

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

FAO 5212 of 2015 (O&M)

Date of Decision: August 16, 2017

Parminder Singh

.....Appellant

Vs.

Bhupinder Singh (Deceased) and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.
HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH.

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Present: Mr. M.L. Saggar, Sr. Advocate with
Mr. Armaan Saggar, Advocate for the appellant.

Mr. B.S. Khehar, Advocate for respondents No.2 and 3.
Respondent No.1 since deceased.

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M.M.S. BEDI, J.

This appeal has been preferred by father of Aliza Singh, minor girl under Section 47 of the Guardians and Wards Act, 1980, for short 'the Act' against the order dated May 21, 2015 dismissing his petition under Sections 19 and 25 of the Act for the custody of Aliza Singh, minor daughter of the appellant from the custody of respondents No.1 to 3. Respondents No.1 and 2 are maternal grand-parents of Aliza Singh and respondent No.3 is the wife of the appellant. As per the allegations in the original petition, the marriage of the appellant has been solemnized with respondent No.3

Monika Singh who is daughter of respondents No.1 and 2 on January 11, 2009 at Malerkotla by way of Anand Karaj whereas the remaining ceremonies were performed at Marriage Palace in Malerkotla. After the marriage, respondent No.3 initially stayed with the appellant at Village Alamgir, Tehsil and District Ludhiana. On June 11, 2009, respondent No.3 accompanied the appellant to Australia. The husband- appellant had pleaded that in the matrimonial advertisement in Daily Ajit, Jalandhar, dated December 7, 2008 the respondents had expressed their desire that only such intending parties need to contact who could afford to bear total expenses regarding immigration to Australia. The respondents had allegedly shown greener pastures to the appellant and his parents but later on respondent No.3 had started pressurizing the parents of the appellant to arrange money for the purpose of immigration to Australia. The father of the appellant told respondent No.3 that Pritam Kaur, mother of the appellant was to retire in March 2009 and that VISA proceedings will be got processed after she receives the retiral benefits but respondent No.3 was adamant to leave India at the earliest. The father of respondent No.3 Bhupinder Singh (now deceased) visited the native village of the appellant and impressed upon the parents of the appellant to make arrangement of a sum of Rs.20 lacs for the immigration of the appellant and respondent No.3 to Australia at an early date in presence of relations including Surjit Singh and Jarnail Singh. The arrangements were made for money by the parents of the appellant as per the dictates of the respondents. Appellant and respondent No.3 went to Australia on June 11, 2009 and they stayed with Dalbir Singh, brother of respondent No.3. The appellant shared rentals and grocery expenses with

Dalbir Singh at Australia. The behaviour of respondent No.3 was indifferent and she kept the appellant on tenterhooks at the instance of her near relatives. It was alleged in the petition that in the month of June 2009 after conception, respondent No.3 expressed her desire to undergo process of termination of pregnancy. Similar was the intention of respondents No.1 and 2. But on refusal by the appellant, respondents No.1 and 2 insisted for sex determination test so that in case of sex of the child being female, the pregnancy could be terminated. The appellant was disturbed and upset with the said act of the respondents. Despite all the efforts on the part of appellant to realize the realities of life, respondent No.3 had a hostile attitude towards the appellant but the appellant did not loose his temper with the hope that respondent No.3 shall mend her ways with the passage of time. On the birth of female child on March 25, 2010, respondent No.3 wept bitterly and respondents No.1 and 2 also expressed their displeasure. The parents of appellant visited Australia in April 2010 but the behaviour of respondent No.3 was quite indifferent. On August 18, 2010, Harinderpal Singh @ Bawa, who is the cousin brother of respondent No.3 came to the residence of the appellant and misbehaved with him. When the petitioner protested to the said behaviour, respondent No.3 complained the matter to the police levelling false allegations of domestic violence by the appellant. The appellant was detained on the basis of the complaint of respondent No.3. Finally, the appellant and his mother returned from Australia on September 30, 2010. It is alleged in the petition that on October 8, 2010, the father of respondent No.3 called the appellant from Australia and told him that respondent No.3 was not child producing machine and threatened that

