

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

CR No.9234 of 2018 (O & M)

Date of Decision: April 11, 2019

Inderbir Singh

.... Petitioner

Versus

Amandeep Bains & Ors.

.... Respondents

CORAM: HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present: Mr. Sumeet Mahajan, Senior Advocate with
Mr. Amit Kohar, Advocate for the Petitioner.

Mr. Sahil Nayyar, Advocate for the Respondents.

SUDIP AHLUWALIA, J.

This Revisional Application is directed against the Order dated 04.12.2018 passed by the Ld. Additional Civil Judge (Senior Divison), S.A.S. Nagar, Mohali whereby the Application moved by Mrs. Amandeep Bains-Respondent No.1 seeking grant of interim and temporary custody of her minor child namely Sahib Inder Deep Singh, aged more than 8 years had been allowed.

2. The impugned order was passed on an Application for interim custody of the minor child moved by Respondent No.1 under Section 12 of the Guardians and Wards Act, 1890 (for short “the Act of 1890”) in her main Guardianship Petition, in which, the Petitioner, who happens to be her husband, and three other members of his family being his mother, brother and sister-in-law, who are Proforma Respondent Nos.2 to 4 in this Revisional Application, were made Respondents.

3. The background leading upto the filing of the Guardianship Petition by Respondent No.1 is chequered and somewhat unpleasant. Nevertheless, it is appropriate to first take note of the certain events starting from the marriage of the Petitioner and Respondent No.1, which took place on 12.8.2007. The minor child (son) namely Sahib Inder Deep Singh was born on 31.1.2012. The marital relationship between the parents was not smooth. The father i.e. the Petitioner had initially filed a Petition seeking dissolution of marriage against Respondent No.1 on 19.1.2018 which was subsequently withdrawn after some attempts at reconciliation. His grievance against his wife (Respondent No.1) was that she had treated him and his family members with physical and mental cruelty. On the other hand, contention of the wife was that the Petitioner, who is an IPS Officer, was involved in an extra marital affair with a junior lady Police Officer, on account of which, he had not only been mistreating his wife, but had also neglected to take appropriate care of his minor son as expected of a good father. After withdrawal of the initial Petition u/s 13 of the Hindu Marriage Act by the Petitioner, there was some sort of temporary reconciliation between the parties, by which time, he was posted as A.I.G., Policy and Rules at Chandigarh since April, 2018 and was also assigned additional charge as AIG Cyber Crime, Jalandhar one year later.

4. As a consequence of the reconciliation effected between the parties, both the parents alongwith minor child decided to shift to the Petitioner's parental house at Jalandhar, and they accordingly moved there with the minor child who initially was studying in

“Manav Mangal Smart School” at Mohali, but it had subsequently closed for summer vacations on 22.5.2018. The parties resided together in the family house of the Petitioner at Jalandhar with his other family members for about a month, after which some discord arose between them. A sequence of criminal case and counter case between them followed in which each side claimed to be the victim of physical violence/attacks by the other side with his/her family members. It is the Petitioner's claim that the Respondent-wife had herself returned with her parents from her husband's house in Jalandhar on the evening of 27.6.2018, although the version of the wife was that she had been assaulted and driven out of the house and that custody of the minor child was forcibly taken from her, even though he continued to be a student in “Manav Mangal Smart School” at Mohali.

5. Subsequently, the Respondent-wife filed a Habeas Corpus Petition, being CRWP No.540 of 2018 on 3.7.2018 seeking recovery of the minor child from illegal custody of the Petitioner and his family members. Notice of motion was issued on her Application for 17.7.2018, on which date, the Respondent-husband appeared in Court with the child, which was followed by attempts at fresh reconciliation between the parties, on account of which, the matter was adjourned to 21.9.2018. On that date, the Court awarded interim custody of the minor child to Respondent No.1-wife for two days with a direction to bring him back on 24.9.2018. But on the designated date, the Respondent-wife did not bring the child with her for handing over his custody to the Petitioner-husband, and on

the contrary, made certain serious allegations in the nature of sexual abuse/assault on the part of the Petitioner's brother against the minor child in the Petitioner's ancestral house. The concerned Bench, which was being presided over by Hon'ble Mrs. Justice Daya Chaudhary, J. then directed listing of the Habeas Corpus Petition before some other Bench, after which, the matter came up before Hon'ble Mr. Justice Kuldip Singh for further consideration. Thereafter, as seen from Paras 45 to 49 of the impugned Order, His Lordship took the minor child inside his Chamber to verify the serious allegations levelled by Respondent No.1 against the Petitioner's brother, and made note of what could be ascertained, and ultimately dismissed CRWP No.540 of 2018, as a consequence of which, the custody of the minor son was restored to the present Petitioner.

