

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

**Civil Revision No.5777 of 2018
Date of Decision:17.10.2018**

Smt. SangeetaPetitioner
Vs
Shri Parveen KumarRespondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. Harkesh Manuja, Advocate
for the petitioner.

Mr. Rishab Lohan, Advocate
for the respondent/caveator.

RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed the order dated 23.08.2018 passed by the District Judge, Family Court, Sonapat, whereby objections filed by the petitioner were dismissed and the SHO Police Station City Sonipat was directed to recover the minor Saket from the custody of the petitioner and to hand over him to the respondent.

[2]. The marriage of the petitioner was solemnized with the respondent on 04.12.2005 in Sonipat. A male child took birth out of this wedlock on 06.02.2007. Due to differences between the husband and wife, they decided to separate by way of mutual consent. A petition under Section 13-B of the Hindu Marriage Act was filed and the same was decreed on the basis of mutual

consent. It was decided between the parties that custody of minor son Saket will remain with the petitioner for the next five years and thereafter the petitioner shall hand over the custody of the minor to the husband. Fortnightly visitation rights were given to the husband during the aforesaid period of five years. The marriage was dissolved by mutual consent under Section 13-B of the Hindu Marriage Act vide order dated 01.03.2012. The decree passed in the aforesaid petition was to the following effect:-

“This petition is coming up for final disposal this day before me (Alka Malik Addl. District Judge, FTC, Sonapat) in the presence of Sh. J.S. Saini, counsel for the petitioner No.1 and Sh. Parvesh Kumar, counsel for the petitioner No.2.

It is ordered that the petition is accepted and the marriage between the parties which was solemnized on December 4, 2005 at a place called Sonapat, is hereby dissolved by mutual consent under Section 13B of the Hindu Marriage Act, 1955.”

[3]. After expiry of five years of custody of the minor with the mother, the respondent filed a contempt application/ execution petition for non-compliance of the decree dated 01.03.2012 and joint statement of the parties dated 21.02.2012 in the proceedings of mutual divorce before the Family Court. Para Nos.7, 12, 14 and prayer clause reads as under:-

“7. *It is submitted that the after the above order/judgment/decreed/statement on oath, the Defendant has performed the meeting of Master of Master Saket with the plaintiff/father only twice i.e. 06.10.2013 & last on 04.04.2014 and after that the defendant had not taken any steps for the meeting of master Saket with the plaintiff/father even after due compliance of giving prior information to the father of Defendant on behalf of the Defendant by the plaintiff through mobile phone again and again.*

12. *As per above order/judgment, the custody period for 05 years of child Saket in the hands of petitioner No.2 has been completed on 1.3.2017 and now the custody of child Saket is required in the hands of petitioner no.1 father but the petitioner no.2 is denied for the custody of child in the hands of petitioner no.1 father.*

14. *That the petitioner No.1 direction may be issued to the petitioner no.2 for handover the custody of child to petitioner No.1.*

It is, therefore, respectfully prayed that the petitioner No.2 may kindly be punished with imprisonment or fine under the Contempt of Court Act.”

[4]. The petition was contested by the petitioner. The District Judge, Family Court, Sonipat vide order dated 23.08.2018 dismissed the objections filed by the petitioner and directed the SHO Police Station City Sonipat to take minor into his custody from the petitioner and hand over the custody of the

minor to the respondent.

[5]. At the time of issuance of notice of motion, both the parties were directed to come present on the adjourned date along with minor child and till the next date of hearing coercive method for production of child was stayed.

[6]. Minor Saket is about 11 years old and studying in 6th class in Satluj Public School in Sector 2 Panchkula. I have interacted with him separately in my Chamber besides interacting with the parties in the Court.

[7]. During course of interaction it was found that petitioner as well as the respondent have contracted second marriage after their mutual divorce. Petitioner has given birth to one son from the lion of her second husband. Similarly, a daughter has born to the respondent from his second marriage.

[8]. Section 26 of the Hindu Marriage Act, 1955 mandates in the following manner:-

“26 Custody of children. In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the

custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made. [Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent].”

[9]. Perusal of the aforesaid provision would show that the custody issue of the minor is a dynamic process and cannot be treated to be static with the passing of the order. The welfare of the child is of paramount consideration. The order relating to custody of minor is always considered to be temporary order. With the passage of time the Court is entitled to modify the order in the interest of the minor. Even the order based on consent can be varied in the interest of the minor, if the welfare of the minor so demands.

