUSTICE SNEH PRASHAR**

Present: Mr. Gaurav Mohunta, Advocate for the appellants.

Mr. Vivek Khatri, Advocate for the respondent.

SNEH PRASHAR, J.

Assailing the judgment dated 22.07.2015 passed by learned Additional District Judge, Jind by virtue of which a petition under Section 25 of the Guardian and Wards Act, 1890 (for short, “the Act of 1890”) filed by respondent Suman-mother for custody of minor daughter Rishika was allowed, appellants Mahabir (since deceased) and Omsari-parental grandparents had preferred this appeal.

In this case, the tug of war is over the custody of minor daughter Rishika born on 20.12.2009 out of the wedlock of Suman (respondent) and Krishan son of Mahabir (appellant). Unfortunately, on 14.09.2011 when Suman was living at her parental home, as according to her she had been turned out of the matrimonial home because of demand of dowry raised by her parents-in-law etc. which she was unable to fulfill, her husband Krishan reached there in a drunk condition. She and her family

members got him admitted in the hospital where he died as he had consumed poison. On receipt of information, the appellants-parents of Krishan lodged a complaint with the police that Krishan had committed suicide because of the harassment and maltreatment he was facing at the hands of Suman and her family members. Based on their complaint, First Information Report No.351 dated 15.09.2011 under Section 306 read with Section 34 of the Indian Penal Code (for short, "I.P.C.") was registered. During investigation, the allegations were found to be false and the First Information Report was cancelled by the police.

It was pleaded by Suman that the appellants (her parents-in-law) flatly refused to keep and maintain her after the death of her husband, therefore, she alongwith her minor daughter started living with her parents. On 11.07.2012 the appellants tried to take the custody of her minor daughter forcibly but with the timely intervention of the police the minor was saved. Thereafter, on 18.07.2012 the appellants again approached her and on that day were successful in taking away her minor daughter forcibly from her. Submitting that she is the natural guardian being mother and that the minor daughter is the only hope of life for her and further that being a graduate and having every possible resource to maintain her daughter with dignity and honour, Suman filed the instant petition claiming her custody from the appellants (grandparents).

The appellants contested the petition raising various legal and factual objections. They denied that they had taken custody of minor Rishika forcibly. According to them, Suman had settled all her disputes with them amicably and out of her own sweet will had handed over custody of the minor to them. She had voluntarily executed an affidavit-cum-

declaration dated 18.07.2012 in the presence of witnesses which she got duly attested by Executive Magistrate, Jind and therein she admitted that minor Rishika would reside with her parental grandparents (appellants) and she will never claim her custody in future. The First Information Report registered against Suman and her family members was cancelled as a consequence of compromise between the parties in the presence of Panchayat on 18.07.2012. They (appellants) had deposited a sum of Rs.5 lacs in FDR dated 12.10.2012 in the name of Rishika having maturity value of Rs.21,59,965/- as on 22.02.2028. Appellants pleaded that the minor was being brought up properly with due love and affection and was being given good education. Alleging that Suman had no source of income for maintaining the minor as she herself was living at the mercy of her parents whereas they were financially well off and the welfare of the minor would lie in not disturbing her current residence/custody, the appellants prayed for dismissal of the petition.

On the basis of the pleadings of the parties, following issues were settled:-

- (1) Whether petitioner is entitled to custody of minor Rishika? OPP.
- (2) Whether the petitioner is estopped by her own act and conduct? OPR.
- (3) Whether this court has no jurisdiction to entertain this petition? OPR.
- (4) Relief.

In order to substantiate her case, the respondent herself stepped into the witness box as PW1. On the other hand, the appellants examined

Mahavir Singh as RW1, Umed Singh as RW2, Narender Singh as RW3, Kuldeep Singh as RW4, Badal Singh as RW5 and appellant No.1 Mahabir himself stepped into the witness box as RW6.

Considering the evidence and the arguments addressed, learned trial Court, allowed the petition and directed the appellants to hand over custody of the minor child to Suman-mother.

Feeling aggrieved by the judgment dated 22.07.2015, the appellants preferred the instant appeal.

We have heard the submissions made by Mr. Gaurav Mohunta, learned counsel representing the appellants and Mr. Vivek Khatri, learned counsel representing the respondent and perused the record.

As the matter was opened for arguments, it was brought to our notice by learned counsel for the appellants that Mahabir (appellant No.1) has since expired and the appeal is now being pursued by Omsari (appellant No.2) grandmother of the minor in whose care and custody minor Rishika is living for the last more than four years. Learned counsel contended that on 18.07.2012 after a criminal case relating to death of Krishan, husband of respondent Suman, was registered against her and her parental family members on a complaint lodged by the appellants, an amicable settlement was arrived at between the parties with the intervention of the Panchayat and consequent to the settlement Suman, on her own accord, had decided to part with the custody of the minor and had handed over the same to the appellants. She executed an affidavit-cum-declaration Ex.RA which was witnessed by respectables of the Panchayat and was got attested from an Executive Magistrate by appearing before him. When Suman stepped into the witness box, she admitted her signatures on the document Ex.RA. A

perusal of the document shows that the stamp paper for executing the same was purchased by Suman herself and her photograph was also annexed on the same. It was due to the compromise between the parties that the police submitted a report for cancellation of the First Information Report registered against Suman and her family members, before the Magistrate. Having undertaken not to claim custody of the minor in future by virtue of the settlement Ex.RA, Suman was debarred from filing the instant petition.

