

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

FAO-487-2016

Date of Decision: 24.5.2017

Jagdev Singh

....Appellant.

Versus

Mandeep Kaur

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU.**

PRESENT: Mr. Vikram Preet Arora, Advocate for the appellant.

Mr. J.S. Moudgill, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

1. Having lost before the trial court in a petition under Section 25 of the Guardian and Wards Act, 1890 (in short “the Act”) for the custody of minor child, namely, Armandeep Singh, the appellant-husband has approached this Court by way of instant appeal challenging the judgment dated 23.10.2015 passed by the Additional Civil Judge (Senior Division), Amloh (exercising the powers of District Judge).

2. Put shortly, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The marriage between the parties was solemnized on 15.10.2006 at village Shamshpur, Tehsil Amloh. From the said wedlock, son Armandeep Singh was born on 3.7.2007. The parties could not adjust with each other and got panchayati divorce and later on filed a petition under Section 13B of the Hindu Marriage Act, 1955 for a

decree of divorce by mutual consent which was granted vide judgment and decree dated 20.10.2008. At the time of getting divorce by mutual consent, it was agreed that neither they will file any suit/proceedings against each other nor the appellant would file a petition for custody of the minor. Further, the respondent agreed that she would maintain and keep the minor child and would not claim any maintenance from the appellant who had already paid lump sum amount to her on account of permanent alimony. However, the respondent later on filed a petition under Section 125 of the Code of Criminal Procedure on behalf of the minor and the trial Court granted maintenance @ ₹ 1500/- per month to the minor. According to the appellant, the respondent had already contracted second marriage with Satnam Singh and was residing with her at village Uksi Dudhal, Tehsil Payal and the minor was residing with his maternal grand mother (Nani) at village Shamshpur. The respondent was not in a position to keep and maintain the minor and the minor was residing without care and custody of his mother and father. Accordingly, the appellant filed a petition under Section 25 of the Act for the custody of the minor, namely, Armandeep Singh. The said petition was contested by the respondent by filing a written statement. Besides raising various preliminary objections, it was pleaded that the present petition was filed by the appellant only to avoid the payment of maintenance to the minor son which was allowed by the Judicial Magistrate Ist Class, Amloh. The minor child was residing with the mother at village Shamshpur and she had a right to claim maintenance for the welfare of the minor and had been rightly considered natural guardian of the minor in the petition under Section 125 of the Code of Criminal Procedure. It was further pleaded that the appellant was enjoying with the second wife.

Even at the time of giving divorce, it was agreed between the parties that they would not file any suit/ proceeding against each other nor the appellant would file a petition for custody of the minor. The respondent would maintain and keep the minor with her and would not claim any maintenance from the appellant. The other averments made in the petition were denied and a prayer for dismissal of the same was made. Rejoinder was filed controverting the averments made in the written statement and reiterating that made in the petition. From the pleadings of the parties, the trial court framed the following issues:-

1. Whether the petitioner is entitled for custody of minor child, namely, Armandeep Singh? OPA
2. Whether the petition is not maintainable? OPR
3. Relief.
4. In support of his case, the appellant examined himself as PW1, Balwinder Kaur as PW2, Gulzar Singh as PW3 and Jaswinder Singh as PW4 (wrongly mentioned as PW3 in the judgment). On the other hand, the respondent besides examining herself as RW1, also examined Tejinder Singh as RW2 and Avtar Singh Lamberdar as RW3.
5. The trial court on appreciation of the evidence led by the parties dismissed the petition under Section 25 of the Act vide judgment dated 23.10.2015 holding that the custody of the minor could not be disturbed until or unless the Court is satisfied that the future or life of the minor child was at stake in the hands of the present guardian. Hence, the present appeal.
6. Learned counsel for the appellant submitted that the respondent has proceeded to foreign country after leaving the minor child in India. It

was further submitted that the appellant being the father of the minor had every right to claim the custody of the minor.

7. On the other hand, learned counsel for the respondent supported the judgment passed by the trial Court and submitted that the trial Court had rightly declined the custody of the minor to the appellant.

8. After hearing learned counsel for the parties, we do not find any merit in the appeal.

9. The Apex Court in **Gaytri Bajaj v. Jiten Bhalla 2012(4) RCR (Civil) 603** discussing the issue relating to custody of minor child had held as under:-

“14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor

which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.”

10. Undisputedly, the father of the minor is the natural guardian, though custody of a minor who has not completed the age of five years shall ordinarily be with the mother, and has the right of custody unless the Court comes to the conclusion that the father is unfit to have the custody and that it is not for the welfare of the minor that the father should be allowed to exercise his right. Guardianship is in the nature of a sacred trust.