he shall throw minor Aliza Singh at the door step of the appellant in Village Alamgir, Tehsil and District Ludhiana. A complaint was made by father of respondent No.3- wife before the Incharge, Women Cell, Sangrur which was dropped in the last week of December 2010 as the allegations were found to be false. It was pleaded in the application that respondent No.3 left for Australia in the first week of January 2011, leaving minor Aliza Singh with her parents at Malerkotla. The appellant claimed that at the time of filing of the petition, the minor baby Aliza Singh was only 10 months old when she was left at Malerkotla. The appellant has claimed that he has got sufficient means to meet the requirements of the minor and is capable of rearing her with love and affection being the natural guardian. He claims that as respondent No.3 had left minor Aliza Singh with respondents No.1 and 2 as such little caring about the well being of minor child who had been left to rot in the company of her parents. As respondent No.3-mother had left the child with her parents, the appellant claiming himself to be the father and natural guardian of the minor and entitled to the custody of the child, filed the petition for the custody of the child. Respondent No.1, the grand-father of the child, had filed an application under Section 125 Cr.P.C. for claiming maintenance for the minor daughter. The appellant claimed that he and his family members are educated as such it would be convenient for them to give enough time to minor Aliza Singh. The sister of the appellant, namely, Gurvinderjit Kaur who frequently visits with her minor children, the child feels comfortable with them. The appellant had specified in the petition that he had previously filed a petition under Sections 19 and 25 of the Act for seeking custody of the minor daughter Aliza Singh on March 29, 2011 but it

was withdrawn on account of technical defects therein on March 31, 2011. He also pleaded that a petition under Section 125 Cr.P.C. had been filed by the maternal grand-parents of Aliza Singh claiming maintenance for the child.

The petition filed by the appellant was contested by the respondents raising the preliminary objections regarding maintainability and jurisdiction alleging that there was no cause of action and there has been suppression of material facts. It is averred in the written statement that from the date of marriage, relations between the husband and wife were not good. The appellant maltreated and misbehaved with respondent No.3 and gave beatings. The relationship of the parties was admitted. It was averred that both the husband and wife had gone to Australia on June 11, 2009 and minor Aliza Singh was born out of their wedlock on March 25, 2010 at Gold Coast Hospital, Queensland, Australia. On August 18, 2010, the appellant had maltreated and misbehaved with respondent No.3 and gave her merciless beatings as such she was admitted in hospital and a case was registered against the appellant under Domestic Violence Act and protection order was passed by the Magistrate Court of Queensland at Southport on August 20, 2010. He again assaulted respondent No.3 and minor Aliza Singh on August 24, 2010 in Australia. The minor child was thrown on the floor. The matter was reported to the police by Monika Singh. Appellant was arrested and he remained in jail for a long period for assaulting Monika Singh and minor child Aliza Singh. Under the compelling circumstances, respondent No.3 along with her minor child Aliza Singh remained in the house of her brother in Australia and at the time of domestic violence and assault by the

