

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

**FAO-2600-2019 (O&M)
Decided on : 13.11.2019**

Ravi Kumar

... Appellant(s)

Versus

Manju

... Respondent(s)

**CORAM: HON'BLE MR. JUSTICE RAJAN GUPTA
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL**

Argued by: Mr. K.S. Sidhu, Advocate
for the appellant(s).

Mr. Amit Prashar, Advocate
for the respondent(s).

MANJARI NEHRU KAUL, J.

The instant appeal has been preferred by the father-Ravi Kumar, impugning the judgment and decree dated 19th March, 2019, passed by the Ld. Guardian Judge, Chandigarh (in short 'Ld. Court below') vide which the petition filed by the respondent-mother/Manju, under Sections 7, 9, 17 & 25 of the Guardian and Wards Act, 1890 (for brevity 'the Act'), seeking custody of her minor son, was allowed.

A few facts necessary for adjudication of the case may be noticed.

The marriage between the appellant and the respondent was solemnized on 26th January, 2006, at Chandigarh. A son namely Shourya was born out of the said wedlock on 01.01.2007. However, differences cropped up between them and their relations turned sour soon thereafter. All the efforts made by the wife time and again to salvage her marriage proved futile. It was alleged by the respondent-mother that in her absence,

the husband had emptied the house of all the household articles where they had been residing i.e. House No. 193-A, Sector 51, Chandigarh and moved to an undisclosed address along with their minor son Shourya. As the relations between the parties deteriorated, their marriage was dissolved by decree of divorce dated 20th August, 2015 (Annexure P-7). She alleged that the husband was a drunkard. He remained out of the house for most part of the day, as he was working with Ace Tutorial, Sector 34, Chandigarh as a tutor. Resultantly, their minor son was left with no other option but to remain in the Institute with the father till 08:00 P.M., which was not conducive to his normal and healthy development. She alleged that the son had been forcibly taken away from her custody on 14.11.2013, even though both the son and she were very attached to each other. She further alleged that the appellant-father was in the habit of using abusive and foul language against both her and the son and would even beat up the minor child. Hence, she filed the petition seeking custody of her minor child.

In the written statement filed by the appellant-father (respondent therein) before the Ld. Court below, he categorically refuted and denied all the allegations levelled against him in the petition filed by the respondent-wife. He submitted that the son was being properly taken care of and was being brought up in a normal and healthy environment. He alleged that it was, in fact, the respondent-mother who would beat up the son over trivial issues and compel him to live with her at her parental home against his wishes. He claimed that the minor child was happily and willingly residing with him and had in fact refused to accompany the mother. He further claimed that the custody of the child had always been with him and the wife too had made a statement to that effect before the

JMIC, Chandigarh on 30th July, 2013 (in a petition filed under Section 26 of the Act), wherein, she had stated that she would not forcibly take the child away from the lawful custody of the father. Besides controverting rest of the averments of the mother, the father prayed for dismissal of the petition filed by her for seeking custody of the minor son.

From the pleadings of the parties, the following issues were framed by the Ld. Court below:-

- “1. Whether the petitioner is entitled for the custody of the minor child namely Shourya ? OPP*
- 2. Whether the petitioner has not approached the court with clean hands and concealed the material facts from the court ? OPR*
- 3. Relief.”*

Both the parties adduced evidence in support of their respective stands taken before the Ld. Court below. The respondent-mother herself stepped into the witness-box as PW-1. On the other hand, appellant-father examined himself as RW-1 and thereafter, closed his evidence.

After analyzing the evidence led by the parties and other material on record, Ld. Court below, allowed the petition filed by the mother and directed the father to hand over the custody of the minor son Shourya to the mother within a period of one month from the date of the impugned order.

We have heard learned counsel for the appellant and have reappraised the evidence and other material on record.

It may be noticed that during the pendency of the appeal, the parties who were present in the Court maintained their respective stands as

taken before the Ld. Court below and reiterated their allegations against each other. Learned counsel for the appellant-father vehemently argued that it would be unfair to uproot the child from his custody. It was further urged that the child was reluctant to reside with the respondent mother and hence it would be extremely traumatic for him to have his custody given to the mother against his wishes. He further submitted that the Ld. Court below gravely erred in arriving at a conclusion after an interaction with the child that it would be in the welfare of the child to be with the mother, without appreciating the evidence and material placed on record in the right perspective.

Learned counsel for the respondent-mother on the other hand strenuously urged that the son was not only being maltreated by the father, but was living under fear all the time, which was not conducive to his healthy and normal growth and hence custody had rightly been given to her.

It would be relevant to notice that in the impugned judgment, the Ld. Court below granted custody of the minor child to the mother, by observing as under:-

“Under the given facts and circumstances of the case taking into consideration the welfare of the minor child, I find it appropriate to interview the minor child Shourya in camera. Accordingly during the proceedings of this case, minor son Shourya has been interviewed by the undersigned in camera. Taking into consideration the welfare of the minor child, I don't find it appropriate to reproduce the contents of the interview conducted in the judgment. This interview of the

minor child done in camera by the undersigned has been kept in sealed confidential cover and this interview of the minor child became the turning point of this case. The interview of minor child thereafter helped the court to reach at an irresistible conclusion that it would be better and proper if the custody of minor son is restored to his mother i.e. petitioner – Manju. The interview of the minor child done in confidential led the court to reach at a decision that the welfare of the minor will be in a position if he resides with her mother than his father.”