11. The courts while adjudicating the issue of custody of minor has to ensure that the interest and welfare of the minor is of paramount importance. While deciding the better rights of either parent would not be of great significance. The factors to be borne in mind by the Court while allowing custody to a parent is to see the desire of the child along with the availability of a conducive and appropriate environment for proper upbringing and further the ability and means of the concerned parent to take care of the child. No doubt, all other factors cannot be said to irrelevant but it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

12. In the present case, it was not disputed in the statement of Jagdev Singh PW1 appellant and his mother Balwinder Kaur PW2 that at the time of granting divorce, it was agreed by both the parties that they will not file any suit/proceedings against each other nor the father-appellant shall file any petition for the custody of the minor. In such circumstances, the petition now filed for custody of the minor cannot be held to be bonafide

especially when the father has not been able to demonstrate that there was negligence on the part of the respondent-wife to maintain him and act of the respondent-wife was not for the welfare of the child. The appellant had not produced any evidence to show that the minor was not happy in the company of his mother-respondent. She appeared to be in a position to look after the minor and provide with adequate educational facilities and also to maintain him in a proper and congenial manner. Further, the appellant had contracted second marriage and his second wife was having a child with her. Moreover, the interest of the minor would be better served by allowing him to remain in the custody of the respondent. The appellant had miserably failed to prove that welfare of the minor would be better served if the custody is granted to him. Thus, keeping in view the facts and circumstances of the case, it would not be in the interest of the minor to dislodge him from his natural mother-respondent when there were no specific reasons or evidence produced on behalf of the appellant to do so.

13. The trial Court after appreciating the oral as well as documentary evidence had rightly concluded that it was in the interest of the minor that he remained with his mother with the following observations:-

“17. After considering the rival submissions of learned counsel for the parties, this Court is of the opinion that in the petition as well as statement of PW1 Jagdev Singh petitioner and PW2 Balwinder Kaur mother of the petitioner admitted that at the time of getting divorce both the parties agreed that they will not file any suit/proceedings against each other nor petitioner will file petition for the custody of the minor. When the

petitioner agreed that he shall not claim the custody of the minor then how he can file the present petition. The perusal of statement of Jagdev Singh during divorce proceedings Ex.D22 reveals that he has not even reserved his visiting right to meet the minor child Armandeep Singh. The petitioner has made statement before the matrimonial court that the custody of the minor child shall remain with the respondent absolutely without any interference on his part. The matrimonial court accepted the statements of the parties which were in the nature of undertakings and based on those statements, passed a decree of divorce dated 21.12.2008. In the light of these facts, any petition filed by the petitioner for the custody of the child seeking to appoint him as guardian of the minor is in the breach of the undertaking given by him to the matrimonial court. There was no justification on the part of the petitioner to have approached the Guardian & Wards Court for the relief as aforesaid. Further the perusal of petition under Section 13B of Hindu Marriage Act Ex.D21 shows that in para No.3 it is averred that after the marriage the parties to the petition lived together and cohabited with each other at Dashmesh Colony, Mandi Gobindgarh, Tehsil Amloh, District Fatehgarh Sahib upto second week of August, 2007 and a son namely Armandeep Singh was born out of the wedlock of the parties to the petition on 3rd July, 2007 which shows

that the petitioner and respondent started living separate from each other after few days of birth of minor Armandeep Singh and therefore the petitioner has no love and affection with the minor Armandeep Singh. The argument of learned counsel for the petitioner that the respondent had remarried and the second husband of the respondent is not adopting the minor son as his son. This argument of learned counsel for the petitioner is not tenable as the respondent has pleaded and stated that the petitioner has remarried. The petitioner has not cross-examined her on this point and it is settled law that when the cross-examination is not conducted on the specific point, then it is presumed to be admitted. Further, in the rejoinder, the petitioner has also not denied this fact specifically. So, the respondent has proved on record that the petitioner has also remarried. Had the petitioner not remarried, then the position must have been different. Further, the fact that respondent has married a person by itself is not a ground to take away the custody of the child from the mother and reliance to this effect is placed on the authority of **Lekshmi Vs. Vasantha Kumari 2005 (3) Civil Court Cases 259 (Kerala)**. Next argument of learned counsel for the petitioner that the respondent is not properly maintaining the minor child Armandeep Singh. This argument of learned counsel for the petitioner is also not tenable as the respondent has

placed and proved on record tuition fee receipts of Armandeep Singh Ex.D26 to Ex.D35 which shows that at present the minor child Armandeep Singh is studying in Baba Nand Singh Ji Public School, Mukandpur, Ludhiana. Further, the respondent has also examined RW2 Tejinder Singh, RW3 Avtar Singh who have also deposed that the respondent is property maintaining her minor child Armandeep Singh. There is nothing on the file that the minor child Armandeep Singh is neglected and is not being provided love and affection by the respondent. Until or unless, the court is satisfied with the fact that the future or life of the minor child is at stake in the hands of her present guardian, the custody of the minor should not be disturbed. In view of above discussion, this issue is decided in favour of the respondent and against the petitioner.”

14. In view of the above and the findings recorded by the trial court, no ground is made out for handing over the custody of the minor to the appellant. Accordingly, finding no merit in the appeal, the same is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

May 24, 2017
gbs

(HARINDER SINGH SIDHU)
JUDGE

Whether Speaking/Reasoned **Yes**

Whether Reportable **Yes**