

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

**Civil Revision No.5160 of 2017 (O&M)
Date of Decision: 23.08.2017**

Daya Ram

.....Petitioner

Vs

Tarun Kumari and others

....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Munish Behl, Advocate
for the petitioner.

Mr. B. Diwakar, Advocate
for the caveators/respondents.

RAJ MOHAN SINGH, J.

[1]. Petitioner has challenged the order dated 21.07.2017 passed by Addl. District Judge, Palwal whereby the application filed by respondent No.1 for handing over the custody of minor child was allowed.

[2]. Brief facts are that the marriage between the petitioner and respondent No.1 took place on 21.11.2008 according to Hindu rites and ceremonies. A son namely Meru Kanwar took birth from this wedlock on 20.08.2009. The matrimonial discord took place between them as the petitioner was involved in a

criminal case under Section 376 IPC and was convicted and sentenced to undergo imprisonment of 5 years by the trial Court. The sentence was reduced by the High Court at Allahabad thereby reducing the same to 4 years 6 months. During the period of custody of the petitioner, the wife and minor son remained in the parental house of the wife. Petitioner has already completed the sentence. After the release, the petitioner took respondent No.1/wife and his son with him. The respondent No.1 raised allegations of harassment and captivity. Respondent No.1 was recovered by means of search warrants issued by the Sub Divisional Magistrate, Palwal. The allegations were made that when the police party went to get the respondent No.1 released, the police party was assaulted by the petitioner resulting in lodging of a criminal case.

[3]. The custody issue of the minor child under the provisions of Guardian and Wards Act, 1890 was considered by the trial Court with reference to an interaction done with the minor. The trial Court found him to be quite capable child having understanding of more than a child of his age. The rival assurances given by the parties were considered by the trial Court and ultimately the trial Court allowed the application of respondent No.1 and directed the petitioner to hand over the child to respondent No.1 on 24.08.2017.

[4]. Learned counsel for the petitioner vehemently contended that an amount of Rs.5,000/- fixed under Domestic Violence Act is being paid regularly except the period since March 2017 for which the petitioner is ready and willing to make good the arrears. Respondent No.1 is living with her parental family. Father of the petitioner has already died on 12.08.2017. Besides the petitioner, there is a mentally retarded brother of the petitioner at home and an old mother.

[5]. Learned counsel further submitted that respondent No.1 has no independent means of livelihood except the assistance rendered by her father, who is an ex-army man and brother, who are managers in some multi-national company. Welfare of the child is of paramount consideration and the welfare of the child lies only with the petitioner.

[6]. Learned counsel by relying upon **Mausami Moitra Ganguli vs. Jayant Ganguli, 2008(4) R.C.R. (Civil) 551; Rozy Jacob vs. Jacob A. Chakramakkal, 1973 AIR (SC) 2090; Smt. Surinder Kaur Sandhu vs. Harbax Singh Sandhu and another, 1984 AIR (SC) 1224** contended that custody of minor child more than of six years of age can be given to the husband in view of the fact that parents of the minor child are having constrained relations. Since the petitioner is quite resourceful in order to meet out the exigencies of maintaining the child in

terms of his well being, therefore, welfare of the child preferably lies with the petitioner/husband. The welfare of the child is of paramount consideration in the custody issue between the parties.

[7]. On the other hand, learned counsel for the respondent has vehemently submitted that the petitioner was convicted for an offence of moral turpitude. The family of the petitioner is comprising of himself, his mentally retarded brother and an old mother. In view of composition of family, there will be no healthy atmosphere in the house, so as to bring out the house from sarcastic atmosphere, where the petitioner would be viewed with an intent of guilt by all concerned including the neighbours.

[8]. Learned counsel further submitted that respondent No.1 along with minor child were being adequately maintained by her parental family as two of his brothers are highly placed as managers in some multi-national company and her father is an Ex. Army Officer. The future of the child would be secured at the hands of respondent No.1. Petitioner is having criminal antecedents i.e. firstly, he was convicted for the offence under Section 376 IPC. Secondly, even after arrival at home, he confined respondent No.1 and the child against the wishes of respondent No.1. Respondent No.1 could be recovered only with the aid of search warrants issued by the SDM, Palwal.

Even the petitioner assaulted the police party, which ultimately resulted in lodging of a criminal case against him. By referring to the certificate issued by the Principal B.V.N. Sr. Sec. School, Villlage Khambi, Distt. Palwal dated 21.08.2017, learned counsel submitted that the admission of Meru Kanwar has been cancelled from the school due to his continuos absence.

[9]. I have considered the rival submissions made at the bar.

[10]. Apparently, petitioner and respondent No.1 are having constrained relations. Welfare of the child is basically a question of fact which requires determination on the basis of evidence. At this stage only *prima facie* evidence can be considered in order to see the welfare and interest of minor which are paramount in nature. The natural instinct of the mother in favour of the infant does not require any such evidence to show that the mother is not having any self-less interest in motherly care and affection towards the child, which is indispensable for the healthy growth of the minor. The self-less of the minor for the welfare of the infant is a natural instinct of the mother which is not confined to human being alone. None else can provide such love and affection to the minor except the mother, who is having God's own cradle.

[11]. This Court has also interacted with the minor on 22.08.2017 and found the minor to be capable of understanding. At the time of interaction, the minor was found to be under the influence of his father, but this Court is bound to take a realistic approach in the facts and circumstances of the case. Child is of tender age and requires motherly care and affection for the ultimate growth of his personality. Since the petitioner was convicted under Section 376 IPC and was accused of opening assault on the police party as well, therefore, it would be unsafe to allow the custody of the minor in the hand of petitioner, particularly when there is no other male members in the family except the mentally retarded brother of the petitioner to take care of the minor in terms of healthy teachings at home. The old mother of the petitioner would not be in a position to fulfill the needs of the minor. Above all, as per the certificate issued by the Principal, B.V.N. Sr. Sec. School, Village Khambi Distt. Palwal, the admission of the minor has been cancelled on 21.08.2017 due to his continuous absence from the school.

[12]. There cannot be any dispute with regard to the views expressed by the Courts in the cited precedents by learned counsel for the petitioner. **Mausami Moitra Ganguli's** case (supra) was in respect of custody issue of minor child aged 10

years in which custody was given to the husband, subject to certain conditions. The facts involved in the said case were totally different. The husband was not involved in any offence of moral turpitude in the cited cases. The other precedents cited by learned counsel operate in individual fields, which cannot be opined to be overlapping with the facts of the present case.

[13]. The cumulative effect of the facts and circumstances of the case would lead only to an irresistible conclusion that welfare of the minor child would be in the company of the mother, who being a natural mother would provide him the natural instinct of her self-less interest, motherly care and affection towards ultimate growth of the child's personality.

[14]. In view of above, I do not find any error of jurisdiction committed by the Court below. This petition is accordingly dismissed.

August 23, 2017

(RAJ MOHAN SINGH)
JUDGE

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Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No