In the background of the aforementioned observations of the Ld. Court below and the submissions made by both the parties before us, we deemed it fit to direct the Secretary, District Legal Services Authority, Chandigarh (in short 'Secretary, DLSA') to visit the place of residence where the minor son was residing with the appellant-father to hold an inquiry and interact with the minor child, so as to help this Court to arrive at a just decision. In pursuance of the directions of this Court, the Secretary, DLSA, Chandigarh, visited the child at the house where he has been residing with his father and paternal grandmother and submitted his report in a sealed cover. As per the report submitted to this Court by the Secretary, DLSA, Chandigarh, the minor child seemed well settled in his daily routine. Not only this he appeared to be a healthy child, who was pursuing a lot of extra curricular activities. He was doing well academically and was also very enthusiastic about his cricket coaching. The child during his interaction with the Secretary, DLSA, Chandigarh expressed a clear

preference and desire to continue staying with the father. It would also be relevant to notice that not only did the Secretary, DLSA, Chandigarh, interact with the child but also interacted with his father i.e. the appellant, paternal grandmother as well as the land lord of the premises. Since the report of the Secretary, DLSA, Chandigarh was at variance with the observations of the Ld. Guardian Judge, Chandigarh and respondent-mother had levelled serious allegations against the appellant-father of maltreating the minor child, we deemed it appropriate to direct the appellant-father to produce the minor child in the Court. Pursuant to the directions of this Court, the minor son Shourya was produced before us and we interacted with the child at length, in the absence of the parties, in our chambers.

It goes without saying that when a child is already in the custody of one parent, the other parent would have to make out a strong case for his/her custody. The custody of child can be granted only after a satisfaction has been arrived at, by the Court that the same would be in the welfare and in the interest of the minor child. While arriving at a decision *qua* the interest and welfare of the child, it would have to be ascertained:-

- i. Where would the child be happier ;
- ii. Where would the child get a better and more conducive environment for his/her overall development and growth ; and
- iii. Where and from whom the child would get love and affection, care, guidance and protection as and when required by him.

It is, thus, not a very easy task for the Court to decide the delicate issue of custody of a child of divorced parents. No doubt while

granting custody, the paramount consideration has to be the welfare of the

child, but if the child is sufficiently mature and grown-up to make a choice, then due weightage must be given to his wishes, which of course should be taken into account only after the Court has arrived at a satisfaction that the child's willingness or unwillingness to go or not to go with a particular parent is free from any outside influence or coercion.

As per the report of the Secretary, DLSA, Chandigarh and our interaction with the child, who is aged about 13 years, he came across as very mature for his age and a confident boy who was sufficiently grown up to make an intelligent preference as to with which out of the two parents he would like to live. He categorically stated he wanted to continue residing with his father with whom he admittedly has been living for the past 06 years. So much so, he even expressed his unwillingness and reluctance to go and reside with his mother in his maternal grandparents house. He spelt out the reasons for wanting to stay on with the father which were the same as noticed by the Secretary, DLSA, Chandigarh in his report submitted to this Court. Further, it was very apparent that the minor child Shourya is being provided with good education and he is living with his father happily and willingly. He spoke with a great deal of enthusiasm about his sport activities. Once the child has expressed his willingness to stay with a particular parent and has categorically expressed his unwillingness to go with the other parent, forcing him to go against his wishes would amount to subjecting the child not only to cruelty, but also trauma, which could leave its scars for the rest of his life. However, every child needs the love and affection of both the parents. Notwithstanding, the strained relations between the parents, the mother and the child cannot be deprived of each other's love and affection,

which is essential for the child's harmonious and balanced growth.

Having regard to the facts and circumstances of the case and after giving our thoughtful consideration as to what would be in the best interest of the child, we feel that the interest of the minor child will be better served if he continues living with the father but with sufficient access to the respondent-mother, who would visit and meet the minor son at frequent intervals.

The appellant-father would continue to have custody of the child, however, the same would be subject to the following terms: -

- I. The respondent-mother would meet her minor son Shourya twice a month i.e. on every 2nd and 4th Sunday of each month from 11:00 AM to 3:00 PM at any place convenient to both the parties. It would be open to the mother to take her son for an outing as per the schedule for their meetings.
- II. The respondent-mother is granted visitation rights on the birthdays of Shourya for three hours, as per mutual convenience and at a place convenient to both the parties.
- III. During the summer and winter vacations of Shourya, the respondent-mother would be permitted to have his custody for two weeks and one week, respectively, as per mutual convenience.

It is, however, made abundantly clear that the respondent-mother is not being held unfit for getting the custody of Shourya. As and when the son grows up and if the circumstances undergo some major changes, the mother would be at liberty to seek the custody of the son through

appropriate legal proceedings before the Family Court/appropriate Court.

Before parting, we would also like to make it amply clear that the appellant-father shall not create any hindrance or hurdle during the meetings between the respondent-mother and child.

Consequently, we set aside the impugned judgment and decree dated 19th March, 2019, passed by the Ld. Court below. The present appeal stands allowed in the above terms.

(RAJAN GUPTA)
JUDGE

(MANJARI NEHRU KAUL)
JUDGE

November 13, 2019

J.Ram

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No