

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

Criminal Misc. -M No. 7912 of 2017 (O&M)

Date of decision : August 02, 2018

Prince Kalra

.....Petitioner

Versus

Heena Kalra and others

....Respondents

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Gautam Dutt, Advocate
for the petitioner.

Mr. M.K. Sood, Advocate
for respondent No. 1.

Mr. Lovekirat Singh Chahal, Advocate
for respondents No. 2 and 3.

LISA GILL, J.

1. The petitioner is aggrieved of order dated 23.02.2017 passed by the learned Sessions Judge, Faridabad whereby appeal preferred by respondent No. 1 (petitioner's wife) has been disposed of while upsetting the directions given by the learned Judicial Magistrate First Class, Faridabad vide order dated 06.01.2017 on an application under Section 23 of the Protection of Women from Domestic Violence Act, 2005 ('the Domestic Violence Act' – for short).

2. Brief facts necessary for the adjudication of the case are that respondent No. 1 – wife of the petitioner, filed a petition under Sections 12, 17 to 20, 22 and 23 of the Domestic Violence Act with the averments that her marriage was solemnised with the petitioner on 15.08.2014 at Faridabad. It was their second marriage, both of them being divorced prior to their marriage. Applicant-respondent No. 1 had a son from the first marriage and

she had custody of the said child. The petitioner, it was stated, expressed eagerness to adopt the child of respondent No. 1 from the first marriage. Accordingly, the child was adopted by the petitioner on 16.08.2014. Adoption deed No. 1089 was registered on 16.01.2015. However, after marriage, behaviour of the petitioner and his parents i.e. respondents No. 2 and 3 was rude towards the son of respondent No. 1. The couple was blessed with twins (both sons on 21.06.2015).

3. It is pleaded that the behaviour of the petitioner and his parents became worse after the birth of twins. Respondent No. 1 was pressurised for cancellation of adoption deed and in order to save her matrimony she was compelled to give her consent for cancellation of the adoption deed. Civil suit was filed on 17.09.2015 wherein respondent No. 1 and her father admitted the claim set forth by the petitioner. Adoption deed was, accordingly, declared null and void. Respondent – wife, it is stated, was compelled to hand over the custody of her child from first marriage to her parents. CCTV cameras were installed in the matrimonial house. Respondent – wife was allegedly restrained from meeting her eldest son. Allegations regarding demand of dowry as well as unnatural sexual intercourse, sodomy etc. were raised against the petitioner. Immoral and illicit relations with other woman by the petitioner were also alleged. It was pleaded that on 17.12.2016 respondent – wife had gone to parental home to see her eldest son (from first marriage), however, when she returned to her matrimonial home the house was found locked. The petitioner, his parents alongwith twin children had fled from the house. Lock of the house was not opened despite information to the police. The respondent - wife, it is stated was compelled to live in veranda of the house. Thus aggrieved, above said

petition was filed by the respondent – wife praying for:-

- (i) grant the residence order of three bedroom on the ground floor at shared house No. 5M/123 & 5M/55 NIT Faridabad;
- (ii) restraining the respondents not to interfere in the life of appellant/applicant and children;
- (iii) restraining the respondents from alienating or creating any third party interest on the shared house;
- (iv) compensation under Sections 20 & 22 of the Domestic Violence Act for treatment, mental pressure, emotional stress, mental and physical violence upon the appellant/applicant, and to grant protection order under Section 18 of the Domestic Violence Act;
- (v) to give the possession of all her Istridhan, and valuable clothes, jewelery etc;
- (vi) relief of ₹20 lakhs alongwith monthly maintenance of ₹10 lakhs;
- (vii) claimed immediate custody of both the minor children; and
- (viii) for unlocking the premises etc.

4. It was averred that the petitioner was a businessman in his own right having an income of more than ₹40 lakhs per month as well as rental income. The petitioner was stated to be the owner of various residential properties in Faridabad and Gurgaon as well agricultural land. Application under Section 23 of the Domestic Violence Act for interim relief was also moved by respondent No. 1.

5. The petitioner upon notice resisted the petition while raising a number of preliminary objections. All allegations of physical, mental cruelty and domestic violence were denied. It was averred that respondent – wife was only interested in grabbing the property of the petitioner's parents. The twin minor children born out of the wedlock were never looked after in a proper manner by her and she never breast fed them. It was averred that still effort was made to save the matrimony. Consequently, the parties decided to

live separately and premises were taken on rent but the respondent – wife was not interested to live with the petitioner. The petitioner ultimately filed a petition under Section 13 of the Hindu Marriage Act on 15.11.2016 in which notice was issued for 17.12.2016. It was denied that the son of the respondent – wife from her first marriage was ever adopted by the petitioner or that any adoption deed was executed. It was, thus, submitted that the respondent – wife was not entitled to any relief.