6. The Respondent-wife then approached the Ld. Court below seeking permanent as well as interim custody of the minor child under the Act of 1890. After hearing both sides, her Application was allowed by the Ld. Court below. The relevant extracts from the impugned order on the basis of which, the custody of minor child has been directed to be passed on in favour of Respondent-mother, are set out as below -

“108. After hearing the submissions of Ld. Counsel for the parties, respondent No.1 and perusing the record, this Court is of the view that interim custody of the minor Sahib Inder Deep Singh is liable to be granted to the petitioner Amandeep Bains on account of the following discussion.

109. The law laid down in the rulings cited by the Ld.

Counsel for the petitioner is not in dispute. The paramount consideration with the Court in custody matters is the welfare of the child and not the rights of the parties as per the statute, as per the law laid down in the rulings and as per statute.

110. Keeping in view the above principle, the facts of the case would show that the petitioner, who is the mother of the minor, at this stage, is in a better position to take care of the minor child and the best interest/welfare of the child would lie with the mother.

121. In the totality of the circumstances, the welfare of the minor child would be better taken care of, in case the custody is granted to the petitioner mother.

122. The respondents are directed to hand over the custody of minor child Sahib Inder Deep Singh to the petitioner mother.

123. The respondent No.1 is granted visitation rights to meet the minor child once in a month at a place of mutual agreement between the petitioner and respondent No.1. In the event the parties are unable to reach at a mutual agreement qua the place of meeting then the respondent No.1 can meet the child from 3 PM to 5 PM on every first Saturday at Mediation and Conciliation Centre, SAS Nagar, Mohali.”

7. Aggrieved with the above order, the Petitioner has approached this Court seeking to have the impugned order set aside. The matter has been contested hotly by both sides, and during the course of such contest, there have been allegations/counter allegations of misbehaviour and improper conduct imputable to both the sides and their respective family members. In view of the level of vehemence observed during the hearing, this Court on 21.12.2018 after a close

interaction with the minor child had directed the Petitioner to produce the said child at the Mediation and Conciliation Centre at Chandigarh on each Saturday between 11 AM to 5 PM in order to understand exactly what the wish of the child is, for the eventual purpose of bringing about a tangible closure to the bitterly contested disputes between the parties, and Dr. Aman Preet Kaur Sandhu, a trained Mediator of this Court was appointed Mediator for this purpose. Subsequently on 18.1.2019, the Ld. Mediator was requested to give a summary of her observations, impression, and recommendations, if any, in view of her various interactions with the minor child and the parties in between. She subsequently submitted her report in a sealed cover on 22.2.2019. This Court glanced over the report and got it sealed again, and thereafter before taking a final call regarding long term custody arrangement of the minor child observed -

“The Ld. Mediator has submitted her report in a sealed cover in compliance of the earlier order dated 18.01.2019.

Before taking a final call regarding long term custody arrangements of the minor child, this Court is inclined to satisfy itself about the following vital aspects emerging in the controversy as of now:-

- 1) The respondents' side to clarify as to how studies of the minor child shall not be affected, and whether the school in which he was originally admitted would be willing to accept him without any adverse consequences to the minor;*
- 2) Whether the respondents' side would be in a position to bear the financial burden of the minor's education and general upbringing without imposing any substantial burden on the petitioner's side.*

Let answers to these queries be placed before this Court on behalf of the respondents on 08.03.2019.

Petitioner's side is also at liberty to place on record any other facts or material, considered relevant to the controversy.

Let the minor child be produced before this Court on the next date of hearing.