appellant, the mother of the appellant was also present in Australia and that after release from the jail, the appellant and his mother absconded from Australia by leaving behind Monika Singh and minor child Aliza Singh in Australia. During the stay in Australia, the appellant had no love and affection towards the minor Aliza Singh since her birth and he never cared about the minor child. He refused to sign on the passport documents of minor Aliza Singh. Monika Singh was on study Visa in Australia. Her study was disbursed due to domestic violence and assault of the appellant. The appellant had withdrawn the entire money from the joint account of the parties. Respondent No.3 Monika Singh got temporary passport of her daughter and was left with no alternative but to return to India along with child Aliza Singh in the month of October 2010. Her study was left incomplete, however, she went back to Australia in the month of January 2011 to complete her studies by leaving the minor child Aliza Singh with her parents at Malerkotla. The parents of Monika Singh were the custodian and guardian of the minor child whereas the appellant was not entitled to get the custody of the child from respondents No.1 and 2. Jurisdiction of the Courts at Malerkotla was challenged on the ground that the appellant had left Aliza Singh at Australia. The appellant has filed an divorce petition which is pending in the Court of Additional District Judge, Ludhiana. Respondent No.3 claimed that the appellant and his family members had no love and affection with the minor child since her birth as the appellant and his mother were not happy on the birth of the female child on account of which reason the appellant had assaulted respondent No.3 and the child with an intention to kill the minor daughter by throwing her on the floor in

Australia. The petition has been filed with malafide intention to create a defence in the proceedings under Section 125 Cr.P.C. which are pending. The appellant remained silent for a period of 1½ years. The maternal grandparents of minor Aliza Singh on account of great love and affection with the minor are looking after the minor child. In the written statement it was pleaded that the minor child was staying with respondents No.1 and 2.

From the pleadings of the parties, the Guardian Judge had framed the following issues:-

1. Whether the petitioner is entitled to the custody of Aliza Singh minor daughter of the petitioner? OPA.
2. Whether the present petition is not maintainable? OPR.
3. Whether the respondent has concealed material facts from the Court? OPR.
4. Relief.

The appellant examined PW1 Makhan Singh, himself appeared as PW2; examined PW3 Ajay Kumar, Clerk of Civil Hospital, Malerkotla, PW4 Gurpreet Singh, Clerk of DMC, Ludhiana and PW5 Tarsem Singh, his father and closed the evidence, whereas respondent No.3 herself appeared as RW1 and her father appeared as RW2.

Considering the statements of the witnesses of both the parties, issue No.1 was decided against the appellant on the following grounds:-

- i) The conduct of the appellant was that he had assaulted respondent No.3 Monika Singh and the appellant was taken in custody and that he had left

Australia along with his mother in September 2010, he had withdrawn the entire amount lying in the joint account with respondent No.3 leaving minor Aliza Singh in Australia, whereas his wife was having no source of income at that moment when Aliza Singh was abandoned;

- ii) While leaving Australia, the appellant had not made any arrangement for the daily expenses of Aliza Singh;
- iii) On account of the appellant having not signed the documents for preparing the passport of minor Aliza Singh, Monika Singh, respondent No.3 was left with no alternative but to leave minor Aliza Singh with her parents in India as the consent of father was required for preparation of the passport of the minor for stay in Australia under the Indian Consulate Canberra Rules;
- iv) Respondent No.3 has since completed her study and was since doing volunteership in Australia for the job whereas the appellant being MCA was not doing any job and was only assisting his father in the shop of goldsmith in his village.

Taking into consideration the above said circumstances, the custody of the minor was not given to the appellant, however, it was held

that the appellant would be at liberty to meet minor child Aliza Singh once in a month till she remains in India.

Issue No.2 was decided against the respondents as not pressed whereas issue No.3 was decided in favour of the appellant as no evidence was led by the respondents on the said issue. The petition of the appellant for the custody of the child was dismissed as the welfare of the minor child was held to be necessary. The custody of the child with her maternal grandparents was held to be the custody on behalf of Monika Singh, who is the mother and natural guardian of the minor.

It is apt to observe at the very outset that Bhupinder Singh, respondent No.1, father of respondent No.3- Monika Singh had expired and this aspect had been noticed vide order dated September 7, 2015.

