

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

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FAO-1524-2018 (O&M)

Date of Decision: 31.10.2018

AASHISH SHARMA

....Appellant.

Vs.

MANISHA SHARMA

.... Respondent.

**CORAM:- HON'BLE MR. JUSTICE RAKESH KUMAR JAIN
HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL**

Present: Mr. Raj Kumar Gupta, Advocate with
Mr. Atul Gaur, Advocate
for the appellant.

Ms. Binayjit Sheoran Virk, Advocate
for the respondent.

RAKESH KUMAR JAIN, J. (ORAL)

This appeal is directed against the order dated 5.3.2018 passed by the Family Court, Rohtak by which a petition filed by the respondent (mother) for seeking custody of the child namely Ishita, has been allowed.

Brief facts of the case are that the parties to the lis were married on 21.4.2008 at Rohtak. They were blessed with a female child namely, Ishita. She was born on 4.10.2009. At present she is more than 9 years of age and is studying in Pathania Public School, Rohtak. There was an issue of incompatibility between the parties to the lis and as a result thereof, they preferred to get a decree of divorce by mutual consent.

In this process, a petition under Section 13-B of the Hindu Marriage Act, 1955 (for short 'the Act') was filed by both of them before the District Judge, Rohtak. Both the parties recorded their first motion statements on 19.9.2013. Petitioner No.2, in her statement, stated that "it has been settled between us that our daughter Ishita shall remain in custody of petitioner No.1 (Aashish). Petitioner No. 2 Manisha Sharma will have no right to seek the custody of the above-named minor child Ishita in future". The second motion statement was recorded by the Court on 20.3.2014 and on the same day the decree of divorce was passed dissolving the marriage of the parties by granting the decree of divorce under Section 13-B of the Act. The respondent then filed an application seeking review of the order dated 20.3.2014 but the said application was withdrawn on 17.7.2014, in which the following order was passed:-

"Present: Petitioner in person with Sh. Pankaj Kaushik, Advocate.

Respondent in Person with Sh. J.K. Nandal, Advocate.

In pursuance of the notice, respondent put his appearance. Power of Attorney on behalf of respondent filed. Respondent Ashish Sharma has suffered a statement to the effect that the petition under section 13-B of Hindu Marriage Act has already been decided by this Court on 20.3.2014. If his daughter Ishita desire and wish meet with the applicant-petitioner then he has no objection. His daughter Ishita is residing with him and his parents. He is duly identified by his counsel.

Thereafter, petitioner Manisha Sharma suffered a statement to the effect that she does not want to pursue this petition further and withdraw the same. The present petition may kindly be dismissed as withdrawn. She reserves her right to file

the fresh petition in the competent court of law for the custody of her child. She is duly identified by her counsel.

Heard. In view of the statement of learned counsel for the petitioner the present petition is hereby dismissed as withdrawn. File be consigned to the record room after due compliance.”

Thereafter, the respondent had filed the application for seeking custody of the minor child on 22.2.2017. During the pendency of the said application, the respondent had also filed an application for seeking interim custody of the minor child. The said application was dismissed by the family Court on 11.4.2017. It was specifically recorded in the order that “the minor Ishita is not ready to go with the petitioner even for a small time”. Ultimately, it was opined that it would not be an appropriate stage for the purpose of giving custody of the child to the respondent and the application was accordingly dismissed. Thereafter, the main petition was decided on merits after taking into consideration the evidence brought on record by both the sides. From the pleading of the parties, the trial court had framed three issues in which Issue No.1 was the important issue in which the Court was to decide was as to whether the petitioner is entitled to custody of the minor child? The learned trial court, while allowing the petition filed by the respondent, has observed that the interest of the minor is paramount and since the appellant husband has got remarried, therefore, the stepmother may not treat the minor child properly, which may cause an adverse effect on the mental and physical growth of the child. Besides this, the trial court has also observed that the family of the husband has been treating the respondent-wife with cruelty as she was given beatings and as a result

thereof, she was to be hospitalized during the subsistence of her marriage and in this regard, reference has been made to the medical record Exhibits P-4 and P-5 brought on record. The Court was ultimately of the view that the appellant herein is habitual in treating the females with cruelty and, therefore, the minor female child of the respondent herein would not be safe in the custody of the appellant. It is also observed by the trial Court that the respondent being a teacher would provide good education to the minor and can look after her welfare.

Learned counsel for the appellant has submitted that the learned trial Court, while recording the facts of the case, referred to the statement made by the respondent before the Court, who had decided the petition filed under Section 13-B in which the respondent had specifically waived her rights over the custody of the minor child, who was at that time 3 years of age but has not recorded any finding about these facts in the later part of the order. It is further submitted that the respondent cannot blow hot and cold in the same breath and cannot take a somersault for the purpose of claiming the custody of the child after suffering the statement before the Court which was read over and made her to understand the implication of the same as she is not illiterate but a teacher. She had taken a conscious decision at that time when she got recorded her statement on 19.9.2013 that the matter has been settled between the parties and she does not want the custody of her minor daughter rather she has specifically stated that she would not have any right to claim the custody of the minor child in future. It is further submitted that the respondent then filed the application for review of the order by which the marriage was dissolved by way of mutual consent but the said application was also withdrawn by her for the reasons best