In the meantime, the existing arrangement in terms of the previous orders shall continue.”

8. Two days before the next date fixed (8.3.2019) however, the Respondent's Application (CM No.5210-CII of 2019) for modifying/ vacating the interim order with prayer to permit visitation rights to her, came up before this Court, in which it was made out that the Petitioner had unilaterally intimated the Mediator that he would not be able to come to the Mediation and Conciliation Centre at Chandigarh with the minor child on 2.3.2019 due to some outstation assignment. The prayer for interim custody at that stage was rejected since the matter was already fixed for final hearing for that purpose only two days later, but in view of the averments made in the said Application (CM No.5210-CII of 2019), it was directed that on the fixed date (8.3.2019), the Petitioner would be required to make the child to meet Respondent No.1 in the first half of the day in the presence of the Mediator (in terms of the earlier arrangement), after which the matter would be placed before this Court in the second half. Subsequently, the Respondent has also submitted her verified response supported by an affidavit in compliance of the directions of this Court passed on 22.2.2019.

9. In a nutshell, it has been made out therein that Transfer Certificate of the minor son from “Manav Mangal Smart School”

was not issued at any stage, on account of which, he continues to be a student of that School. A Certificate dated 6.3.2019 issued by the Principal of the School has also been appended by the Respondent in which it has been stated that *'in the overall interest of Mst. Sahibinder Deep Singh (Admission No.6252), we shall have no reservation in accommodating him in Class III for the Academic Session 2019-2020 in the event of the child giving his final exams in the School where he is presently studying, and presents his Report Card after which he may be promoted to Class III in the Academic Session 2019-2020 after holding special examinations for him.*

10. In addition, it has been mentioned in the Respondent's detailed response that she is fully dependent upon her parents for financial support and living expenses besides the expenses of minor child and that both her parents are eminent academicians and fully supportive of her, apart from her brother who is a highly qualified professional and a practising lawyer in this Court with his independent and separate income. It has also been made out that there are no household liabilities or loans and other expenses of family of Respondent No.1, who are also possessed of ample funds in family savings and that she from her own accumulated savings over the years had made an FDR for the sum of Rs.8 Lacs in the name of the minor child which is maturing on 20.7.2019. Therefore, according to Respondent No.1 -

“ 16. That the entire financial burden, household expenses, school fees etc. besides all other expenditure of the minor child will be borne by the parents of respondent no.1 who have been already bearing the expenses of the minor child since 2014 onwards. The tuition fees of the

minor child from 2015 to May 2018 was paid by the petitioner. Thereafter, from July 2018 onwards the tuition fees of the minor child and other school charges have been paid by the parents of respondent no.1. However, the parents of the respondent no.1 will bear the tuition fees and other school expenses upon the return of the minor child at Manav Mangal Smart School, Mohali besides all other expenses etc. Hence, no substantial financial burden will be imposed on the petitioner.

17. That in the totality of the above facts and circumstances, no substantial financial burden would be imposed on the petitioner for the upbringing, education, maintenance and upkeep of the minor child since the parents of respondent no.1 would be happy and willing to provide all these facilities and funds to their grandson i.e. minor child as they have been doing since 2014.”

11. After concluding the arguments, this Court also had direct interaction with both the parties individually, as also the minor child separately, and after thus considering the entire facts and circumstances as well as the arguments and submissions raised by the Ld. Counsel for the parties, now proceeds to put on record its final observations in the light of the contentions raised by both the sides in the following paragraphs.

12. The first and foremost ground seeking restoration of the custody by the Petitioner-father is that he being a well qualified with a high status having sufficient Salary and Perks provided to him would be in a better position to look after the child's welfare in comparison to the Respondent-wife, who admittedly does not have any regular income inspite of being otherwise highly qualified having completed her LLM Course. The Petitioner has re-asserted that he is an IPS Officer of 2007 Batch holding a good status,

drawing handsome salary and perquisites. In the opinion of this Court however, this submission of the Petitioner is not reason enough to hold that he is necessarily better suited to provide for the welfare of minor child as compared to the Respondent-wife.

