

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

FAO No.M-1182 of 2019 (O&M)

Date of decision:11.02.2019

Naresh Kumar

...Petitioner

Vs.

Anita Rani

....Respondent

**Coram: Hon'ble Mr. Justice Rakesh Kumar Jain
 Hon'ble Mr. Justice Harnaresh Singh Gill**

**Present: Mr. Suresh Kumar Kaushik, Advocate,
 for the petitioner.**

Rakesh Kumar Jain, J.

This appeal is directed against the order dated 09.01.2019 passed by the Family Court, Hisar, by which petition filed by the respondent-wife for seeking custody of her minor daughter Upasana has been allowed.

In brief, the appellant got married with the respondent on 11.05.2005 at village Rawalwas Khurd, Tehsil and District Hisar as per Hindu rites and ceremonies. They were blessed with two daughters, namely, Mehak and Upasana, born on 10.02.2009 and 20.12.2010 respectively. The respondent-wife was allegedly harassed and humiliated for bringing less dowry and was thrown out of her matrimonial home by the appellant-husband and without obtaining decree of divorce, the appellant-husband allegedly solemnized second married with one Divya and out of the said marriage, one daughter was born on 11.10.2012. It is also alleged that the appellant-husband had also filed an application under Section 97 of the Code of Criminal Procedure, 1973 and got the custody

of both the daughters in pursuance of an order passed by the Court of SDM, Hisar. It was further alleged by the respondent-wife that the appellant-husband used to remain out on work and the second wife (Divya) used to harass, humiliate and ill-treat both the daughters. On this premise, the petition was filed by the respondent-wife for seeking custody of Upasana.

The appellant-husband had denied the allegations in regard to the demand of dowry etc. rather it is alleged that the respondent-wife herself used to harass him and his family members as she had never given due respect to him and he has never contracted second married with Divya.

On the pleadings of both the parties, the Family Court framed as many as four issues, in response to which the parties led their respective evidence. It has come on record that the appellant had admitted that he is in “live-in relationship” with another lady and has a daughter out of their live-in relationship. The Family Court found that in such circumstances, it would not be in the welfare of the child to remain in the custody of the appellant because he is stated to be a habitual drunkard, living an immoral life.

Learned counsel for the appellant has submitted that since the appellant has admitted his daughter Upasana in a good school at Hisar, therefore, if the welfare of the child is of paramount consideration, then the custody of the child should be allowed to be retained by the appellant because the respondent-wife does not have any source of income.

We have heard learned counsel for the appellant and perused the record with his able assistance.

As per Section 6 of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the “Act”), the natural guardian of a minor girl in respect of her person as well as her property should be her father and if she has not completed the age of five years, then it should ordinarily be the mother. Section 13 of the Act provides that in the matter of appointment or declaration of any person as guardian of a Hindu minor, the “welfare” of the minor shall be of paramount consideration. It further provides that no person would be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the Court is of the opinion that his or her guardianship will not be for the welfare of the minor.

The question, thus, arises as to whether in case the father is living an immoral life besides being labeled as a drunkard, it would be in the welfare of a minor girl to give her custody to the father?

The Family Court has recorded a finding that the appellant, without giving divorce to the respondent with whom he has solemnized marriage as per Hindu rites and ceremonies, is living with another woman in (live-in relationship” and has also fathered a daughter from the said live-in relationship. The Court has opined that the custody of minor girl should not be given to such a person.

In the case of **Amit Beri and another vs. Smt. Sheetal Beri**, 2003(2) RCR (Civil) 471, the custody of a minor child of above six years was given to the father because the mother in that case was in the habit of attending night clubs and coming late to her house. The Court had found that in such circumstances, the minor child would come into contact with undesirable elements and, therefore, opined that to make the minor a good

citizen and of good character, he should not be left in the custody of his mother.

In the case of **N. Nirmala vs. Nelson Jayakumar**, 1999 AIHC 2809, the mother was denied custody of the minor on one of the grounds that she was in government service and had to leave the service because of her defamation for allegedly having an affair with her boss (senior).

Since the Court has to look into the welfare of the child in terms of Section 13 of the Act for the purpose of handing over the custody and the word “welfare” is not defined, the Supreme Court, in the case of **Gaurav Nagpal vs. Sumedha Nagpal**, Civil Appeal No.5099 of 2007, decided on 19.11.2008, has observed that *“the word “welfare” used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being”*.

In the present case, the custody of a minor girl is in question and since the appellant-father is living an immoral life as he is living with another woman in live-in relationship and has got a child also from that woman, without obtaining any decree of divorce from her legally wedded wife (respondent herein) and has also been labeled as a habitual drunkard, therefore, this Court is satisfied to conclude that the welfare of the minor child would not be in the company of such person as the minor child would learn that the live-in relationship is the way of life, that too by such a person who is already married and having a living spouse. The appellant is in live-in relationship with another woman obviously for the reason that as per Section 5 of the Hindu Marriage Act, 1955, it is one of

the conditions that neither party has a spouse living at the time of the marriage.

The Court cannot approve this kind of social set up in which a person, in the presence of a living spouse and even without dissolution of his marriage from his wife by obtaining a decree of divorce, is living with another woman in live-in relationship and has fathered a child because it would give a wrong signal to the society at large and would create an adverse impact on the tender mind of the minor child especially a girl child.

Thus, we do not find any reason to differ with the view taken by the Family Court for the purpose of granting custody of minor Upasana to the respondent in these peculiar facts and circumstances.

No other point has been raised.

In view of the above, the present appeal is found to be without any merit and hence, the same is hereby dismissed, though without any order as to costs.

(Rakesh Kumar Jain)
Judge

February 11, 2019
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(Harnaresh Singh Gill)
Judge

Whether speaking / reasoned : Yes

Whether reportable : Yes