6. Learned trial Court while dealing with the application under Section 23 of the Domestic Violence Act observed that the house in question is the exclusive property of the father-in-law, therefore, cannot be termed as a shared household. However, while noting the consent of the petitioner to provide separate accommodation, liberty was afforded to the respondent – wife to occupy the flat bearing No. C3/1402 Puri Pranayam, Faridabad.

In respect to the custody of the minor children, learned trial Court noticed the alleged admitted conversation between the respondent – wife and her parents and some transcripts thereof. It was observed that the recording in question was played in Court wherein the respondent – wife alleged that the children be kept barefoot and out in the sun etc. Learned trial Court while observing that though the said recordings are not conclusive proof but it prima facie appeared that the respondent – wife was not interested in the children, thus, directed that the custody of the minor children shall remain with the petitioner though the respondent – wife would be at liberty to meet her twin children once every week on Sundays at 12 noon to 5.00 p.m. at a convenient place. ₹13,000/- per month was directed to be paid to respondent wife as ad interim maintenance allowance.

7. Aggrieved therefrom, an appeal was filed by the respondent –

wife. Learned Additional Sessions Judge, Faridabad set aside order dated 06.01.2017 passed by learned Judicial Magistrate First Class, Faridabad with the following directions:-

- (i)that appellant/applicant is entitled to the restoration of possession of same matrimonial premises, till pending enquiry w.r.t. the ownership of the other properties;
- (ii)that respondent No. 1 will immediately hand over the custody of minor twin sons namely Yuvraj & Sehraj to appellant/applicant/wife, with liberty to join the cohabitation, if he so desires;
- (iii)that appellant/wife is entitled to at least 1/3rd income of her husband which comes to Rs. 55,000/-, subject to allowing her for enjoying the residential right in the matrimonial house, and the other facilities like conveyance and domestic helpers etc.;
- (iv)that respondents are directed to remove all the CCTV cameras, recording machines etc. installed in the matrimonial house for surveillance of appellant/applicant/wife, and allow her to live in the said premises peacefully without any interference;
- (v)that respondents will not restrain Aryan, son from previous marriage to live and reside, or to meet the appellant/applicant at her matrimonial house;
- (vi)that in case during the enquiry respondents prove the fact that respondent No. 1 is not the owner of the other residential houses, then in that case, respondent No. 1 will be liable to pay the monthly rent of three bedroom suitable accommodation to appellant/applicant/wife near her matrimonial or parental house at NIT, Faridabad; and
- (vii)that appellant/applicant/wife will give due love and care to her minor twin sons, and will not commit any negligent or intentional act in this regard.

8. Present petition has been filed by the petitioner - husband challenging order dated 23.02.2017 passed by the learned Additional

Sessions Judge, Faridabad.

9. Learned counsel for the petitioner submits that learned Additional Sessions Judge, Faridabad has predetermined the entire dispute vide impugned order dated 23.02.2017. It has been wrongly observed by the learned Additional Sessions Judge, Faridabad that adverse circumstances were created by the petitioner by first adopting the first child of the respondent – wife, thereafter disowning him and compelling the respondent – wife and her parents for cancellation of the adoption deed after the birth of the twins. It is contended that it is a matter of record that petition under Section 13 of the Hindu Marriage Act was filed by the petitioner on 15.11.2016. Notice of this petition was issued to the respondent – wife for 17.12.2016. It is further contended that the petitioner never at any stage adopted the eldest son of the respondent – wife (born out of her first marriage). Therefore, there was no question of any cruelty to the respondent – wife on this count. Moreover, no appeal whatsoever was ever preferred against decree dated 26.08.2016 (Annexure P-1). Twin children were born to the petitioner and respondent – wife on 21.06.2015. Suit for cancellation of the adoption deed dated 16.01.2015 was instituted by the petitioner prior thereto on 17.09.2015. It was specifically averred in the suit that the adoption deed was procured by way misrepresentation, concealment and fraud and the same is not binding on the petitioner. As per the written statement filed on behalf of the father of the respondent – wife, it was mentioned that a mistake had occurred on the part of the Advocate, who had wrongly drafted the adoption deed contrary to instructions given by them. It is reiterated that no appeal was preferred.

