

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

FAO-3302-2017 (O&M)

Date of Decision: 16.5.2017

Satgur Singh

....Appellant.

Versus

Vir Pal Kaur and another

...Respondents.

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

PRESENT: Mr. Amit Kumar Walia, Advocate for the appellant.

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 son Harmandeep Singh, the appellant-husband has approached this Court by way of instant appeal challenging the judgment dated 1.3.2017 passed by the Additional Civil Judge (Senior Division), Sangrur (exercising the powers of Guardian Judge under the Guardian and Wards Act).

2. Put shortly, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The marriage of the appellant with respondent No.1 was solemnized on 29.9.2006 at village Phalera, Tehsil Sunam, District Sangrur as per Sikh rites by Anand Karaj ceremony. From the said wedlock, a minor son, namely, Harmandeep Singh was born on 10.7.2008. The appellant had a right to seek the custody of his minor son being natural guardian and had no adverse interest to that of minor.

Respondent No.1 was a short tempered lady and had left her matrimonial home without any reason in December, 2008 along with the minor son. The appellant took panchayat on 31.5.2009 to village Phalera but respondent No.1 refused to join his company. She had also filed an application under Section 125 of the Code of Criminal Procedure and the appellant had filed a petition under Section 9 of the Hindu Marriage Act, 1955 (in short "1955 Act"). Lateron, the parties had effected a compromise and both the petitions were withdrawn by the respective parties. Thereafter, respondent No.1 joined the company of the appellant and after living for about 15 days with the appellant, she had left the matrimonial home. She had also levelled allegations against the appellant and his family by moving an application before the Senior Superintendent of Police, Sangrur. Again, a compromise was effected between the parties and as per the said compromise, respondent No.1 agreed to live separately from the appellant and to get divorce and all the disputes were settled between them. The appellant and respondent No.1 filed a joint petition under Section 13B of the 1955 Act but the appellant backed out from the compromise and withdrew the said petition. Respondent No.1 filed a petition under Section 13 of the 1955 Act and during the pendency of the said petition, a compromise was effected between the parties and the said petition was converted into a petition under Section 13B of the 1955 Act. The said petition was allowed by the trial court vide judgment and decree dated 4.4.2012 and the marriage between the appellant and respondent No.1 was dissolved by a decree of divorce by mutual consent. However, the parties could not make any settlement regarding the future custody of the minor and the said issue was left open.

According to the appellant, respondent No.1 had no interest in the well

being of the minor son and she was neither providing any maintenance nor any education to him. The appellant being father of the minor had great love and affection and wants to keep his custody with him as he had good source of income and was doing the business of electronics. He requested respondent No.1 to handover the custody of the minor but to no effect. Accordingly, the appellant filed a petition under Section 25 of the Act seeking custody of the minor. The said petition was resisted by respondent No.1 by filing a written statement. Besides raising various preliminary objections, it was pleaded that the appellant was a man of bad habits and used to give beatings to respondent No.1. The appellant filed a petition under Section 9 of the 1955 Act whereas respondent No.1 filed a petition under Section 125 of the Code of Criminal Procedure but later on both the petitions were withdrawn on account of compromise having been arrived at between the parties on 31.10.2009. Respondent No.1 along with the minor son joined the company of the appellant but after few days, the appellant turned out of respondent No.1 from the matrimonial home along with the minor son. It was further pleaded that due to intervention of the respectables, the parties had agreed to get the divorce by mutual consent and filed a petition under Section 13B of the 1955 Act for a decree of divorce by mutual consent. However, the appellant backed out from the compromise and withdrew the said petition. Thereafter, respondent No.1 filed a petition under Section 13 of the 1955 Act and during the pendency of the said petition, a compromise was effected between the parties and all the claims were settled. As per the compromise, the minor son was to reside with respondent No.1. The said petition was converted into a joint petition under Section 13B of the 1955 Act on the basis of the said compromise.

