

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH**

**RA-CR No.267-CII of 2015 in  
FAO No.3629 of 2015  
Decided on: 07.11.2016**

Vikramjit Singh

....Applicant/Appellant

Versus

Kawaljeet Kaur

....Non-applicant/Respondent

**CORAM: HON'BLE MR JUSTICE M. JEYAPPAUL  
HON'BLE MRS JUSTICE REKHA MITTAL**

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**Present :** Mr. Ashish Aggarwal, Sr. Advocate  
with Ms. Ritu Pathak, Advocate  
for the applicant.

Mr. V.K. Jindal, Sr. Advocate  
with Mr. Akshay Jindal, Advocate  
for the respondent.

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**REKHA MITTAL, J.**

The present litigation pertains to custody of a girl child born on 08.08.2006, out of wedlock of Vikramjit Singh and Kawaljeet Kaur. At present, the child is in custody of her father and residing at village Nissing, District Karnal. Kawaljeet Kaur (respondent), mother of the child filed a petition under Sections 6 and 13 of the Hindu Minority and Guardianship Act for custody of the child that came to be decided by the Guardian Judge, Karnal vide order dated 28.04.2015. The trial Court, in view of its observations recorded in para 20 of the judgment, answered issue No.1 in favour of the respondent and as a result, directed the applicant/appellant to handover custody of minor

Ishmeet to the respondent – mother within one month from the date of judgment. The father was allowed visiting rights to the child once in a week at the place where the child would reside.

Feeling aggrieved by the judgment passed by the trial Court (Guardian Judge, Karnal), the applicant – father preferred an appeal that was decided by this Court. A relevant extract from the orders passed by the Court on 14.10.2015 and 19.10.2015 reads as follows:-

*“Counsel for the parties made a statement on instructions from their respective party that they would abide by the wish of the minor. After due consideration of this statement, we interacted with the minor in chamber. The minor though studying in class IV, is aware of the entire dispute between her parents and on account of our interaction, we are of the opinion that she is capable of taking a considered and conscious decision regarding the parent with whom she wishes to reside. The minor has while stating that it would be ideal if the parents live together, expressed her wish to reside with her mother.*

*In view of statement made by counsel for the parties on instructions and the statement made by the minor before us in chamber, we dismiss the appeal and direct the appellant to hand over the custody of the minor to the respondent-mother within three weeks from today. It would be necessary to record that after the minor made statement before us, both counsel who were instructing the senior counsel, were called into the chamber and apprised about the statement made by the minor.*

*Sd/-*  
**[ RAJIVE BHALLA ]**  
**JUDGE**

14.10.2015  
shamsher

Sd/-  
[ REKHA MITTAL ]  
JUDGE

*Before we could put our signatures on the order, the appellant and his parents have put in appearance and state that the minor was confused, and pray for reconsideration of the matter.*

*Adjourned to 19.10.2015.*

*The order be kept in abeyance till next date of hearing.*

*Counsel for the respondent states that notice may be sent to the respondent.*

*Let notice be issued to the respondent for the adjourned date.*

*Process dasti.*

Sd/-  
[ RAJIVE BHALLA ]  
JUDGE

14.10.2015  
shamsher

Sd/-  
[ REKHA MITTAL ]  
JUDGE

*“We have duly considered the request made by the appellant and his parents, as recorded in order dated 14.10.2015. A perusal of the aforesaid order reveals that the order directing custody of the minor to the respondent-mother has been made on a concession and, therefore, express our inability to recall our order. We are conscious of the fact that the welfare of a minor is the primary consideration and but for the statement made by the parties, recorded, in order dated 14.10.2015, would have considered this question. Even otherwise, the minor is a girl who has expressed her desire to reside with her mother. The trial Court has also held that the welfare of the minor lies with her mother. Consequently order dated 14.10.2015 is maintained and the appeal is dismissed”.*

The applicant/appellant filed an application under Order 47 Rule 1 read with Section 151 of the Code of Civil Procedure (in short 'CPC') for review/recall of orders dated 19.10.2015 and 14.10.2015 (Annexures A-9 and A-10) passed by the Court by alleging that as welfare of the child lies in her custody with the father with whom the child is living for the past more than 09 years and is being provided the best of education from Doon International School, Karnal, the matter may be decided from the angle of welfare of the child and not the conflicting rights/interests of the parents.

