

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

FAO-760-2014 (O&M)

Date of Decision: June 1, 2018

Rabinder KaurAppellant
Vs.

Gurmit SinghRespondent

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.
HON'BLE MR. JUSTICE HARI PAL VERMA.

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Present: Ms. Promila Nain, Advocate for the appellant.
Mr.Ajaivir Singh, Advocate for the respondent.

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M.M.S. BEDI, J.

Aggrieved by order dated January 15, 2014 passed under Section 25 of the Guardians and Wards Act by the Guardian Judge, Amritsar allowing the petition of the respondent-husband directing the custody of the minor daughter Ms.Parneet Kaur to be handed over to the respondent-husband with appellant-wife to exercise her visitation rights, the wife has preferred the present appeal.

The respondent-husband had filed a petition under Section 25 of the Guardians and Wards Act, for short 'the Act', claiming the custody of minor daughter alleging that the marriage between the parties was solemnized on January 15, 2006 and they cohabited together and out of their wedlock, a female child, namely, Parneet Kaur was born on July 19, 2007. The respondent averred that respondent and the appellant lived happily for sometime but after some time on account of undue interference by the parents of the appellant, their married life spoiled. It was alleged that the

appellant started creating bitterness with the respondent as well as his family members at the instance of her parents. The behaviour of the appellant was not good towards the respondent- husband and was cruel. The appellant is allegedly a lady of loose tongue who insulted the respondent- husband in presence of his relatives and friends. The respondent alleged that during the pregnancy period the appellant went to her parental home on the pretext that she will return back after delivery but subsequently the appellant never came back to her matrimonial home. It is alleged by the respondent that he had approached the appellant a number of times to take her back after delivery but she never returned to the matrimonial home and refused to accompany him. All the attempts made by the respondent- husband to bring the appellant to the matrimonial home with the help of respectables turned futile as the appellant had refused to accompany him. The respondent claimed that he sent many gifts to the minor daughter but the appellant refused to accept the same and did not allow the respondent to meet the minor daughter. The respondent claimed that he has got great love and affection for the child. It was alleged in the petition that the atmosphere for the child in the company of the appellant is not congenial for her physical development. The appellant had no source of income to maintain the minor child whereas the respondent was a man of means having sufficient source of income to maintain and bring up the minor child as he was residing in a developed city Mohali which has got many educational institutions for the minor child. The family members of the appellant are involved in criminal cases and the development of the minor child was likely to be affected during her custody in the hands of the mother-appellant.

The appellant had contested the petition by taking preliminary objections that respondent was estopped by his conduct from filing the petition and that the petition was a counter blast to a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005, for short '2005 Act'. An application for maintenance had been filed by the appellant against the respondent. On merits, the appellant contested the petition claiming that the marriage was not a simple one rather it was solemnized with great pomp and show at Chandigarh and huge dowry was given as istrydhan. The appellant was tortured by the respondent and his family members for bringing insufficient dowry. The respondent as well as his sister Manpreet Kaur @ Bobby and his parents were not satisfied with the dowry and they started quarreling with the appellant and torturing her. The respondent adopted cruel attitude towards the appellant on the very next day of her marriage. The sister of the respondent had dragged her to the kitchen and she was asked to cook food for the entire family. The parents of the appellant had given sum of Rs.3 lacs to her for purchase of Maruti Car but the respondent and his family members asserted that she should have brought an Esteem Car as per their status. The sister of the respondent caused physical and mental torture to the appellant. The appellant claimed that she was expelled from the matrimonial home during the period of her pregnancy and she remained at the house of her parents from March 21, 2006 and thereafter on April 16, 2006, the respondent had visited the appellant at Amritsar and asked her to accompany him and undertook to treat her in a proper manner. The appellant had gone with him to the matrimonial home. The appellant had taken up a job of Teacher on April 28, 2006 in St. Joseph School,

Chandigarh and her pay used to be snatched by the respondent- husband and his mother. Their behaviour was cruel and harsh towards her and the appellant was made to leave the matrimonial home on May 17, 2006 and she stayed with her parents till June 13, 2006.

On the pleadings of the parties, the lower Court framed the following issues:-

- “1. Whether the petitioner is entitled for the custody of the minor daughter namely, Parneet Kaur? OPP
2. Whether the present petition is not legally maintainable? OPR
3. Whether the petitioner is estopped by his own act and conduct from filing the present petition ? OPR
4. Relief.?”