10. Learned counsel for the petitioner further argues that the

petitioner was still ready and willing to try and reconcile the differences with his wife, keeping in view the future of the minor children. During the pendency of this petition, premises to the liking of respondent No. 1 were taken on rent. As reflected in orders dated 15.03.2017 and 27.03.2017 in this petition, petitioner and respondent No. 1 started residing together. Respondent No. 1 regularly visited her eldest child from the first marriage who was residing with her parents. No objection was ever raised thereto by the petitioner. It is contended that respondent – wife, however, left the matrimonial home (subsequently rented premises) on 17.05.2016. It is submitted that the petitioner is looking after the minor children continuously in a proper manner. Handing over their interim custody to the respondent – wife would not be in the welfare of the children. Reference is made to the conversations between the respondent- wife and her parents to contend that she does not have any affection towards the twin children and their interest would not be safeguarded by her. It is alleged that in the said conversations respondent – wife stated that she did not care about the twin children and that they could very well be kicked out after a proper settlement. It is submitted that specific amount in question was being discussed by the respondent – wife with her parents/brother. It is contended that the learned trial Court had passed a reasonable order after duly hearing the said conversations, which were admitted by the respondent – wife.

11. In respect to the matrimonial house, it is submitted that the house in question does not belong to the petitioner and cannot be termed a shared household and in any case he has been living separately at the rented premises. Premises taken on rent, as per the wishes of the respondent – wife during the pendency of this petition, are still being maintained by him.

Respondent – wife, it is contended, is not entitled to right of residence at the house, which belongs to the petitioner's parents i.e. respondents No. 2 and 3. It is further submitted that a sum of ₹55,000/- awarded to the respondent – wife as maintenance is excessive and unjustified. It is, thus, prayed that this petition be allowed and order dated 23.02.2017 passed by the learned Additional Sessions Judge, Faridabad be set aside.

12. Per contra learned counsel for respondent No. 1 has refuted the arguments as above. It is contended that respondent No. 1 has been subjected to immense cruelty and domestic violence at the hands of the petitioner and respondents No. 2 and 3. It is submitted that the petitioner and his parents were very well aware of the first marriage of the respondent – wife. Adoption deed in respect to her eldest son out of the first marriage was duly registered on 16.01.2015. However, it was under pressure that the same was cancelled and, accordingly, no appeal was preferred only in order to save her marriage. It is submitted that the petitioner is a businessman having handsome income in his own right, therefore, the interim maintenance has been rightly fixed. Moreover, it cannot be disputed that the respondent – wife is entitled to the right of residence at the house where the petitioner was living alongwith his parents after solemnisation of their marriage. It is vehemently argued that as many as three maids had been employed, therefore, there was no question of neglect of the minor children. It is the petitioner, who created such adverse circumstances that it was not possible for the respondent – wife to co-habit with him. All efforts were made to resume cohabitation pursuant to orders dated 15.03.2017 and 27.03.2017. However, it appears that the whole exercise was merely a ruse on the part of the petitioner. It is denied that respondent No. 1 left the rented

premises. To the contrary, it is submitted that she was dropped at her parents house by the petitioner on 17.05.2017 and told to be ready to come present before this Court for the hearing in this case on 19.05.2017. However, petitioner did not pick her up from her parental home. It is contended that the petitioner alongwith the twin children is presently living with his parents. Rented accommodation has been locked. It is additionally submitted that relief of interim custody to the father is not permissible in the present proceedings. It is, thus, prayed that this petition be allowed.

13. I have heard learned counsel for the parties at length and have gone through the file.

At the outset, it is relevant to note that the petitioner and respondent No. 1 had initially agreed to resume cohabitation alongwith the twin children. Relevant part of order dated 15.03.2017 of this Court reads as under:-

“ Respondent No. 1 duly identified by her counsel is present in Court. The parties are agreeable to live with each other alongwith their twin children in separate rented premises away from each others parents. Respondent No. 1, however, submits that the premises, which have been taken on rent by the petitioner, are not very suitable.

Learned counsel for the petitioner submits that the petitioner is amenable to take any other premises on rent in a locality pointed out by respondent No. 1 subject to his financial capabilities. Respondent No. 1 has stated that she would indicate the said localities/areas where she would like to reside in the rented premises by 7.00 p.m. today to her counsel for onward transmission to the learned counsel for the petitioner. Learned counsel for the petitioner submits that the needful shall be done in this regard within one week thereafter. In the given circumstances, interim order shall enure till the

next date of hearing.