A notice of the application was issued to counsel for the non-applicant/respondent. Thereafter, counsel for the non-applicant/respondent filed response by way of affidavit dated 27.11.2015.

On 07.12.2015, the order passed by this Court reads as follows:-

*“Without expressing any opinion as to the rights of the review petitioner, we call upon the parties to file an affidavit with regard to respective claims that the welfare of the minor lies with them.*

*The executing Court shall adjourn the hearing of execution to a date beyond the date fixed before this Court but visitation rights as already granted shall continue.*

*The appellant shall ensure that the child attends school failing which it shall be taken as an adverse circumstance while deciding the welfare of the child.*

*Adjourned to 17.12.2015.”*

In pursuance of the order extracted hereinbefore, Vikramjeet Singh filed his affidavit dated 17.12.2015 and the same was

taken on record.

The applicant/appellant filed rejoinder by way of affidavit in response to the affidavit dated 27.11.2015 filed by respondent – Kawaljeet Kaur.

Counsel for the parties advanced arguments primarily on the question of welfare of the child on the basis of affidavits filed by both the parties. The review applicant filed an application CM No.7187-CII of 2015 seeking permission to produce the minor before the Court for just decision of the matter. Counsel for the non-applicant/respondent raised no objection for interacting with the child, brought before the Court by the applicant/appellant. In view of no objection by counsel for the respondent/non-applicant, the aforesaid civil miscellaneous application was allowed vide order dated 15.07.2016. We interacted with the minor child in our chamber and passed order dated 15.07.2016. A relevant extract therefrom reads as follows:-

*“We interacted with the child-Ishmeet in our chamber who was brought today to the Court in terms of the order passed by us in C.M. No.7187 of 2016. We embarked upon interaction with the minor child in our chamber. The minor child expressed her desire to join her mother”.*

Counsel for the applicant/appellant has submitted that the Guardian Judge did not advert to a vital and material aspect of the matter in regard to welfare and interest of the child while disposing of the petition primarily on the ground that the child expressed her desire to stay with the mother. It is further argued that this Court by order dated 14.10.2015 again did not address the issue of welfare of the child

and dismissed the appeal in view of interaction with the minor child on the basis of consensus got recorded by counsel for the parties. It is argued with vehemence that as the law has imposed an obligation upon the Court to decide the question of well-being and interest of the minor, a paramount consideration in matters relating to appointment of guardian or custody of a minor child, the order dated 14.10.2015 is liable to be reviewed.

To substantiate contention of the review petitioner that welfare of the child lies in her custody with the father, it is argued that marriage of the parties was performed in the year 2005 and the minor child was born on 08.08.2006. The mother left the matrimonial home on 08.08.2012 and at that time she gave in writing Annexure P-3 (Ex.PY) wherein there is not even a whisper about the child, sufficient to show that she left the matrimonial home without bothering about the minor.

The respondent is residing in a Dera (a house outside *abadi* of the village) 07 kms. away from Patiala. In case the child is uprooted from the present place, she may have to travel a long distance for studies in a good school or otherwise she has to compromise in regard to her education. At present, the child is studying in Doon International School, Karnal and is performing very well both in academics and extra curricular activities, proved by the documents appended as annexures. The respondent – mother may be allowed visitation rights as deemed proper.

The applicant belongs to an agriculturist family and is the only son of his parents. He is joint in mess and income with his father.

The grandmother of the child is quite healthy and stout and has a strong

bonding with the minor. She (grandmother) has no other obligation except to look after the minor child. It is argued with vehemence that in view of the aforesaid facts and circumstances, the appeal should be decided on merits and custody of the child should be allowed to continue with the father.