Learned counsel emphatically submitted that minor Rishika is in custody of appellant Omsari ever since 18.07.2012 i.e. for the last more than four years. The grandmother has looked after her physical, psychological, emotional, financial and moral needs. The child has no emotional bonding with respondent Suman. Apparently, ignoring the welfare and interest of the minor on all the aforesaid counts, learned trial Court has wrongly ordered for transfer of custody of minor Rishika from the appellants to respondent Suman.

On the other hand, learned counsel for the respondent, supporting the findings of learned trial Court, vehemently controverted the arguments of learned counsel for the appellants and challenged the legality and veracity of the affidavit-cum-declaration Ex.RA. He submitted that Suman, being mother of minor Rishika, is her natural guardian after the death of the father. The statutory right of the mother to have custody of the minor child could not be defeated by getting executed alleged affidavit-cum-declaration from her. The signatures of Suman were obtained by exerting pressure and undue influence. Any contract which is against the public policy and against the provisions of law is void ab-initio. During her deposition, respondent Suman explained that since a false criminal case had

been foisted on her and her family members under Section 306/34 I.P.C. relating to death of her husband, a pressure was built on her to either deliver the custody of minor to the grandparents or to face the criminal trial. As stated by her, the contents of the document were not read over to her and she had also not gone for attestation of the same.

Needless to say that as per Section 6 of the Hindu Minority and Guardianship Act, 1956, the natural guardian of a Hindu, minor, in respect of minor's person as well as in respect of minor's property (excluding his or her undivided interest in joint family property) in case of a boy or an unmarried girl is the father, and after him, is the mother. It is also provided that in case the minor has not completed the age of five years, the custody shall ordinarily be with the mother.

The emphasis of the appellants has been on the document Ex.RA i.e. an affidavit-cum-declaration allegedly executed by Suman on 18.07.2012. Indeed, Suman admitted presence of her signatures on the said document, but at the same time the facts and circumstances during which the said document was alleged to have been executed cannot be ignored. Admittedly, a criminal case under Section 306/34 I.P.C. had been got registered by the appellants against Suman and her parental family members relating to death of her husband (son of the appellants) who committed suicide. Resultantly, she was facing acute emotional crises firstly due to death of her husband and secondly because of the criminal case registered against her and other members of her parental family. In such circumstances, her explanation that her signatures were obtained under pressure and undue influence and without even informing her of the contents of the document, is not improbable. In any case, even if it is

accepted for the sake of argument that knowing and understanding the contents she had signed on the document, yet the fact remains that the document was result of an immense pressure put on her which is evident from the fact that the document was got executed on 18.07.2012 and after less than three months i.e. on 05.10.2012 she knocked the door of the Court by filing instant petition claiming custody of her minor daughter.

Be that as it may, Suman is the natural guardian of the minor and is legally entitled to her custody. Section 23 of the Indian Contract Act postulates that if any mutual agreement is intended to restrict or extinguish the right of a party from enforcing his/her right under or in respect of a contract, by the usual legal proceedings, such an agreement would to that extent be void. In other words, parties cannot contract against a statute as was held by Hon'ble Apex Court in **A.V.M. Sales Corporation vs. M/s. Anuradha Chemicals Pvt. Ltd., 2012(1) R.C.R. (Civil) 859.** For that reason, the document Ex.RA needs to be ignored and has no bearing on the maintainability of the petition filed by Suman.

Needless to say that first and the paramount consideration in the matter relating to custody of a minor is the welfare of the minor and not the legal rights of the parties. The object of the Act of 1890 is not merely physical custody of the minor but due protection of the rights of a ward's health, maintenance and education. No doubt, appellant Omsari is the paternal grandmother of minor Rishika and she is residing with her for the last more than four years but it is also true that there could be no substitute for a mother's love. The moral and physical welfare of the child has to be weighed and one can say without two thoughts that the mother is always in a better position to look after a minor daughter.

Minor Rishika was born on 20.12.2009. As admitted by the parties upto 18.07.2012 that is till she was 2 years and 6 months old, she remained in the lap of her mother. Presently, she is about seven years old and with the growing age she certainly needs the care and guidance of the mother. Appellant No.1-Mahabir has already died and appellant No.2 Omsari-grandmother is living with her other son and it has come in evidence that she is suffering from asthma and is illiterate whereas Suman is young, in good health and is a graduate. Suman is also stated to be the only child of her parents. Even if Suman is not doing any job she has the means and ability to earn a living for herself and her daughter. She is naturally being supported by her parents also. Therefore, there is not one ground on which Suman-mother can be declined the custody of the minor. The welfare of the child lies not with the parent/grandparent who is financially sound but with the person who can cater to physical, psychological, emotional and moral needs besides financial necessities. The mother would naturally facilitate the proper growth and development of the minor daughter. In the presence of the natural guardian-mother, it will be harsh to leave her in the custody of the grandmother whose expectancy of life at this stage is much less.

In the above premise, the judgment passed by learned trial Court directing the appellants to hand over custody of the minor daughter Rishika to Suman is affirmed. However, considering the bonding, the minor child must have developed with her grandmother-Omsari, it would be expedient and in the interest of justice that the grandmother is allowed visitation rights. Accordingly, appellant Omsari will be at liberty to take minor Rishika to her paternal home on every 2nd Saturday and Sunday. But

it shall be her responsibility to pick up the child from the house of Suman on Saturday morning at around 7'O clock and leave her at the house of Suman on Sunday evening by 5'O clock. In case the child desires and there is no restriction due to her school timings etc. she may at times with permission of her mother-Suman be taken by the grandmother on Friday evening and during vacations for a longer period.

(M. Jeyapaul)
Judge

(Sneh Prashar)
Judge

14.09.2016
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Whether speaking/ reasoned : Yes

Whether Reportable : Yes