13. Not only the trained Mediator in her report, which is on record, had mentioned that personal preference of the minor child is for living with his mother, even though he admittedly also is attached to his father. This was also the minor's answer to the Court's query during the interaction in closed doors on 8.3.2019. Needless to add, the minor child certainly appeared to be possessed of rather exceptional intelligence and a degree of maturity beyond his biological age of which not only the Mediator has taken note in her report, but which is also established from his excellent Academic Performance Report, which itself is a part of the record. In such circumstances, the mere fact that the Petitioner-father is a high ranking Police Officer, good salary, status and perquisites is in itself not a sufficient ground to hold that welfare of the child would necessarily be better ensured by retaining his custody. In this context, this Court cannot be unmindful of the fact that the Respondent-wife and her immediate family members including parents are both eminently placed and experienced academicians and by the admitted case of the Respondent well placed and provided for financially to support the minor child, whose own wish does appear to be to live with his mother, without altogether discarding the association with his father.

14. The next argument raised on behalf of the Petitioner-father

was that educational pursuits and intellectual growth of the minor child can be better assured by retaining him in his present School which happens to be 'Mayor World School, Jalandhar' which is affiliated to the Prestigious Mayo College at Ajmer (Rajasthan), in which, the child was admitted on 10.7.2018, and which School according to Petitioner is much more prestigious in comparison to his earlier "Manav Mangal Smart School" at Mohali. This submission of the Petitioner also does not impress the Court to any great extent. It needs to be remembered that at this stage, the minor son is only a student of Class-II at an essentially formative age. There is no reliable empirical Data to the knowledge of this Court that children studying in relatively prestigious Schools necessarily turn out to have better careers or personality development in comparison to those from less glamorous but otherwise respectable Institutions. On the contrary, many of the successful people and intellectually advanced persons well placed in life are pass outs from normal academic Institutions. In this backdrop, considering the declared own preference of the concerned child qua the normal custody in favour of his mother, an argument that his academic pursuits and intellectual development would stand to be compromised by putting him back in Manav Mangal Smart School at Mohali is found untenable.

15. A number of decisions of Supreme Court regarding the principles governing custody of the minor children in contested Guardianship cases have been cited before this Court. In '**Mausami Moitra Ganguli Vs. Jayant Ganguli**' 2008 (4) RCR (Civil) 551

the Apex Court had directed the grant custody of a minor child to his father on observing that he was reluctant to remain with his mother considering that he reacted adversely even at the suggestion of remaining with his mother for some time, and was totally reluctant to remain with his mother.

16. In '**Nil Ratan Kundu and another Vs. Abhijit Kundu**' (2008) 9 Supreme Court Cases 413, it was held by the Supreme Court inter-alia -

“71. In the instant case, on overall considerations we are convinced that the Courts below were not right or justified in granting custody of minor Antariksh to Abhijit-respondent herein without applying relevant and well-settled principle of welfare of the child as paramount consideration. The trial Court ought to have ascertained the wishes of Antariksh as to with whom he wanted to stay.

72. We have called Antariksh in our chamber. To us, he appeared to be quite intelligent. When we asked him whether he wanted to go to his father and to stay with him, he unequivocally refused to go with him or to stay with him. He also stated that he was very happy with his maternal grand-parents and would like to continue to stay with them. We are, therefore, of the considered view that it would not be proper on the facts and in the circumstances to give custody of Antariksh to his father, the respondent herein.

73. For the foregoing reasons, the appeal deserves to be allowed and is accordingly allowed. The application filed by the respondent. Abhijit for custody of his son, Antariksh, is ordered to be dismissed. In view of the facts and circumstances of the case, however, there shall be no order as to costs.”

17. The above judgment is in full consonance with Section 17(3) of the Act of 1890, which provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference. In this particular decision, the concerned minor child who was aged six years was found to be quite intelligent by Hon'ble Judges of the Court, who interacted with him in Chambers, and on his refusal to go and stay with his father and in view of his preference for his grand parents, the father's request for having his custody was rejected.