Counsel for the respondent, on the contrary, would urge that as the order dated 14.10.2015 was passed by the Court on the basis of interaction with the minor child after recording statements of counsel for the parties, on instructions from their respective party and in absence of any plea that the said statement is incorrect much less vitiated on any legal ground, the application for review of orders dated 14.10.2015 and 19.10.2015 is not tenable. In addition, it is argued that if such a course is allowed to be adopted by an unsuccessful litigant, it may lead to chaos, confusion and set-back to sanctity of judicial proceedings.

To refute contentions of the applicant that welfare of the minor child lies in her custody with the applicant – father, it is argued that welfare rather lies in shifting her custody from father to that of mother. To substantiate his contention, counsel has made manifold submissions.

The first submission made by counsel is that the child is a girl child aged about 10 years'. Due to biological changes in coming years, she would be requiring constant counseling, guidance and care of her mother. The respondent is a well educated woman. She is Post-graduate in Political Science, Graduate in Education (B. Ed.) and is pursuing another Post-graduate degree in Punjabi in II<sup>nd</sup> year. She is

qualified ETTE and is a State level Judo Champion. The applicant father is simply a Matriculate. In view of educational background of the mother, she would be better equipped to guide the child for pursuing her career and render her necessary assistance from time to time.

So far as her financial capacity to look after needs of the minor, she is owner of land measuring 11 kanals 02 marlas situated at village Brass, District Karnal. Her father passed-away in December, 2015 and left behind 16 acres of land and she would be entitled to 1/4<sup>th</sup> share on the basis of natural succession. After death of her father, her brother deposited an amount of Rs.9,00,000/- in her account in December, 2015. The applicant is not owner of any immovable property. It is argued that the minor would be better placed financially if she is allowed to stay with the mother.

The respondent is residing in a house just 07 kms. away from Patiala. There are excellent schools available at Patiala. Most of the schools provide facility of transportation of children upto a distance of 25-30 kms. The minor child can be admitted in the best school of Patiala if allowed to reside with her mother.

The applicant is facing criminal prosecution for offence punishable under Section 498-A of the Indian Penal Code (for short 'IPC'). A criminal complaint has been filed by the respondent against her father-in-law for offence punishable under Section 376 read with Section 511 IPC. According to counsel, as the applicant and his father are facing criminal proceedings, it would be in the fitness of things and interest of the child to shift her custody from father to that of the mother.

Much stress has been laid by counsel that the child is quite intelligent and mature enough to understand her well being. On three separate occasions, when there was interaction between the minor and the Hon'ble Judges, she was insistent in her desire to join her mother. Further dilating, it is argued that for the first time, such an interaction was held by the Guardian Judge. For the second time, Hon'ble the Division Bench interacted with the child in view of consensus recorded by counsel for the parties, detailed in order dated 14.10.2015. Despite the fact that the minor child is residing with the applicant and his parents exclusively since the year 2012 when the mother allegedly left the matrimonial home, on an application filed by the applicant for producing minor before the Court to know her wish, the child again expressed willingness to join her mother in an interaction held on 15.07.2016. It is vehemently argued that intelligent preference given by the minor on repeated occasions when examined in the light of other materials on record that have strong bearing on paramount consideration of welfare of the minor, order passed on 14.10.2015 is liable to be affirmed with a direction to the applicant to handover custody of the child to the mother without any further delay.

In response, counsel for the applicant has submitted that land measuring 11 kanals 02 marlas situated at village Brass, District Karnal was purchased in the name of respondent by father of the applicant who preferred his daughter-in-law over his son.

We have heard counsel for the parties and perused the paperbook with their able assistance.