Learned senior counsel for the appellant Mr. M.L. Saggar has submitted that an application bearing CM 22258-CII of 2015 had been filed for an appropriate direction from this Court highlighting the circumstance that on October 11, 2015, the minor child had been taken to Australia. Counsel submitted that another application bearing CM 284-CII of 2016 was filed before this Court for an interim injunction to restrain the respondents from removing minor Aliza Singh from the jurisdiction of this Court during the pendency of the appeal and on April 11, 2016 a direction was issued by this Court that the child should not be removed from the jurisdiction of this Court as such the Misc. application No. 237-CII of 2017 was filed to the effect that despite the order dated April 11, 2016, the appellant was neither permitted to meet the child nor the order dated April 11, 2016 was complied with. It is averred in the application that the respondents had removed the

minor child from the jurisdiction of the Court and taken her to Australia, despite the fact that the orders dated April 11, 2016 were conveyed to the High Commission in Australia. A prayer was made for a direction to produce the minor Aliza Singh in the Court as she had been removed from the jurisdiction of the Court in violation of the orders dated April 11, 2016.

All the misc. applications were taken up along with the main case and parties were given an opportunity to amicably resolve the dispute regarding the custody of the child suggesting that the child is a living being and is not to be considered as a commodity. Both the parties should respect the feeble mind of the child and take appropriate steps to see that the child is comfortable.

On July 19, 2017, a direction was given to the respondents to be present in the Court on July 26, 2017. The appellant and respondent No.2 along with the minor child came present in the Court. It was informed by the counsel for the respondents that in compliance with the arrangement as ordered by the Guardian Judge giving liberty to the minor child Aliza Singh once in a month till she remains in India, respondent No.2 Baljit Kaur was present in the Court along with the minor child. It was also informed that since the child is at present residing with the mother, but she was available in India for few more days, in the interest of justice, a direction was issued vide order dated July 26, 2017 that the appellant would be permitted to meet the minor child Aliza Singh in the Mediation and Conciliation Centre of Punjab and Haryana High Court in the room meant for said purpose for a period of two hours in presence of Baljit Kaur. It was ordered that the matter should be taken up by two Mediators on July 31, 2017. It was also

ordered that Mediators would ensure that no discomfort or inconvenience is caused to the minor child by any of the parties.

After compliance of the orders, matter was again taken up on August 4, 2017. The minor child was again present in the Court on said date. As such the parties were directed to appear before the Mediation and Conciliation Centre of Punjab and Haryana High Court at 2.00 o'clock with a specific direction that discomfort and inconvenience to the minor child should be avoided. A discretion was given to the Mediators that in case it is required in the interest of justice and welfare of the child, the mediation proceedings could also be taken on any date between August 8 to August 10, 2017 as per the discretion of the mediators in a just manner. The matter was taken up on August 11, 2017. On said date, the Court made an attempt to amicably get the dispute resolved. Though the parties cooperated but no final decision could be arrived at and no amicable settlement could be entered into between the parties to facilitate any arrangement by which the child could be brought frequently to India by sharing the expenses, without disturbing the study schedule of the child. No arrangement could be made by the parties to arrive at a plan by mutual arrangement, taking into consideration the Parenting Plan regarding the physical custody of the child, a mutual settlement regarding the decision of taking legal custody; regarding visitation/ access rights; the school holidays, vacations and festivals; physical and mental health care of the child; settlement regarding overnights and visitation; settlement regarding communications and mutual decision-making, Mr. Saggar, learned senior counsel for the appellant had submitted

that the appeal could be finally disposed of on merits after hearing the parties.

Counsel for the appellant and counsel for the respondents were heard at length to explore the best interest of the child by preparing some parenting plan.

