

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

FAO-3192-2017 (O&M)

Date of Decision: 30.5.2017

Maninder Kaur and another

....Appellants.

Versus

Jagdev Singh

...Respondent.

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

PRESENT: Mr. Rajesh Gupta, Advocate for the appellants.

Mr. Fariad Singh Virk, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

1. The appellant-wife has approached this Court by way of instant appeal challenging the judgment dated 8.3.2017 passed by Civil Judge (Senior Division), Ludhiana, whereby the petition under Section 25 of the Guardian and Wards Act, 1890 (in short “the Act”) filed by the respondent-father for the custody of his minor son, namely, Gurshant Singh, was allowed.

2. A few facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The marriage of appellant No.1 and the respondent was solemnized on 17.11.2007 and from the said wedlock, son Gurshant Singh was born on 12.8.2009. However, due to temperamental differences between the parties, the matrimonial ties between them was dissolved by a decree of divorce dated 9.3.2011 passed by the trial Court.

The minor being newly born infant was in the custody of appellant No.1 being dependent upon her feed. Before filing the petition for the grant of decree of divorce by mutual consent, a compromise was effected between the parties which was reduced into writing on 13.7.2010 and it was agreed by the appellants that they would hand over the custody of the minor after passing of decree of divorce to the respondent provided that till the grant of divorce, he would live with appellant No.1. After the passing of the decree of divorce, the appellants started dilly delaying the matter regarding the custody of the minor. After few months, the appellants left their residential house from the village without information and started living at undisclosed place to deprive the respondent from the custody of the minor. Later, the respondent came to know that appellant No.1 had left India and had gone abroad and had also remarried there by leaving the minor child with appellant No.2-grand father (hereinafter referred to as appellant No.2). Appellant No.1 had neglected the minor and left his company and there was nobody in the family of appellant No.2 to look after the minor. Appellant No.2 is also employed in Fishery Department and he had to remain out of house on his duty. The atmosphere in the house of the appellants was adverse and was not conducive for the proper development and growth of the minor who is of tender age and required constant love, care and affection. The interest and welfare of the minor was not safe at the hands of the appellants and was not good for mental and physical growth of the child. The respondent was interested to keep and maintain the minor child and he had great love, affection and attachment with him. He is employed at PTU learning Centre, Main Market, Doraha which is near to his residence. He can give sufficient time to the child as his working hours are also very short.

Further, the respondent was living in a joint family consisting of his parents, second wife and one female child. His second wife was also educated and was employed as computer teacher in the Government School. She had been looking after small girl child and also desired to keep the minor along with her and was ready to provide motherly treatment to him. The interest and welfare of the minor was safe and secure at the hands of the respondent for his proper development and growth. Accordingly, the respondent-husband filed a petition under Section 25 of the Act for the custody of the minor child. The said petition was resisted by the appellants by filing a written statement. Besides raising various preliminary objections, it was pleaded that the respondent had admitted in a petition under Section 13B of the 1955 Act that the minor would remain in the custody of appellant No.1 and the entire liability of the minor regarding his upbringing, education, marriage etc. was taken by appellant No.1 and the respondent had not taken any objection regarding the same. Appellant No.1 was turned out from her matrimonial home when she was pregnant and she gave birth to the minor son when she was living with her parents. The appellants shifted from village Katani Kalan to Ludhiana for the betterment and bright future of the minor. Further, appellant No.1 solemnized her second marriage in UK with an intention to take the minor son abroad for his better future. Appellant No.1 went abroad on 24.9.2011 and she also applied visa for her minor son but the visa for the minor son was rejected and then she filed an appeal but the appeal was also dismissed. Thereafter, she came back to India on 16.1.2012 and since then she is residing with her minor son. Appellant No.1 is a well qualified and doing the job as a teacher in Amrit Indo Canadian Academy Senior Secondary School and is getting handsome

salary. The minor is also studying in the same school. The respondent had remarried and had also one child from his second marriage. The future of the minor was not safe in the hands of the respondent. The interest and welfare of the minor was very much safe in the hands of the appellants. The other averments made in the petition were denied and a prayer for dismissal of the same was made. The respondent controverted the averments made in the written statement by filing a rejoinder and reiterated that of the averments made in the petition. From the pleadings of the parties, the trial court framed the following issues:-

1. Whether the petitioner is entitled for the custody of minor Gurshant Singh, as prayed for? OPA
2. Whether the petition is maintainable, as prayed for? OPR
3. Whether the petitioner is estopped by his own act and conduct from filing the present petition, as prayed for? OPR
4. Relief.