As has been noticed hereinbefore, the order dated 14.10.2015 was passed by the Division Bench of which one of us (Rekha Mittal, J.) was a member on the basis of consensus got recorded by counsel for the parties on instructions from the respective party. The applicant (review petitioner) has neither challenged correctness of the statement nor sought to withdraw the statement by assigning any reason whatever. Though we have no doubt that there is no error apparent on the face of record or otherwise warranting review of orders dated 14.10.2015 and 19.10.2015 but still as a minor girl child's, life and future is involved along with the fact to avoid an impression that the Court has not discharged its duty completely, we have analyzed comparative merits and demerits of the parties from the point of view of welfare of the child.

Before advertng to the submissions made by counsel for the parties, it is appropriate to recapitulate the settled legal position that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. While considering the welfare of the child, the moral and ethical welfare of the child must also weigh with the Court as well as his/her physical well-being. The child cannot be treated as a property or a commodity and, therefore, the issue has to be handled by the Court with care and caution with love, affection and sentiments applying human touch. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is

conducive to the welfare of the minor.

Reverting to the case at hand, on a critical and comparative analysis of positives and negatives of each of the parents, obviously the choice lies in her custody with the mother for the reasons recorded hereunder:-

- 1. The child is a 10 years' old female and she requires her mother's company more at this stage of life.*
- 2. The mother is highly educated and she would be in a better position to guide her child with regard to her career and academics.*
- 3. She is owner of agricultural land and an amount of approximately Rs.10 lacs is lying deposited in her account sufficient to look after economic needs of the child.*
- 4. The mother has no other obligation except to look after her child. She is young, stout, well-built and has not in any manner rendered herself disqualified to have custody of the child.*
- 5. The mother is away from the matrimonial home since August, 2012 meaning thereby that she was with the child in the initial 06 years from 2006 to 2012. The petition for custody was filed in October, 2012 sufficient to negate plea of the applicant that she left the matrimonial home without bothering about care and welfare of the child.*
- 6. The child was interviewed by the Court on 03*

*occasions. For the first time, she was interviewed by the Guardian Judge at Karnal and the child expressed her desire to live with the mother. This Court had an interaction with the child on 02 occasions i.e. on 14.10.2015 and 15.07.2016. Every time, the child expressed her willingness to stay with the mother in preference to the father.*

When the aforesaid relevant and material aspects are examined cumulatively, there is no hesitation in concluding that it would be in the best interest of the minor if her custody is made over to the respondent – mother.

We have also examined the aspect of dislodging the child from her present place of stay as she is continuously staying with her father and his family for the past about 10 years'. As has been mentioned hereinbefore but for the sake of repetition, the child was staying with the mother as well till 2012 (August). The respondent – wife has not incurred any disqualification to seek custody of the child. The Child has repeatedly expressed her wish to stay with the mother. If custody of the child is shifted from the father to the mother, the child can get admission in a good school at Patiala that has educational facilities upto post-graduation level. Under these circumstances, dislodging of the child from Karnal to a place near Patiala cannot overweigh other relevant and material considerations discussed hereinbefore.

The father of the child is a matriculate. He does not own

any property but joint in mess and income with his father. The father is involved in agricultural activities being the son of an agriculturist. The child would be looked after by the grandmother in case she continues to stay with the father. It is not clear if the grandmother had any formal education much less sufficiently qualified. It appears that the grandmother is a rustic villager and, therefore, may not be of any help in academic career of the child. The father and grandfather of the child are facing criminal proceedings, admittedly, lodged at the instance of the respondent – mother. That being so, we do not find any reason to allow custody of the child to the father on a solitary ground that the child has been staying with the father and his family for the past about 10 years.

When the facts and circumstances of the present case are examined in the light of settled position in law discussed hereinbefore, we do not find any reason to intervene in the order passed by the trial Court or review orders dated 14.10.2015 and 19.10.2015. As a natural consequence, the application is devoid of merit and is accordingly dismissed.

**(M. JEYAPPAUL)**  
**JUDGE**

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

**07.11.2016**

*yakub*

Whether speaking/reasoned:

Yes/No

Whether reportable:

Yes/No