known to her, though she had reserved some kind of right to file a fresh petition in the competent Court of law for the custody of the minor child. It is submitted that the respondent may file any kind of petition but the same has to be looked into vis-a-vis the statement made by her on oath in the proceedings initiated under Section 13-B of the Act for the purpose of dissolving the marriage between them by mutual consent. He has further submitted that Court had interacted with the minor child at the time of deciding the application for interim custody of the minor child. At that time minor Ishita had specifically stated that she does not want to meet the respondent even for a minute. It is further submitted that the minor child, in the company of the family of the appellant, is progressing tremendously as she is participating in various activities like dance, singing, sports etc. and is a brilliant student academically. It is also submitted that the petitioner is living in a joint family and his father is a retired lecturer. He has got remarried and has got another son also, namely, Pratham. Though he is 11 months old but his wife is looking after both the children very well. It is also submitted that the respondent has filed this application for seeking custody just to punish the appellant. In support of his submission, learned counsel for the appellant has relied upon a judgment of the Supreme Court rendered in the case of **Gaytri Devi Versus Jiten Bhalla, (2013) AIR SC (Civil) 77** and another judgment of the Supreme Court rendered in the case of **Civil Appeal No.10771 of 2018, Dr. Amit kumar Vs Dr. Sonila and others** decided on 26.10.2018. It is submitted that once the respondent had abandoned the minor child by giving all the rights to the appellant, she cannot turn around and claim the custody of the minor child thereafter as she will be estopped by his own act and conduct. On the other hand, counsel for the

respondent has submitted that the marriage was dissolved with the consent of both the parties because they were not pulling on well. But it is submitted that the statement made on 19.9.2013 by the respondent, allowing the appellant to remain in the custody of the minor daughter was under a misconception or wrong impression. It is also submitted that in order to cure the said error, she had filed a review application also and when the Court was not inclined to review its order, she had withdrawn the review application to file a separate petition for seeking the custody of the minor child. It is, thus, submitted that respondent cannot be non-suited on the ground that she had earlier waived off her right for seeking the custody of the minor child by suffering a statement on 19.9.2013 as she had reserved her right for the purpose of seeking the custody of minor daughter by making a statement before the Court. She has also argued that the decision on the application for interim custody of the minor child, vide order dated 11.4.2017, would not have any adverse effect because it was only an intermediate stage of the proceedings but as ultimately, the Court had found, after taking into consideration the evidence brought on record, that the appellant family is quarrelsome because the appellant husband had caused injuries to the respondent and as a result thereof, she had to be hospitalized and in this regard the medical record has been exhibited as P-4 and P-5. It is also submitted that welfare of the child is paramount for the Court to be considered. It is also sought to be argued that since the appellant has got remarried and has a child from the other wife, it may be presumed that the second wife of the appellant may not give the same love and affection to the minor daughter of the respondent. It is further submitted that the respondent is a Teacher, though living alone but her parents are just living around the

corner, therefore, she always has their support and she would be in a better position to look after the welfare of the minor child insofar as her personal well being and education is concerned. However, the learned counsel for the respondent has not referred to any precedent in support of his contention.

We have heard learned counsel for the parties and perused the record with their able assistance.

The facts are not in dispute. The marriage of the parties to the lis got dissolved by mutual consent. At that stage, the minor daughter Ishita, born on 4.2.2009, was 3 years of age. Since the respondent is a Teacher, therefore, it is presumed that she understands the legal proceedings better than an uneducated person. She had specifically and categorically suffered a statement on 9.9.2013 before the Court during the proceedings in the petition for grant of divorce by mutual consent that the matter has been settled between the parties and she does not want the custody of Ishita and would not have any kind of right over her even in future. The said statement was made by the respondent on oath in Court. However, the respondent has changed and decided to file an application for seeking review to seek the custody of the child but that was too late in the day as she had already missed the bus. The Court was not inclined to review its order for the purpose of expunging the statement made by the respondent. However, at that time respondent had decided to withdraw the review application stating that she would file a fresh petition in the competent court of law for seeking custody of the minor child. The very fact that the respondent had voluntarily given the custody of the minor child to the father when she was just 3 years of age and was requiring the attention and care of the mother and that the

respondent had abandoned her for the reasons best known to her as nothing has been brought on record, the miscellaneous application filed by the respondent before the learned Family Court was also met with the same fate because the Court had an interaction with the minor child who had categorically stated that she do not want to go with the respondent even for a short while, the finding recorded by the Family Court while allowing the application filed by the respondent is not based on the true facts of the case as everything has been presumed that since the appellant has got remarried, therefore, the stepmother may not treat the child properly and that there was dispute between the parties in the past because of which the husband would become cruel and treat his daughter with cruelty. These are all imaginations of the learned Court below having no foundation on the basis of which the respondent can be given the custody despite the fact that she had herself decided to leave the custody of the minor daughter with the husband. In this regard, we have also had the interaction in our chamber with the minor child Ishita and found that she is mature than her age and has categorically stated before us that she does not want to meet her mother (respondent herein). She has also stated that she is being looked after by her father, her grandfather, her grandmother and also her mother Mrs. Monika very well. There is no doubt that the Court has to look after the welfare of the minor but the welfare of the minor is not only in the worldly things. In the present case, Ishita is getting love and affection of family of her grandparents, father, mother and also a small brother whereas the respondent is all alone and is in job. She has to attend the job also and then there is no one at home to look after the child. The decision of the Supreme Court relied upon by the learned counsel for the appellant in

Gaytri Devi Versus Jiten Bhalla (supra) and Dr. Amit kumar Vs Dr. Sonila and others (supra) are supporting the case of the appellant for the purpose of allowing the appeal.

Thus, taking into consideration the aforesaid facts and circumstances, we are of the considered opinion that the appeal is meritorious and the same is, thus, hereby allowed and the order passed by the learned Family Court, Rohtak on 5.3.2018 is hereby set aside.

(RAKESH KUMAR JAIN)
JUDGE

(ANUPINDER SINGH GREWAL)
JUDGE

31.10.2018.
SwarnjitS

Whether speaking/reasoned :	YES/NO
Whether reportable :	YES/NO