Issues No.1, 2 and 3 were taken up together. Issue No.1 was decided in favour of the respondent holding that he was entitled to the custody of the minor daughter Parneet Kaur. Issues No.2 and 3 were decided against the respondent.

Counsel for the appellant Ms.Promila Nain has vehemently contended that the lower Court has not fairly appreciated the evidence on the record and wrongly allowed the application under Section 25 of the Act directing the handing over of the custody of the minor daughter to the respondent- husband.

On the other hand, counsel for the respondent- husband Mr.Ajaivir Singh has vehemently urged that the welfare of the minor daughter demanded that her custody should remain with the father who has

got better economical status and he is capable of providing better life to his daughter for whom he has got lot of love and affection.

With the assistance of counsel for both the parties, we have gone through the evidence on the record. It is not out of place to mention here that an application under Order 41 Rule 27 CPC was filed by the appellant for permission to place on record documents Annexures A-1 to A-16. The document annexure A-1 is a copy of the sale deed dated February 18, 2012, in favour of Rabinder Kaur regarding purchase of a house measuring 175 sq. yards by the appellant in her name, annexure P-2 is ration card in the name of appellant and Parneet Kaur; Annexure A-3 is proof of gas connection in the name of the appellant, annexure A-4 is FDR in the name of Parneet Kaur jointly with the appellant for a sum of Rs.6 lacs prepared in January 2014; annexure A-5 is FDR of the same amount till 2015, Annexure A-6 is another FDR of Rs.6 lacs till 2015; annexure A-7 is the pass book showing sum of more than Rs. 4 lacs in the account of Parneet Kaur under the guardianship of the appellant, annexure A-8 is a certificate of appreciation of Parneet Kaur of Class Ist with the fee account and progress report; Annexure A-9 is the progress report; Annexure A-10 is an insurance policy of the appellant; Annexure A-12 is an affidavit produced in a petition under Hindu Marriage Act by Gurmit Singh-respondent, in which he has stated that he has got no source of income except a rent of Rs.6500/- per month ; annexure A-13 is another affidavit of respondent indicating that he has got rental income of Rs.6500/- per month, which affidavit was produced in proceedings under Section 13 of the Hindu Marriage Act. Similar is the affidavit annexure A-14 declaring his income as Rs.6500/- per month;

annexure A-16 is his unemployment certificate. All these documents appeared to be relevant for the just decision of the case and as such were permitted to be taken on record as Annexure A/APP1 to Annexure A/APP 16. Opportunity was given to the respondent to produce rebuttal evidence in the shape of documents.

The respondent had also filed an application for producing Annexure R/Res/1 to Annexure R/Res/8 on the record. The said documents are as follows:-

- i) Annexure R/Res/1, is an FDR in the name of the respondent and Manjeet Kaur for a sum of Rs.4 lacs for which maturity date was May 8, 2015;
Similar FD of Rs.4 lacs in the name of Manjeet Kaur with maturity date of May 8, 2015;
Another FDR in the name of Manjeet Kaur and Gurmit Singh with the HDFC Bank for Rs.4 lacs;
- ii) Annexure R/Res/2 is the statement of account of M/s Everest Financial showing the financial status of the said finance Company;
- iii) Annexure R/Res/3 is the statement of account of Gurmit Singh in the Yes Bank showing the deposit of more than Rs.8 lacs as on February 16, 2008;
- iv) Annexure R/Res/4 is the joint account with Parneet Kaur in HDFC Bank opened on March 14, 2012;
- v) Annexure R/Res/5 is the Insurance Policy of ICICI Bank;

- vi) Annexure R/Res/6 is the Income Tax Return of the year 2016-17 showing a total taxable income as Rs.3,86,640/-;
- vii) Annexure R/Res/7 is a photocopy of the vehicle loan of vehicle Innova Crysta granted to the respondent;
- viii) Annexure R/Res/8 is the affidavit of Surinder Kumar produced in a criminal case against Sachleen Singh @ Sunny stated to be brother of the appellant.