List on 27.03.2017.”

It is pertinent to note at this juncture that status quo regarding custody of the children as well as residence was directed to be maintained till the next date of hearing vide order dated 08.03.2017.

Order dated 27.03.2017 reads as under:-

“ Learned counsel for the petitioner submits that suitable premises in accordance with the wishes of respondent No. 1 i.e. House No. 866, First Floor, Sector 15- A, Faridabad, have been taken on rent by the petitioner. This fact is not disputed by the learned counsel for respondent No. 1.

Learned counsel for the petitioner and respondent No. 1 are *ad idem* that the petitioner and respondent No. 1 shall live together along with their twin children on the said premises. Their respective parents shall not interfere in their matrimonial life and neither will the parties invite their interference.

The petitioner and respondent No. 1, who are present in Court agree that respondent No. 1 would visit her child from her first marriage residing with her parents every Monday from 2.00 p.m. to 8 .00 p.m. The petitioner would look after the twin children during this period.

Respondent No. 1 shall join the petitioner at the above said premises tomorrow i.e. 28.03.2017 at 4.00 p.m. The petitioner would be present at that time at House No. 866, First Floor, Sector 15- A, Faridabad.”

14. The petitioner and respondent No. 1 on 21.04.2017 while appearing before this Court submitted that both of them were living together alongwith the twin children. It was further agreed that respondent No. 1 apart from visiting her eldest child on every Monday from 2.00 p.m. to 8.00 p.m. shall also proceed to visit the child on every Thursday from 5.00 p.m. to 8.00 p.m.

15. Thereafter, CRM-24979-2017 was moved by respondent No. 1 for preponement of the date of hearing of the case on the ground that the petitioner had dropped her at her parents home on 17.05.2017. The petitioner was to pick her up on 19.05.2017 for hearing of this case, however, he did not come forward to pick her up. The petitioner alongwith the twin children, it was stated, had started residing at his parent's home after locking out the rental accommodation.

16. On the other hand, the petitioner moved application CRM-18227-2017 seeking to place on record certain events which according to him took place after 21.04.2017. Counter allegations were raised against respondent No. 1 that in fact she left the company of the petitioner on 17.05.2017 and refused to join his company and not vice versa. The children, it was stated, were left by her with the petitioner.

17. Thereafter, an effort was made to amicably resolve the dispute between them. The matter was placed before the Mediation and Conciliation Centre of this Court, however, mediation between the parties has failed.

18. This Court is extremely conscious of the tender age of the twin children who are now about three years old. It is a settled position that interim custody of children of such a tender age should normally be handed over to the mother without hesitation. It is only in extreme cases that it should be denied to the mother. The Court is under an onerous duty to ensure the welfare, well being and interest of the minor children as the same is the paramount consideration.

19. The Hon'ble Supreme Court in K.M. Vinaya versus B.R. Srinivas 2015 (16) SCC 405 has referred to its earlier decision (Lekha v. P. Anil Kumar, (2006) 3 SCC 555) and extracted relevant paras of two other

decisions which read as under:-

“16. In **Samuel Stephen Richard v. Stella Richard**, AIR 1955 **Mad 451**, the High Court in deciding the question of custody held as follows:

“ In deciding the question of custody, the welfare of the minor is the paramount consideration and the fact that the father is the natural guardian would not ‘ipso facto’ entitle him to custody. The principal considerations or tests which have been laid down under Section 17, in order to secure this welfare, are equally applicable in considering the welfare of the minor under Section 25. The application of these tests casts an ‘arduous’ duty on the court. Amongst the many and multifarious duties that a Judge in Chambers performs by far the most onerous duties are those cast upon him by the Guardians and Wards Act. He should place himself in the position of a wise father and be not tired of the worries which may be occasioned to him in selecting a guardian best fitted to assure the welfare of a minor and thereafter guide and control the guardian to ensure the welfare of the ward—a no mean task but the highest fulfilment of the dharmasastra of his own country. It is only an extreme case where a mother may not have the interest of her child most dear to her. Since it is the mother who would have the interest of the minor most at heart, the tender years of a child needing the care, protection and guidance of the most interested person, the mother has come to be preferred to others.”

