

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

**Civil Revision No.2974 of 2018
Date of Decision: 18.07.2018**

Baljit Kaur Saggoo

.....Petitioner

Vs

Chiranjeev Singh Saini

.....Respondent

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

Present: Mr. Abhinav Aggarwal Advocate
for the petitioner.

Mr. Gaurav Chopra, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this revision petition against the order dated 11.04.2018 passed by the Guardian Judge, Chandigarh in an application under Section 12 of Guardian & Wards Act, 1890 (hereinafter to be referred as 'the Act') for production of minor child Devansh Singh Saini and for grant of temporary custody to the petitioner and further permission to meet the minor child during pendency of the petition.

[2]. Brief facts are that marriage of the petitioner with the respondent was solemnized on 20.04.2014 at Chandigarh according to Sikh rites and ceremonies. After the marriage the

parties resided in Chandigarh and cohabited as husband and wife. From the wedlock, one son namely Devansh Singh Saini took birth on 04.11.2014, when they were residing in Panchkula.

[3]. There are allegations and counter allegations made against each other by the parties. Petitioner has pleaded that on 01.08.2016 at about 11.00 a.m., respondent illegally and fraudulently took away the minor child Devansh Singh Saini from the petitioner on the pretext of going for a walk. Thereafter respondent did not turn up along with the child. Respondent started living with his parents at Kalka. Petitioner also pleaded that her efforts to bring the child back remained futile and thereafter she filed the petition under Section 25 of Act for grant of custody of minor child Devansh Singh Saini along with visitation rights. An application under Section 12 of the Act was also filed by the petitioner for interim custody of the minor child.

[4]. Petition under Section 25 of the Act and the application for interim custody were contested by the respondent primarily on the ground that the conduct and temperament of the petitioner are not best suited to the child as she is provocative and used to abuse the respondent and his parents without caring for the honour of the family. She pounced upon the respondent and slapped him many times. She picked up the minor child from the bed and dashed him on the concrete floor

of the room. She also started banging her head against the wall in a fit of rage. The over all development of the minor child would be possible only in the company of the respondent. Respondent sought to produce on record DVD by way of moving an application in order to show abnormal, violent, brutal, impulsive, aggressive, abusive and immoral behaviour along with murder threats and suicidal tendencies of the petitioner.

[5]. The Guardian Judge, Chandigarh vide order dated 14.12.2017 allowed the respondent to place the DVD on record without giving any observation in respect of authenticity of the same. Admissibility, authenticity and genuineness of the DVD was left open to the parties to prove the same with reference to evidence at appropriate stage. No final observation was made on DVD as the same was required to be proved in accordance with law at appropriate stage.

[6]. The Guardian Judge, Chandigarh vide order dated 11.04.2018 partly accepted the application of the petitioner observing that before allowing the petitioner to take interim custody of the minor child (if at later stage the Court comes to the conclusion that interim custody of the minor can be given to the petitioner) on trial basis the petitioner can be granted visitation rights to meet the child in order to ascertain the fact that whether the child feels comfortable in the company of the

petitioner or not and the said visitation rights will only suggest and help the Court in coming to the conclusion that whether she is entitled to interim custody of the minor or not. In view of aforesaid contingent order, the Guardian Judge, Chandigarh observed that the petitioner being mother of the child has an inalienable right to meet her child and she cannot be deprived of her right. The application was partly allowed to the extent of meeting the child and she was permitted to meet the child during pendency of the petition on every 1st and 3rd Saturday at 2.00 p.m. in the court and was at liberty to meet the child between 2.00 p.m. to 4.30 p.m.

[7]. Perusal of the aforesaid order would show that the right of the petitioner was acknowledged being an inalienable right. Before granting interim custody of the minor child, the Court devised the mechanism to ascertain whether the child was comfortable in the company of the petitioner or not? Precisely for the aforesaid exercise, the petitioner was allowed to meet the child on every 1st and 3rd Saturday between 2.00 p.m. to 4.30 p.m.

[8]. The photographs produced on record by the petitioner shows that the minor child remained comfortable throughout with the petitioner and the aforesaid arrangement is still in force. It appears that the aforesaid arrangement made by the

Guardian Judge, Chandigarh before allowing the petitioner to take interim custody of the minor child during pendency of the main petition, the visitation rights were granted to the petitioner on trial basis in order to ascertain the factum of comfortability of the minor in the company of the petitioner.

[9]. Learned counsel for the petitioner by referring to **Rosy Jacob vs. Jacob A. Chakramakkal, 1973 AIR 2090**; **Gaurav Nagpal vs. Sumedha Nagpal, 2008(4) R.C.R. (Civil) 928**; **Vivek Singh vs. Romani Singh, 2017(1) R.C.R. (Civil) 1063**; **Roxann Sharma vs. Arun Sharma, 2015(2) R.C.R. (Civil) 93** and **Kamal Maini vs. Natasha alias Mona and others, 2017(5) R.C.R. (Civil) 196** contended that merely because the father loves the minor child and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the child would be better promoted by granting custody of the minor to him as against mother, who may also be equally affectionate towards the minor. Minor being of tender age is not immune to deliberate attempt to poison his mind with negative facts against the mother. The daily trauma, the child appears to undergo while being tutored against his mother would be far in excess of trauma likely to be faced while entrusted to the respondent. The minor child would be allowed to grow up with healthy regard for both the parents. The welfare

of the child is of paramount consideration in deciding the question of upbringing of the child, the Court must regard the minor's welfare as the first and paramount consideration and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of mother. In Halsbury's Laws of England, Fourth Edition, Vol.24, para 511 at page 217, the mother's claim was held to be superior to that of father.