[10]. In **Rosy Jacob vs. Jacob A. Chakramakkal, 1973 AIR 2090**, the Hon'ble Apex Court held that the children are not mere chattels, nor are they mere play things for the parents. Absolute right of parents over the destinies and 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 Guardian Court in case of dispute between the mother and the father is expected to strike a just and proper balance between the requirements of welfare of the minor child and the rights of respective parents over the child. In nutshell, welfare of the child has to be appreciated in all possible manner. Any undertaking given in the divorce case between the couples is not binding upon the minor. All orders relating to custody of the minor must be considered to be temporary orders made in the existing circumstances. With the passage of time and with changed conditions and circumstances, the Court is entitled to vary such orders in the interest and welfare of the minor.

[11]. In **Vikram Vir Vohra vs. Shalini Bhalla, 2010(2) R.C.R (Civil) 521**, the Hon'ble Apex Court again relied upon the ratio of **Rosy Jacob's** case (supra) and held that Section 26 of the Hindu Marriage Act cannot create any embargo to treat the order of custody passed by the Family Court to be permanent in nature, rather such order will be too hyper technical to be considered seriously in a custody issue of a child. Child cannot be treated to be a chattel nor an article of personal property of equal halves. The Court must remember that it is dealing with a sensitive issue in considering the nature of care and affection

that a child requires in the growing stages of his life. Custody orders are always considered to be interlocutory orders and by the nature of such proceedings custody orders cannot be weighed rigid and final. These orders are capable of being altered and moulded keeping in view the needs of the child. The view expressed in **Rosy Jacob's** case (supra) was also followed by the Hon'ble Apex Court in **Mausami Moitra Ganguli vs. Jayant Ganguli, 2008(4) R.C.R. (Civil) 551.**

[12]. In **Rosy Jacob's** case (supra); **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 @ Mona and others, 2017(5) R.C.R. (Civil) 196,** it was appreciated 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 husband. The

welfare of the child has to be considered as paramount issue/consideration in deciding the question of upbringing of the child and the Court must regard the minor's welfare as the first and paramount consideration and must take into consideration whether from any other point of view, the father's claim in respect of the 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.

[13]. Even in cases of habeas corpus, the custody issue has to be appreciated on the proverbial universally accepted superiority of 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 minor. Selfless interest of the mother in the welfare of their children is by and large found to be a 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 remained in the custody of his father to the exclusion of his mother. Mother is *per se* best suited to care for infant during tender age.

[14]. Of course on the strength of **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 Bajjal, 2009(3) R.C.R. (Civil) 903** the 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.

[15]. From the interaction of the parties this Court has found that the minor is about aged 11 years and is studying in 6th class in Satluj Public School, Sector 2, Panchkula. He has

participated in painting, chess events and other competitions of the school and have achieved good ranking by such participation. With the interaction with the child, it has also been found that minor was reluctant to go to father's house. At this stage, inclination of the child towards mother may be tutored exercise, but at the same time the Court has to see over all growth of the child in the present state of circumstances. Perusal of the numerous photographs would show that the child was happy in the company of his younger brother. For grant of interim custody of the minor, the comfortability of the minor has to be appreciated. During course of interaction with the minor, he showed his willingness to remain with the mother.

[16]. At the time of mutual divorce in the year 2012, the petitioner wife was not sure about her future. Now she is working as a Teacher. Her second husband is running a laboratory at Barwala. Respondent is serving as JE in the Irrigation Department. The perusal of the petition/execution petition filed by the respondent would show that during the period of five years, when the minor remained in custody of the mother, the respondent had met the child only twice. Even if, he was not allowed or provided access to meet the child, as per the settlement, but he never enforced his right through the Court. He met the child only on 06.10.2013 and 04.04.2014. As argued

by learned counsel for the petitioner, even before the grant of mutual divorce on 01.03.2012, petitioner was living separately with the minor child from 20.12.2009. No effort was made by the respondent either to meet the child or to take custody of child by way of lawful means.

[17]. Since both the parties have happily re-married and are having children from their second marriage, therefore, at this stage, it would not be proper to give custody of the minor to the husband as a permanent feature. However, the respondent can be granted visitation rights in order to see full growth of the minor from all possible angles.

[18]. For the reasons recorded hereinabove, particularly, in view of the fact that comfortability of the minor has to be appreciated at this stage, the present petition is allowed. Impugned order dated 23.08.2018 passed by the District Judge, Family Court, Sonapat is set aside. Nevertheless, the Family Court shall fix a schedule of visitation rights of the respondent after giving due notice to the parties after receipt of certified copy of this order.

October 17, 2018

Atik

Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No