The parties had got recorded their respective statements of first motion on 24.9.2011 and the second motion on 30.3.2012. Both the parties had got solemnized their second marriage. The future of minor son was secure in the hands of respondent No.1. The other averments made in the petition were denied and a prayer for dismissal of the same was made. From the pleadings of the parties, the trial court framed the following issues:-

1. Whether the petitioner is entitled to the custody of minor son, Harmandeep Singh from respondent no.1 Virpal Kaur? OPP
2. Whether petitioner has no cause of action and locus standi to file the present petition? OPR
3. Whether the petitioner has not come to the Court with clean hands and is guilty of suppressing the true and material facts from the Court? OPR
4. Whether the petition is not maintainable in the present form? OPR
5. Whether the petitioner is estopped from filing the present petition by his own act and conduct? OPR
6. Relief.

3. In support of his case, the appellant besides tendering documents Ex.P1 to Ex.P7, examined himself as PW1, his father Ajaib Singh as PW2 and Inderpal as PW3. On the other hand, respondent No.1 examined herself as RW2, Baldev Singh alias Billu as RW1, Lakhwinder Singh alias Lakha as RW3, Mohinder Singh as RW4 and tendered documents Ex.R1 to Ex.R15 into her evidence.

4. The trial court on appreciation of evidence led by the parties

dismissed the petition vide judgment dated 1.3.2017 holding that the minor aged about 9 years was separate from the appellant from the age of 2 years and could not even recognize his father. Further, the welfare of the minor at the hands of respondent No.1 was paramount consideration. The father-appellant was not held entitled to the custody of the minor. Hence, the present appeal.

5. Learned counsel for the appellant submitted that the appellant being the father of the minor had every right to claim the custody of the minor. It was further submitted that after the age of 5 years of the minor, the custody should have been given to the appellant.

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

7. 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.”

8. 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 issue of custody of minor, 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. In other words, no doubt, all other factors cannot be said to be 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.

9. No doubt, the father of the minors 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.

10. In the present case, the minor was separate from his father since he was of the age of 2 years and could not even recognize his father.

Admittedly, the appellant had never gone to meet the child or bring respondent No.1 back after his separation. The trial court had held that the wish of the minor child to stay with his mother and his welfare in the hands of respondent No.1 was paramount consideration. It was further recorded that the overall welfare including moral and ethical welfare of the child was to give the custody of the minor to his mother. The appellant had miserably failed to prove that welfare of the son 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 No.1 when there were no specific reasons or evidence produced on behalf of the appellant to do so.

11. The trial Court on appreciation of evidence had rightly concluded that the welfare of the son was with the mother by recording the following findings:-

“27. Further, with regard to the arguments of learned counsel for petitioner that minor child is not safe in the hands of the respondent who has given birth to one daughter from the loins of Lakhwinder Singh who is only hand to mouth and is having no interest in the welfare of child, is not tenable as over all welfare including moral and ethical welfare of the child lies with the custody of minor with his mother. The minor child who is of the age of 9 years and is studying at village Ganduan and is separate from his father since he was of the age of 2 years and could not even recognize his father would not be attached with his father and rather the petitioner had

himself admitted the fact that after his separation from the respondent he had never gone to meet the child or bring the respondent back. The wish of the minor child being with his mother and his welfare in the hands of the respondent is paramount consideration and in the totality of the circumstances, no doubt the Court has to consider the right of father as guardian but if the custody of father cannot promote the welfare of child, he may be refused such guardianship. As such, this Court holds that the petitioner is not entitled to the custody of minor child, Harmandeep Singh who is well attached with his mother and second father Lakhwinder Singh.”

12. In view of the above, when the appellant has not been able to dispel the findings recorded by the trial court arrived at on appreciation of evidence produced on record, we find no justification to interfere in the judgment of the trial court dated 1.3.2017. Accordingly, the appeal being devoid of any merit is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

May 16, 2017
gbs

(HARINDER SINGH SIDHU)
JUDGE

Whether Speaking/Reasoned

Yes

Whether Reportable

Yes