Mr. M.L. Saggar, senior counsel assisted by Mr. Armaan Saggar has referred to the pleadings of the appellant and the evidence produced by the appellant in support of his contention that the appellant being the natural guardian of the child and having resources to maintain the child has got right to the custody of the child whereas after the death of respondent No.1 it is difficult for the mother of respondent No.3 i.e. respondent No.2 to take care of the child. It is not out of place to mention here that during the course of arguments it has been admitted that at present the child is in Australia and she is receiving education. As mentioned hereinabove, the child had been brought in the Court by her maternal aunt and was permitted to meet the father before the Mediation and Conciliation Centre of Punjab and Haryana High Court. Mr. Saggar has urged that the parents of the appellant being educated and retired have got sufficient time to take care of the minor child. Mr. Saggar has drawn our attention to the facts pleaded and the evidence produced to establish that from the very inception the intention of respondent No.3 was to move to Australia at the expenses of the appellant. He has referred to the cross-examination of Monika Singh- respondent No.3 wherein she has stated that no complaint was made to the police in India regarding demand of dowry or any cruelty. She was confronted with advertisement Ex.PX wherein it was mentioned

that only those boys should contact for marriage who could spend money for the immigration of respondent No.3 to Australia. Mr. Saggar has also referred to the nature of the allegations levelled by the respondents in their written statement and submitted that the entire story of beating had been concocted as respondent No.3 had achieved her objective of going to Australia. It was submitted by Mr. Saggar that the allegations of cruelty and domestic violence have not been proved in Australia. He has urged that on the basis of false allegations levelled against the appellant he was compelled to leave Australia after getting him in jail. In order to impeach the credibility of the respondents it was argued that a false complaint was registered with the Women Cell. Referring to the cross-examination of respondent No.3, Mr.Saggar has submitted that she has admitted that she had left the child in 2010 in India with her parents. But perusal of the cross-examination of Monika Singh RW1 indicates that she has explained the circumstances in which she had to leave the child on account of the appellant having refused to sign and give consent for Visa and her immigration to Australia, being the father of the child. She has placed on record form Ex.R2 which she had submitted twice. She had also applied second time when the daughter got the Visa. In her cross-examination she has clarified that the appellant had admitted to sign the consent form with a promise by raising a demand of Rs.5 lacs. Sum of Rs.5 lacs had to be given to the appellant when the child would reach Australia. Pursuant to a planned device, the appellant has withdrawn his consent by writing a letter to the Australian Immigration claiming that his signatures on the form were fake.

Similar is the explanation given by her father by appearing in the witness box.

Be that as it may, it is an admitted fact that now the child having born in Australia has already migrated there. Pursuant to the allegations that she had been taken out of the jurisdiction of this Court despite an injunction order dated April 11, 2016, the child has been brought in the Court and was permitted to meet the appellant in the Mediation and Conciliation Centre of Punjab and Haryana High Court. It is settled principle of law that the welfare of the child in guardianship cases is the paramount consideration. So far as the welfare of the child is concerned, there is no straight jacket yardstick available with the Court to determine the welfare of the child. The welfare of the child has got many facets, such as financial, physical, educational and religious. The Court is required to weigh balance of the factors before making a decision pertaining to the welfare of the child. The circumstances which are generally considered relevant for making such decision are the relationship, the claim and wishes of the parents, risks, choices and circumstances and determining what is best for the minor's well being. It is always the primary duty of the Court to be satisfied what would be good for the welfare of the minor and to pass an order appointing or declaring a guardian accordingly. The doctrine of best interest of the child has been followed in **Chandrakala Menon Vs. Vipin Menon (Capt.)**, (1993) 2 SCC 6 wherein it was observed that the father is the natural guardian of his minor daughter yet the question regarding the custody of the minor child cannot be decided on the basis of the legal rights of the parties but on the sole criterion of interest and welfare of the minor.

In selecting a guardian, the Court exercises *parens patriae* jurisdiction and is expected to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored and they are equally, or, even more important, essential and indispensable considerations. In this context a reference can be made to the observations made in **Nil Ratan Kundu Vs. Abhijit Kundu**, (2008) 9 SCC 413. The Apex Court in **Vishnu Vs. Jaya**, (2010) 6 SCC 733 had observed that if the children are forcibly taken away from custody of the parent with whom they were living for a long time, and handed over to another, it will only traumatize them and do good to nobody. The legislation in its wisdom had referred to the considerations which are required to be considered by the Court in appointing guardian. Section 17 of the Act reads as follows:-

“17. Matters to be considered by the court in appointing guardian:- (1) In appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and the nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing

or previous relations of the proposed guardian with the minor or his property.