3. In support of his case, the respondent appeared himself as PW1 and tendered various documents including his affidavit Ex.PA and also examined his father PW2 Pritam Singh who submitted his affidavit Ex.PB. On the other hand, appellant No.1 appeared as RW1 and tendered various documents in her evidence including her affidavit Ex.RA. She also examined respondent No.2 Dalbir Singh as RW2 who also tendered his affidavit Ex.RB.

4. The trial court on appreciation of evidence led by the parties, held that in the absence of any positive proof that the father has suffered

from any disqualification from being the guardian and custodian of the minor child, he alone would be the fit and proper person to have the custody of the minor in the absence of his natural mother. Further, it was held that the welfare of the child would be amply protected only if the child is allowed to be in the custody of his father, at least from now. Accordingly, the trial Court vide judgment and decree dated 8.3.2017 allowed the petition and directed appellant No.1 to handover the custody of minor Gurshant Singh to the respondent within a period of one month. However, visitation rights were granted to appellant No.1 to meet the minor. Hence, the present appeal.

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

6. 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.”

7. The father of the minor is the natural guardian 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. Further, the order of custody of minor is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. 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.

8. In the present case, admittedly appellant No.1 and the respondent are the natural parents of minor Gurshant Singh. They were granted divorce by mutual consent by the trial Court vide judgment and

decree dated 9.3.2011. In the said decree, appellant No.1 agreed to give the custody of minor child to the respondent. The minor was residing with appellant No.1 who had solemnized her second marriage. Even the respondent had also solemnized his second marriage and from the said marriage, a daughter was born who is living with the respondent.

9. A perusal of the file shows that when the child was about one and half year old, the divorce was granted to appellant No.1 and the respondent by mutual consent. After one month of the grant of divorce, appellant No.1 applied for visa and after sanction of the visa, she went abroad to resume her matrimonial life with her second husband. However, the visa of the minor was rejected and despite that appellant No.1 went abroad leaving the child at the mercy and custody of her parents. It seems that the welfare of the minor was not cared by appellant No.1. The respondent being the father of the minor was entitled to get his custody and appellant No.1, mother of the minor went abroad to reside with her second husband. Therefore, the care and custody of the minor would not be safe in the hands of the maternal grandparents. Further, there was recital in the statements of the parties that the mother shall be responsible for upbringing of the minor in future, but after the grant of divorce, the minor would remain in the custody of the respondent-father. Therefore, it was the duty of appellant No.1 to handover the custody of the minor to the respondent, but she resiled from the compromise. Even the fact of the alleged agreement to be a fake document was not proved by appellant No.1.

10. Still further, in the compromise, Ex.P3, it was agreed that at present son Gurshant Singh shall remain with his mother Maninder Kaur and at time of passing a decree of divorce by the Court, Maninder Kaur

shall be bound to give the custody of Gurshant to his father. Even in the joint petition filed under Section 13B of the 1955 Act by appellant No.1 and the respondent, in para 6 thereof, it was mentioned that “it has been mutually settled that appellant No.1 will receive a sum of ₹ 2,00,000/- for her claim towards past, present and future maintenance and permanent alimony from the respondent and out of the settled amount, she had received a sum of ₹ 1,00,000/- through demand draft dated 16.8.2010 and the remaining amount of ₹ 1,00,000/- shall be received by her at the time of making second statement in the said petition for passing decree of divorce and she will be bound to give custody of minor Gurshant Singh to the respondent at that time.” Further, reference was made by the learned counsel for the respondent to the statement Ex.PA of the respondent wherein it was also pleaded that as undertaken by the appellants that they would hand over the custody of minor Gurshant Singh after passing of a decree of divorce to the respondent provided that till the grant of divorce decree he would live with appellant No.1.

11. The trial Court on appreciation of the evidence led by the parties had correctly recorded that the father can desire the return of the child to his custody, even though he left the child for a few years in charge of his in-laws. Further, the trial Court held that the appellants had failed to prove that the father does suffer from any circumstance depriving his parental right. In the absence of any positive proof that the father had suffered any disqualification from being the guardian and custodian of the minor child, the father alone would be fit and proper person to have the custody of the minor in preference to his natural mother. The trial court had rightly concluded that in the given circumstances and the evidence brought

on record, the custody of the minor child be handed to the respondent.

12. No illegality or perversity could be demonstrated in the findings recorded by the trial Court being based on misreading or misappreciation of evidence on record which may warrant interference by this Court. Consequently, finding no merit in the instant appeal, the same is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

May 30, 2017
gbs

(HARINDER SINGH SIDHU)
JUDGE

Whether Speaking/Reasoned

Yes

Whether Reportable

Yes