[10]. Learned counsel further submitted that even in cases of habeas corpus, the custody issue has to be appreciated on the proverbial universally accepted superiority of the natural mother's instinctive selfless love and affection of her children, particularly infants. Motherly care and affection is indispensable for the healthy growth of the minors. The selfless interest of mother in welfare of her children is by and large found to be part of her nature. This instinct cannot be confined to human race alone. None else can provide love and affection to the children as mother can, as lap of mother is God's own cradle for children. Intensity of negative feeling of father towards mother would have obvious effect on the psychology of minor, who has remained in the custody of his father to the exclusion of his mother. The suitability of father to the custody is not relevant where child is less than 5 years of age. Mother is *per se* best

suited to care for infant during tender age. It is for the father to plead and prove mother's unsuitability with reference to evidence.

[11]. Learned counsel further submitted that removal of child from custody of mother at such a tender age is not in the welfare of the child. It is only the mother who knows the pulse of the child at a simple glare and caters to the day-to-day requirement of the minor. In custody issues, the Court acts as '*parens patriae*'. The word 'welfare' used in Section 13 of the Hindu Minority and Guardianship Act, 1956 has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. It is ultimate satisfaction of the Court to judge the welfare of the minor. No person shall be entitled to the guardianship by virtue of provisions of this Act or by any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor. The children are not chattels, nor are they mere play-things for their parents. Absolute rights of the parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society.

The aforesaid sentiments were expressed in **Rosy Jacob's** case (supra).

[12]. As against the aforesaid arguments, learned counsel for the respondent by relying upon **R.V. Srinath Prasad vs. Nandamuri Jayakrishna, 2001(2) R.C.R. (Civil) 709; Nil Ratan Kundu & Anr. vs. Abhijit Kundu, 2008(3) R.C.R. (Civil) 936** and **Smt. Anjali Kapoor vs. Rajiv Baijal, 2009(3) R.C.R. (Civil) 903** contended that question of welfare of the minor child has to be considered in background of the each case. Each case has to be decided on its own facts and circumstances. The facts of other cases can hardly serve any binding precedents insofar as factual aspects of the case are concerned. It is no doubt true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. A heavy duty is cast on the Courts to exercise its judicial discretion judiciously in the background of facts and circumstances of the case keeping in mind the welfare of the child as the prime consideration.

[13]. Learned counsel further submitted that in deciding a difficult and complex question as to custody of minor, the Court should keep in mind relevant statutes and the rights flowing therefrom. It is humane problem and is required to be solved with human touch. The Court while deciding custody cases is neither bound by statutes, nor by strict rules and evidence or procedures nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be welfare and well being of the child. In selecting the guardian, the Court is exercising *parens patriae* jurisdiction and is expected, *not bound*, 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. There is no disqualification for the father to claim custody of the minor child in over all welfare of the minor child. Learned counsel also referred to the conduct of the petitioner arising out of the version recorded in the DVD.

[14]. I have considered the submissions made by learned counsel for the parties.

[15]. The legal position as enumerated in the aforesaid precedents provides welfare of a minor as of paramount and controlling consideration. Legal right of a particular party has no

place in the aforesaid consideration.

[16]. On consideration of facts and circumstances of the case, particularly the stage of the case, where evidence of the petitioner is in offing. Leading of evidence by the petitioner is pending. The Guardian Court has already taken cognizance of the controversy. The child is studying in LKG class at Kalka in DAV School. Respondent is pursuing his law studies and is not employed for the time being. Earlier he was working in Dell Company as Technical Expert. He is pursuing his law studies on regular basis from Kala Amb. Source of income available with the respondent is stated to be from his father. On the other hand, petitioner/wife is serving in IT Company in Sector 5, Panchkula. Her monthly salary is stated to be Rs.42,000/- per month. Mother of the petitioner is living with the petitioner as father has died long back.

[17]. The Guardian Judge, Chandigarh has simply tried to ascertain the comfortability of the child in the company of the petitioner and for that purpose interim visitation rights were given to the petitioner for meeting the child on every 1st and 3rd Saturday between 2.00 p.m. to 4.30 p.m.

[18]. The findings recorded in para No.6 of the impugned order would show that the Guardian Judge before allowing the petitioner to take the interim custody of the minor child, visitation

rights were granted on trial basis in order to ascertain the comfortability of the minor child in the company of petitioner. In my considered opinion, the contentions raised by both the parties at this pre mature stage cannot be appreciated, lest it may prejudice the pending decision before the Guardian Judge including the decision on application for interim custody.

[19]. At this stage of litigation, this Court is of the considered view that the issue squarely lies under the domain of Guardian Judge, Chandigarh. Since interim visitation rights have been given to the petitioner on trial basis before allowing her to take interim custody of the minor for a particular purpose of ascertaining the comfortability of the minor in the company of the mother/petitioner, therefore, I deem it appropriate to direct the Guardian Judge, Chandigarh to decide the application for interim custody on the basis of material on record in accordance with law without being influenced by any of the observations made in the preceding paras. Both the parties would be at liberty to lead evidence before the Guardian Judge and highlight the legal position. The precedents have been cited only at the instance of the parties.

[20]. The Guardian Judge, Chandigarh would be at liberty to evaluate the evidence on record or likely evidence to be led by the parties while deciding the main issue. For the grant of

interim custody, the comfortability of the minor as opined by the Guardian Judge, Chandigarh has to be appreciated by the said Court on the basis of interaction of the minor with the petitioner on the dates of meeting fixed by the Guardian Judge during pendency of the petition i.e. 1st and 3rd of Saturday between 2.00 p.m. to 4.30 p.m.

[21]. This petition is disposed with the aforesaid directions. Normal consequences to follow.

July 18, 2018

Atik

Whether speaking/reasoned

Whether reportable

**(RAJ MOHAN SINGH)
JUDGE**

Yes/No

Yes/Nos