

In the High Court of Punjab and Haryana at Chandigarh

FAO-6149-2016 (O&M)

Date of decision: 1.5.2018

Rup Kumar alias Rupa

.....*Appellant*

Versus

Smt. Kamlesh

....*Respondent*

**CORAM: HON'BLE MR. JUSTICE M.M.S.BEDI
HON'BLE MR. JUSTICE GURVINDER SINGH GILL**

Present : Mr. Arvind Bansal, Advocate for the appellant.

Respondent ex parte.

GURVINDER SINGH GILL, J.

1. The appellant-husband has filed this appeal challenging order dated 4.7.2016 passed by the learned Civil Judge (Senior Division), Kaithal, whereby a petition under Section 25 of the Guardians & Wards Act, 1890 (hereinafter referred to as "*the Act*") filed by him seeking custody of his minor son namely Kamaldeep @ Kamaljit, has been dismissed.
2. The appellant-husband, in his petition, averred that he was married to respondent-wife 18 years back in accordance with Hindu rites and ceremonies and two children were born out of the wedlock. While the daughter had expired, the minor son namely Kamaldeep @ Kamaljit was

studying in 5th class. The appellant-husband averred that the respondent-wife left matrimonial home in August 2010 and had been living in a rented house alongwith minor son in the company of one Mukesh Saini in a live-in relationship. The appellant-husband, while asserting that he has reasonable income to maintain his minor son, prayed for custody of his minor son.

3. The respondent-wife, while contesting the petition, filed her reply stating therein that the appellant is a man of bad habits and spends his entire income pursuing his vices and that she had started living in her parental home alongwith her minor child, who is studying in class 7th. The respondent-wife alleged that the appellant-husband has no love or affection for the minor child and seeks his custody only to harass her.
4. The parties were put to proof on the following issues:-
 1. Whether the petitioner is entitled for the custody of minor child Kamaldeep? OPP
 2. Whether the present petition is not maintainable? OPR
 3. Relief.
5. The appellant-husband, apart from himself stepping into witness box as PW-1, also examined PW-2 Mewa Devi. The respondent-wife herself stepped into witness box as RW-1 and also examined RW-2 Manoj.
6. The learned lower Court returned its finding on issue No.1 against the appellant-husband holding therein that he is not entitled to custody of minor son namely Kamaldeep @ Kamaljit. Issue No.2, as regards

maintainability, was decided against the respondent-wife. Consequently, the petition under Section 25 of the Act filed by the appellant-husband was dismissed vide order dated 4.7.2016 passed by the learned Civil Judge (Senior Division), Kaithal, while granting visitation rights to the appellant-husband to meet his minor son once in a month.

7. The learned counsel for the appellant-husband, while assailing the impugned order, has submitted that the learned lower Court did not appreciate the evidence in the correct prospective and did not give weightage to the fact that the respondent-wife was living in adultery in a live-in relationship, which would surely have an adverse effect on the upbringing of the minor child. The learned counsel submitted that for a balanced growth of child, the love and care of the father is also essential and that the said fact has been absolutely overlooked by the lower Court and in these circumstances, the impugned order can not sustain and is liable to set aside. The learned counsel has, thus, prayed for acceptance of his appeal and for setting aside the impugned order and consequently for acceptance of his petition under Section 25 of the Act.
8. The respondent-wife opted not to appear and contest the appeal despite service.
9. We have considered the submissions addressed before this Court and have also perused record of the case.
10. From the evidence on record, it transpires that the appellant-husband is a labourer and in that capacity he would hardly be left with any time to look

after his son much less to take care of his educational requirements. Being a labourer, he would be physically drained by the time, he would be returning home in the evening and it cannot be expected that he would be in a position to devote quality time to take care of his minor child. A child, for his overall balanced growth and development, needs constant care and attention of his parents and the child picks and learns various habits from those in whose company he stays. As against the appellant-husband, the respondent-wife is staying with his brother. There is nothing on record to show that the respondent-wife is not properly looking after the minor child or that anything is lacking in the upbringing of the minor child. As regards, the contention of the appellant-husband that the respondent-wife is living in adultery, the same is not substantiated from any evidence.

11. We do not find that there is any misreading of evidence by the learned lower Court or that there is any perversity in the findings, as recorded on issue No.1. Furthermore, the minor child was born on 2.6.2001 as per birth certificate Ex.P-3, which would mean that by now he would be aged about 17 years and would be fairly mature enough to think about his welfare. Though, of course, it is at the age of 18 years that he can take an independent decision on his own, on the basis of his wishes as to whether he prefers to reside with his mother or father but even as of now there is nothing to suggest that he is not happy living with his mother or that he is not being looked after well.
12. Finding no infirmity in the impugned order, the same is hereby upheld affirming therein that it is the respondent-mother, who is entitled to custody

of the minor son namely Kamaldeep @ Kamaljit. However, the appellant-husband shall continue to exercise the visitation rights, as granted by the learned lower Court. However, in case the said order regarding visitation rights is not complied with, it will be open to the appellant-husband to enforce the same by way of filing execution petition. There is no merit in this appeal and the same is hereby dismissed.

(M.M.S. Bedi)
Judge

(Gurvinder Singh Gill)
Judge

1.5.2018
pankaj

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No