The above said documents having been produced in rebuttal are permitted to be taken on record as Annexure R/Res/.1 to R/Res8. The said documents have been produced to substantiate the plea that financially the respondent has got better resources than the appellant-wife. An attempt has been made to show that on account of involvement of brother of the appellant in NDPS Act case, the child might not have congenial atmosphere for her proper brining up with the appellant.

The respondent has also produced document Annexure R-1 which is a copy of the application produced by the wife in proceedings before the Magistrate exercising powers under Protection of Women from Domestic Violence Act wherein it has been stated that she has got no source of income and has got no property in her name or in the name of her child. The respondent has produced annexure R-2, the report of SHO, PS Women Cell, Phase VI, Mohali to the effect that the appellant has gone to her parents house with her own consent as such her father did not want any action on the application filed before the police. Annexure R-3 is judgment of conviction of Sachleen Singh dated May 3, 2012 in a case under Section 22 of the NDPS Act passed by Judge, Special Court, Amritsar. These documents

have also been taken into consideration for the purpose of determining the welfare of the minor child born to the parties out of their wedlock.

Though the documents have not been proved formally in accordance with the rules of evidence but since these documents have been brought from the reliable sources i.e. either under the signatures of the Managers of the Banks and from the different Courts and their authenticity has not been specifically denied by the opposite party, as such these were permitted to be taken on record in evidence to be considered along with the documents which have been produced by the parties before the lower Court.

With the assistance of the counsel for the parties we have gone through the evidence which has been brought before the lower Court. The respondent/ husband has produced his evidence in the shape of affidavit Ex.PW 1/A before the lower Court and reiterated the contents of the pleadings with an objective to prove the pleadings and to establish that the custody of the minor child with him will be beneficial for the child as he has got better financial resources whereas atmosphere in the house of the appellant- wife would not be congenial. He produced Ex.P-1 to Ex.P-49 to establish that the appellant- wife has got no source of income and that she is totally dependent upon her father. The respondent himself tried to establish that he is owner of a shopping complex. The affidavit produced by the wife in the proceedings under Section 24 of the Hindu Marriage Act in divorce petition and other proceedings were relied upon to establish admissions of the appellant- wife that she does not have any source of income. She had admitted that Gurmit Singh, respondent has got a shopping complex valuing in crores of rupees

having rental income of Rs.40000/- from SCF. A copy of the cross-examination in proceedings under Sections 406, 498 A IPC has also been produced. The appellant herself appeared as RW1 and produced her affidavit to establish her averment in the written statement to state that she had been maltreated on account of having brought insufficient dowry and that she has been mentally tortured by the sister of the respondent and that she has been thrown out of the matrimonial home on May 17, 2006 while she was on family way. She got job of a Teacher on April 26, 2010 in Saint Joseph School in Chandigarh. She also proved that her salary from the School was being snatched by the mother of the respondent- husband. The appellant also produced RW2 Jit Singh, RW3 Manohar Singh her father, RW4 Sat Pal Dhand along with the school record of the minor daughter Parneet Kaur to prove her progress report; RW5 Jasbir Singh, Clerk Harkishan Public School, Amritsar to prove the admission of Parneet Kaur in the School along with admission register etc. The appellant produced her mother as RW6. The lower Court on appreciation of evidence brought on record emphasized on the income and financial status of the husband and held that the husband has got a good educational qualification from Doon School and was an occasional drunker and that the wife has got no property, no bank balance in her name and that her father retired from the School in Amritsar as a Teacher and her mother has also retired from primary school in Amritsar as a Teacher and her parents have got a small house bearing No.32, Anand Nagar, Kangra Colony, Amritsar and there was no officer ranker in the family of her parents. Parents of the appellant have got two rooms in their house. One room is occupied by her parents and the second

room is occupied by her brother's family and the family was dependent upon the pension of the father and were hand to mouth and the child was studying in the normal school and her treatment took place in a charitable hospital at the time of her illness whereas the husband has got commercial properties residing in parents home with area of 2000 yards situated in a posh location i.e. Phase 10, Mohali and that he has got SUV Quanto Car worth Rs.8.5 lacs and that in the cross-examination, the wife has admitted that the husband has got commercial property and income of Rs.40000/-. In view of the financial status of the husband, the application for custody of the minor daughter was allowed and the child was ordered to be handed over to the husband respondent but the wife had been granted the visitation rights to the following effect:-

- 1) Child will be allowed to be in the company of the mother for a period of 7 days during long vacations;
- 2) The period shall be fixed by the mother with due intimation to the father who would permit the child to go with the mother;
- 3) The child would be permitted once in a month on Saturday or Sunday to visit the mother from morning to evening and mother shall take the child and leave her back at the father's place on such days.

