

In the High Court of Punjab and Haryana at Chandigarh

FAO No. 172 of 2017 (O&M)

Date of Decision:- 4.4.2018

Rakesh Kumar

..... *Appellant*

Versus

Ravinder Kaur

..... *Respondent*

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

Present:- Mr. Rajiv Joshi, Advocate for the appellant.

Mr. Rajinder Kumar Singla, Advocate for the respondent.

GURVINDER SINGH GILL, J.

1. Rakesh Kumar (husband) has filed this appeal challenging order dated 30.7.2016 passed by learned Guardian Judge, Jalandhar whereby a petition filed by him under Section 7 and 25 of the Guardian and Wards Act, 1890 (hereinafter referred to as '*the Act*') against his wife Ravinder Kaur for declaring him as a guardian of their minor son Dheeraj as well as for seeking his custody, has been dismissed.
2. The appellant, in his petition filed before the Guardian Judge, averred that he was married to respondent on 25.3.2011 and a male child namely Dheeraj was born out of the wedlock on 15.11.2012. However, due to cruel and quarrelsome nature of the respondent, they could not pull on together. Ultimately, the respondent-wife left her matrimonial home and that the minor son is also residing with her. The appellant averred that he has

sufficient sources of income to maintain the minor whereas if the minor stays with the respondent, his education and future prospects would be affected. The appellant, thus, prayed that he be declared as a guardian of the minor son and also for custody of the said minor son.

3. The respondent, in her reply, took a stand that in fact the appellant and other members of his family had been maltreating her and had been demanding dowry and in fact at one point of time, had agreed to dissolve their marriage by mutual consent, upon payment of an amount of ₹ 3 lacs but later on, he withdrew his consent.

4. The parties were put to proof on the following issues :-

- “1. Whether the petitioner is entitled to get custody of minor as prayed for? OPP
2. Whether this petition is not maintainable? OPR
3. Relief.”

4. The appellant, in order to substantiate his case, himself stepped into witness box as PW-1 and also examined Sheenu Nayyer as PW-2. The respondent, apart from herself stepping into witness box as RW-1, examined her father Harbans Lal as RW-2 and Balwinder Kaur as RW-3.

5. The learned lower Court, upon considering the evidence on record returned its findings on issue no. 1 against the appellant and consequently, dismissed the petition vide impugned order dated 30.7.2016. Aggrieved with the same, the husband has filed the present appeal.

6. The learned counsel for the appellant has submitted that the minor son Dheeraj is aged more than five years and needs love, care and attention of the father for a balanced growth. He has submitted that the next about 10 years would be the formative years of the minor wherein he has to pick up the best of knowledge, education, habits and that it is the appellant who is in a better position to provide the same to the minor son and that in case the minor son is kept bereft of his father's care and attention, he would suffer an irreparable loss. The learned counsel has submitted that the appellant is financially comfortable and would be able to cater to all the needs and requirements of the minor son in a much better way than the respondent. The learned counsel, thus, prayed for setting aside the impugned order and for acceptance of his petition under under Sections 7 and 25 of the Act.
7. On the other hand, the learned counsel for respondent has submitted that the learned Guardian Judge has fully appreciated the evidence on record in context of the considerations to be borne in mind while deciding the question of custody and has passed an appropriate order in the circumstances of the case and that the same does not merit any interference.
8. We have considered the rival submissions addressed before this Court and have perused the record and the impugned order. The relevant extract from the impugned order is reproduced below :-

“Removing child from the custody of mother would not be for the benefit of child. Rakesh Kumar PW1 admitted in cross-examination that he was 8th standard class pass and was a carpenter. Significantly, conceded that he was daily-wager and was having no permanent work. Contrarily, respondent

was pursuing BCA and she was also awarded maintenance to the tune of Rs.4500/- per month. He conceded that he knows English a little bit and was living with a big family constituting father, mother, grandmother and brother. Even, Sheenu Nayeer, Principal PW-2 proved on record timetable of Semesters of BCA Ex.PW2/A to Ex.PW2/D. In cross-examination admitted that Ravinder Kaur was good and punctual student of their college. Company of her father would not be for betterment of since he is 8th standard class pass and is eking-out living of a big family. Spending money for education and medication of child for the petitioner would be tough job for petitioner. For the upbringing child he is paying maintenance to respondent. Significantly, respondent was also pursuing BCA and in the company of educated mother, child would grow well. Love and affection already developed for the last three years, by child in custody of mother, it would be against the interest of child to uproot him. He being in custody of mother would certainly groom. Simply, the fact that respondent was going to college at 9 a.m. and returning back at 2 ground to uproot the child from the custody of mother and implant the child in new atmosphere. Cross-examination by and large had been confined to infighting between the petitioner and respondent. Ravinder Kaur RW1 was not even put suggestion that custody of child with petitioner would be for his welfare.”

9. While deciding upon the question of custody of minor, the Court is not merely to consider as to which of the parent has a superior right to get custody but in deciding that question, must regard the welfare of the minor as the first and paramount consideration. Where the custody or upbringing of a minor is in question, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are

equal. In other words it is the consideration as regards welfare and betterment of the minor which would tilt the scales in favour of that parent. In Mausami Moitra Ganguli v. Jayant Ganguli (2008) 7 SCC 673, Hon'ble the Supreme Court has held that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. The provisions contained in the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 hold out the welfare of the child as a predominant consideration because no statute on the subject can ignore, eschew or obliterate the vital factor of the welfare of the minor.

10. Hon'ble the Supreme Court in its recent judgement in Santhini v. Vijaya Venketesh, (2018) 1 SCC 1 reiterated the aforesaid well settled principle in the matter of custody of minors as follows:

“25. It is to be borne in mind that in a matter relating to the custody of the child, the welfare of the child is paramount and seminal. It is inconceivable to ignore its importance and treat it as secondary. The interest of the child in all circumstances remains vital and the Court has a very affirmative role in that regard. Having regard to the nature of the interest of the child, the role of the Court is extremely sensitive and it is expected of the Court to be proactive and sensibly objective.”

11. Upon perusal of the impugned order, we find that the learned trial Court was fully aware of all the aspects of the case and the considerations necessarily required to be borne in mind while adjudicating upon an application for

deciding guardianship and custody of a minor and the order granting custody of minor to the mother has been passed keeping in view that the mother would be able to devote quality time to the minor for his upbringing and that company of his mother would be better than that of his father for his overall development and education. We do not find any infirmity in the said findings so as to justify interference in the impugned order. There is no merit in this appeal and the same is hereby dismissed. However, the appellant-father deserved to be granted visitation rights. The appellant may exercise said rights on the following terms :-

- (i) The appellant shall be permitted to meet his minor child Dheeraj at ADR Centre, Jalandhar between 2:00 P.M. to 3:00 P.M. on 3rd Saturday of every month in the presence of Secretary, DLSA, Jalandhar or any other senior official of the ADR Centre.
- (ii) In case, the 3rd Saturday is a holiday, the visitation right would be exercised on the last Saturday of that month or the first Saturday of the next month.
- (iii) The appellant would be required to pay a sum of ₹ 1,500/- on each visitation in order to enable the respondent to meet the travelling and other miscellaneous expenses.

(M.M.S. Bedi)
Judge

(Gurvinder Singh Gill)
Judge

4.4.2018
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Whether speaking /reasoned

Yes / No

Whether Reportable

Yes / No