17. In **Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka**, (1982) 2 SCC 544, this Court held as under:

“17. The principles of law in relation to the custody of a minor appear to be well established. It is well settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider

the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

20. In Roxann Sharma versus Arun Sharma 2015 (8) SCC 318

the Hon'ble Supreme Court has observed as under:-

" The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody retained by the mother. Section 6(a) of HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this Section or for that matter any other provision including those contained in the G&W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

It was further observed that suitability of the father for custody is not relevant where the child in dispute is below five years as the mother is per se best suited to care for the infant. It is for the father to plead and prove unsuitability of the mother. Firm and strong doubt has to be cast on the mother's suitability.

21. In the present case, there is no dispute regarding the marriage between the petitioner and respondent No. 1. The question of adoption of the first child of respondent No. 1 by the petitioner and the circumstances in which the adoption deed was cancelled is a matter of serious debate between

the parties. Respondent – wife has taken a specific stand that the civil suit for declaring the adoption deed a nullity was decreed on the admissions made by her and her father as they wanted to save her second marriage out of which the twin children had also been born. It is relevant to note at this stage that the petition under the Domestic Violence Act is still pending trial. Final adjudication has to be rendered by the learned trial Court after proper and complete evaluation of the evidence that may be led by either of the parties. To arrive at a definite conclusion that the respondent – wife does not have the interest of the minor children at heart on the basis of the so-called conversations between her and her parents/brother is not justified. At this stage, it is not considered appropriate to express any opinion on the alleged conversations of the respondent – wife with her parents/brother or the adoption or otherwise of the child from the first marriage of the respondent – wife as the same are subject to proof on the basis of evidence to be led by the respective parties. The manner, context, tone and tenor of the conversations would necessarily be examined by the learned trial Court on a wholesome appreciation of the entire evidence. Similarly, the argument that the children have been with the petitioner ever since the respondent – wife left the matrimonial home and as many as three maids have been employed to look after them is not a relevant consideration to afford interim custody to the petitioner. Interim custody of the children has admittedly been with the petitioner under orders of the Court. No benefit thereof can accrue to the petitioner. The children are of a very tender age and indeed require love and affection of the mother. It is, however, made clear that in case any incidence of neglect or proper care and affection not being afforded to the minor children comes to fore, the petitioner shall be at liberty to move necessary

application. Therefore, direction of the learned Additional Sessions Judge, Faridabad in respect to the custody of the children is upheld. Petitioner is, however, afforded visitation rights i.e. once a week on every Friday before the Mediation and Conciliation Centre, Faridabad between 3.00 p.m. to 5.00 p.m. Liberty is afforded to the parties for any mutual variation in the time and day for the weekly visitation.

22. Respondent – wife shall be entitled to a sum of ₹55,000/- per month as interim maintenance assessed by the learned Additional Sessions Judge, Faridabad. Income tax returns of the petitioner for the year 2016-2017 reflecting his income to be ₹27,88,436/- is not in dispute. However, direction by the learned Additional Sessions Judge, Faridabad in respect to restoration of possession of the same 'matrimonial home/shared household' is not justified in the factual matrix of the case. It has been stated during the course of the proceedings that respondent No. 1 has retained the rented premises i.e. House No. 866, First Floor, Sector 15A, Faridabad. Respondent No. 1 shall be entitled to right of residence at the said premises. The petitioner shall continue to regularly pay the rent of the said premises without any default. However, the petitioner shall not access the said premises without specific permission from the learned trial Court.

23. With following directions and modifications in order dated 23.02.2017 passed by the learned Additional Sessions Judge, Faridabad, this petition is disposed of:-

i) Custody of the minor twins namely Yuvraj & Sehraj shall be handed over immediately by the petitioner to respondent No. 1.

ii) The petitioner shall be entitled to visitation rights once a

week on every Friday before the Mediation and Conciliation Centre, Faridabad between 3.00 p.m. to 5.00 p.m.

iii) The petitioner shall deposit a sum of ₹55,000/- as interim maintenance to respondent No. 1 during pendency of the petition.

iv) Respondent No. 1 shall be entitled to reside at the rented premises i.e. House No. 866, First Floor, Sector 15- A, Faridabad. In case, the said premises have been vacated by the petitioner, similar premises shall be taken on rent and provided for residence to respondent No. 1 within four weeks.

v) In view of the facts and circumstances of the case, learned trial Court is directed to conclude the proceedings within three months from the date of receipt of certified copy of this order.

24. With the said modification in order dated 23.02.2017 passed by the learned Additional Sessions Judge, Faridabad, this petition is disposed of.

August 02, 2018

rts

(Lisa Gill)
Judge

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No