(3) If minor is old enough to form an intelligent preference, the court may consider that preference.

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(5) The court shall not appoint or declare any person to be a guardian against his will.”

It is pertinent to observe here that in this case the controversy involves a cross-border inter parental dispute regarding the child regarding which the legislation is silent. It is also pertinent to observe here that there is no judgment pertaining to the custody of the minor child by any foreign judgment as such the interest and welfare of the minor child have to be taken into consideration independently. In **Ruchi Majoo Vs. Sanjeev Majoo**, (2011) 6 SCC 479, the Apex Court had made an observation that interest and welfare of the minor being paramount, a competent Court in India is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication.

A perusal of the pleadings and the evidence produced on the record gives a clear indication that on account of the appellant having indulged in the act of assault on respondent No.3 and the minor child, a case was registered against the appellant in Australia on August 20, 2010.

With the assistance of counsel for the appellant and counsel for the respondents we have gone through the record which indicates that on August 18, 2010, the appellant was arrested and detained pursuant to the acts

of domestic violence. It is also an admitted fact that appellant along with his mother had returned to India in September 2010.

We have taken into consideration the fact that respondent No.3 returned to India and brought the child in Court as per the interim directions and permitted the appellant to meet the child. It has also been noticed that the child, at present, is living and enjoying all the comforts in the custody of her guardian i.e. mother. For a minor child, the lap of the mother is considered to be the best place. There is nothing on the record that with the changed circumstances respondent No.3 is incapable of keeping the custody of the child and to look after her welfare.

We have considered the age of the minor girl and the capacity of both the parents and the nearness of the child with the mother. We do not find any ground to interfere in the order passed by the Guardian Judge dismissing the application under Sections 19 and 25 of the Act for the custody of minor Aliza Singh from the respondents. Considering the observations of the Apex Court in **R.V. Srinath Prasad Vs. Nandamuri Jayakrishna**, (2001) 4 SCC 71, custody of the child being a sensitive issue involving the emotions of the parties concerned, the Courts have to strike a balance between such emotions and the welfare of the minor, which is a matter of paramount importance, we are of the opinion that the appellant cannot be denied the visitation rights which is important for the proper mental development of the child by getting affection from both the parents. The appellant being the natural guardian can be permitted to meet the child occasionally.

Considering all the facts and circumstances of the present case while dismissing the appeal we pass a direction that the appellant will be permitted to meet the child on the last Friday of every month before the Mediation and Conciliation Centre of Punjab and Haryana High Court at a place meant for the said purpose in the mediation centre, in case the child is in India. But in case the child is not in India on any other month of the year, respondents No.2 and 3 will ensure that during the vacation of the child in school in the month of December, minor Aliza Singh would be brought to India for a period of 10 days so that the appellant is able to meet the child on alternative days, as per the convenience of both the parties before the Mediation and Conciliation Centre of Punjab and Haryana High Court subject to the condition that appellant will deposit a sum of Rs.2 lacs in the first week of every December regarding which intimation can be given by the Registry to respondent No.3 at the address given by registered post as well as by e-mail. Respondent No.3 would give intimation to the Registrar regarding the dates of visit to India / Chandigarh/ Punjab for compliance of the above said order. The amount of Rs.2 lacs will be utilized for the travelling and other misc. expenses of the minor child Aliza Singh till she attains majority.

Dismissed with the aforesaid directions.

(M.M.S. BEDI)
JUDGE

August 16, 2017
sanjay

(AUGUSTINE GEORGE MASIH)
JUDGE

Whether speaking/ reasoned:	Yes/ No.
Whether reportable:	Yes/No.