18. In '**Gaytri Bajaj Vs. Jiten Bhalla**' (2012) 12 Supreme Court Cases 471, it was observed by the Supreme Court inter-alia -

“14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasised is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

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16. Taking into account all the aforesaid facts, we dismiss these appeals, affirm the impugned orders

passed by the High Court of Delhi and deny any visitation rights to the petitioner and further direct that the children would continue to remain in the custody of their father until they attain the age of majority.”

19. From the Respondent's side, it has been made out that welfare of the minor child would be seriously compromised if he is allowed to remain in father's house in view of the fact that his uncle (i.e. Petitioner's younger brother) had allegedly tried to sexually abuse him. There is no material to support this contention in the Mediator's report, nor anything to support this allegation was stated by the minor child during his closed doors interaction with this Court. The only available material in this regard which was shown to this Court was the alleged Video recording in the Mobile Phone of the Respondent-Wife, in which she is seen to repeatedly prompting the child to 'tell what had happened', while the response of the child is muted and not verbally free flowing. The observations made by brother Kuldip Singh, J. earlier in CRWP No.540 of 2018, which was filed by the Respondent-wife and was ultimately dismissed, which are a matter of record, also do not give much importance to the perceived apprehension of sexual abuse. On the contrary, it may be mentioned that in many of the contested custody cases pertaining to minor children, this Court has noticed a pattern of similar allegations of sexual abuse being made at one of the family members of a contesting parties against the other side. As such, this Court is of the opinion that while normal custody of the minor child ought to be granted to the Respondent-wife, but at the same time, he cannot be deprived of the company of his father or temporary

residence in his father's ancestral house simply due to the assertion that he faces the risk of some kind of sexual abuse by his uncle there.

20. In view of the aforesaid totality of circumstances, this Court is of the opinion that in the overall interest of the child's welfare as apparent at this stage, his interim custody should be restored in favour of his mother i.e. Respondent No.1, but with adequate provisions of visitation rights in favour of his father, in accordance with the child's own desire, wish and preference, as could be ascertained from his personal interaction and Mediator's report.

21 The Revision is therefore, disposed off by affirming the impugned order subject to the following modifications -

(i) That while custody of the minor child Master Sahib Inder Deep Singh shall be handed over by the Petitioner to the Respondent-wife at the Mediation and Conciliation Centre at Chandigarh at 11 AM on 13th April, 2019, the minor child shall thereafter live with his mother during the pendency of the main Guardianship Petition subject to the conditions that Respondent-mother shall similarly deliver his custody to the father at 5 PM on each succeeding Friday, during which period, the minor shall live with his father for the weekend and shall be returned to the Respondent-wife either at her parental residence in Chandigarh or at any other fixed spot of their concurrence by 6 PM on Sunday;

(ii) That when the School of the minor child closes for any vacation, his custody for the first half of the vacation period shall be with the petitioner-father from the morning of the first day of vacations, who will thereafter return the child to his mother on the evening of the day on which half of the vacation period expires;

(iii) That when any festival or other important occasion such as the child's own birthday is approaching, the wishes of the child will be ascertained by both the parents, who may record his preference on Camera, at the time when the child is to be handed over back to the Respondent-wife on any given Sunday evening immediately before the date of the concerned Festival or occasion and, in the event of any default on the part of the Respondent-wife to deliver custody of child to his father for such festival or occasion if he so desires, and also in the event of any default on the part of the Respondent-wife to deliver custody to the Petitioner-father for weekends or at the start of commencement of the vacations as directed in this order, the petitioner-father will be at liberty to approach this Court to get this order modified, and to seek any other appropriate remedy. In fine, the Respondent-wife is cautioned to be mindful of the likely consequences that may accrue if she fails to comply with the Court order as had happened once on 24.9.2018, on which occasion, an

esteemed Judge of this Court Mrs. Daya Chaudhary, J. had chosen to recuse herself from the dispute, which in the opinion of this Court, allowed the Respondent-wife to be let off for the default of that occasion rather lightly, and such benevolence need not be taken for granted by the Respondent-wife in future.

(SUDIP AHLUWALIA)
JUDGE

April 11, 2019
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|--------------------------------|--------|
| 1. Whether speaking/reasoned ? | Yes/No |
| 2. Whether reportable ? | Yes/No |