We have considered the reasoning adopted by the lower Court which appears to be absolutely presumptive, unreasonable and contrary to the interest of minor female child. While determining the welfare and custody of the child, financial status of the parties is not the sole criteria. In

the present case, it is not the case where the wife is absolutely bankrupt having no source of income. It is not established from the record that her family is so poor that the child would not be capable of surviving and would starve. The additional evidence produced on the record by the wife which has been discussed above shows that FDRs Ex.R/APP/1 to Ex.R/APP/12 clearly reflect that the child is being financially secured by the FDRs of Rs.6 lacs and the child has got a joint account with the appellant in which an amount of Rs.2000/- to Rs.6000/- is being deposited on different occasions and it has got a balance on different occasions to the extent of Rs.10 lacs and about Rs.3.80 lacs in May 2014. The school in which the minor is studying is Sri Guru Harkishan Public School as is evident from the progress report. The said school is situated in Basant Avenue, Amritsar, a posh area. No doubt the husband has also made an attempt to establish that he has got FDRs but those FDRs are in his name or in the name of Manjeet Kaur. The Court cannot arrive at a conclusion that the amount available with the husband is available exclusively for him to be spent on the minor child.

So far as the financial status of the parties is concerned, both the parties have got almost an equal financial status. Where the custody of minor girl is concerned, it is settled principle of law that for a minor child, the lap of the mother is the best place. The statement of the appellant as RW1 is clearly an indicative of the fact that the girl child has never remained in the custody of her father.

Both the parties have been able to debate the income of the parties by referring to the admissions made in the other parallel proceeding. The said admissions have been made in proceedings under Hindu Marriage

Act and Protection of Women from Domestic Violence Act. Any pleas regarding income in the said proceedings will meant to seek claim of maintenance by the wife and to evade the liability to pay the maintenance by the husband as such the said admissions can not be taken into consideration but on the basis of the documents produced on the record, it transpires that the appellant-wife does not have any inferior economical status than the respondent-husband.

We have gone through the proceedings before the Mediation Centre which reflect that the minor girl had never been comfortable with the father and she had never expressed her desire to remain in the company of the father. A minor child is not a non-living substance which could be handed over from one parent to other. The date of birth of Parneet Kaur is July 19, 2007. She is at present aged about 11 years. At this age her custody with mother is necessary for her growth. Mother would be the best person to take care of her daughter at this growing age. The respondent has taken up the plea that his mother, a retired teacher, would be capable of looking after the child in a better manner as compared to the mother of the child. Such a plea is not acceptable. The judgment of the lower Court which has been given solely on the basis of the better financial status of the respondent- husband is not sustainable and it deserves to be set aside. Ordered accordingly. Findings of the lower Court on issue No.1 are hereby set aside and it is held that the minor child Parneet Kaur being a girl, deserves to remain in the custody of mother as since the inception she has been staying with the mother. There are no circumstances established on the record which indicate that the welfare of the child will be better in case her

custody is provided to her father. The plea that brother of the appellant – wife having been convicted in a case under NDPS Act is not sufficient enough to shift the custody of the minor from mother to father.

In view of the above, the appeal is allowed. The order passed by the lower Court dated January 15, 2014 is hereby set aside. The petition filed by the respondent-husband for custody is dismissed. The husband-appellant, however, shall be entitled to meet the minor child once a month on Ist Saturday of the month between 2.00 p.m. to 4.00 p.m. before the A.D.R. Centre, Amritsar under the supervision of the Secretary, District Legal Services Authority, Amritsar. In case Ist Saturday happens to be holiday, such right will be exercised on the third Saturday of the month between the same hours.

Copy of the order be sent to the Secretary, District Legal Services Authority, Amritsar, for compliance. In case of non-compliance of the order, an application can be made before the appropriate Court.

This order will be implemented w.e.f. Ist Saturday of August, 2018.

(M.M.S. BEDI)
JUDGE

June 1, 2018
sanjay

(HARI PAL VERMA)
JUDGE

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