

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

**FAO No.5472 of 2018 (O&M)
Date of decision: 11.02.2020**

Hardeep Singh

..Appellant

Versus

Paramjeet Kaur

..Respondent

**CORAM: HON'BLE MRS. JUSTICE DAYA CHAUDHARY
HON'BLE MRS. JUSTICE MEENAKSHI I. MEHTA**

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

Mr. P.P.S. Tung, Advocate for
Mr. G.S. Toor, Advocate
for the respondent.

Daya Chaudhary, J.

Appellant-Hardeep Singh is aggrieved by judgment dated 04.07.2018 passed by learned Additional Civil Judge (Senior Division)-cum- Guardian Judge, Ludhiana, whereby petition filed under the Guardian and Wards Act and Hindu Minority and Guardianship Act, 1956 for the custody of minor child, namely, Satnam Singh Samra, has been allowed partly.

The appellant filed a petition before learned Additional Civil Judge (Senior Division)-cum-Guardian Judge, Ludhiana stating therein that marriage between the parties was solemnized on 28.09.2003. Three children i.e. two daughters and one son, namely, Noorpreet Kaur, Harmanpreet Kaur and Satnam Singh Samra, respectively, were born. Some differences arose between the parties and both the female children were residing with their father Hardeep Singh and son was residing with mother-Paramjeet Kaur. It

was also mentioned in the petition that respondent-wife was having illicit relations with some other person and the minor son was not being looked after properly, which had affected the upbringing as well the education of the child. It was also alleged that the minor was being neglected whereas for having custody of minor child, his welfare was required to be taken into consideration. The petition filed by the appellant-Hardeep Singh was partly allowed vide order dated 04.07.2018 by giving visitation rights.

Aggrieved by said judgment, the present appeal has been filed by raising various grounds.

Learned counsel for the appellant submits that the welfare of the minor child has not been taken into consideration as there was specific allegation regarding negligence on the part of respondent-wife. Learned counsel further submits that neither the respondent-wife chose to contest the proceedings nor any reply was filed. In absence of appearance of the respondent-wife, an adverse inference should have been drawn against her and claim of the appellant should have been considered. Learned counsel also submits that the Guardian Court should have considered that the minor child has a right to meet his siblings, who are in care and custody of appellant-father.

Learned counsel for the respondent has opposed the submissions made by learned counsel for the appellant by stating that the detailed speaking order has been passed and there is no infirmity in the impugned judgment. A specific finding has been given that the respondent-mother is taking care of the minor son and it cannot be said that the welfare

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of the minor child has not been taken care. The visitation rights have been granted to the appellant-father.

Heard arguments of learned counsel for the parties and we have also perused the impugned judgment as well as other documents available on the file.

Facts of the case are not disputed. Both the parties are having three children i.e. two daughters and one son. Both the daughters are residing with appellant-father and minor son is residing with respondent-mother. It has not been mentioned that how the welfare of the minor son cannot be taken care by the respondent-wife.

The role of the mother in the development of child's personality cannot be doubted. The company of the mother is the most natural thing for a child so long as the mother does not suffer from any disqualification. It is only in such circumstances when she is unable to take care of the child due to financial restraints, otherwise the wife is having love and affection, which is necessary for care and bringing up of the minor child. The company of the mother is always full of love and affection and it cannot be said in any manner that the interest of the minor child is not being looked after. No doubt the company of both parents is required for the proper care and development of the personality of the children but in case, some differences arose between the parties, which are unavoidable due to any circumstances, it is necessary for the Courts to come to a judicial decision by considering the question of welfare of the children. Simply by saying that father is having more liking and child is being ignored by the mother cannot

be a factor to have the custody of minor child.

It has been observed by Hon'ble the Apex Court in ***Rosy Jacob vs. Jacob A. Chakramakkal, AIR 1973 Supreme Court 2090*** that in case of conflict or dispute between the mother and the father about the custody of their children, the approach has to be different. The children are not mere chattels and they are not mere play-things for their parents. The prime consideration is the welfare of the children so that they may grow up in a normal balanced manner to be useful members of the society. In case of dispute between the mother and the father, a balance is required to be maintained, which is the requirement of welfare of the minor children.

In Division Bench judgment of the Karnataka High Court in ***Chethana Ramatheertha vs. Kumar V. Jahgirdar, 2003(3) RCR (Civil) 52,*** the following observations have been made in para No.25:-

“25. The role of the mother in the development of a child's personality and her ability to do so can never be doubted. In fact, a child gets the best protection and education only through the mother even in nature. It is a most natural thing for any child to grow up in the company of one's mother. In fact the question always should be as to whether a child should be deprived of the company of the mother. Company of the mother is the most natural thing for a child. That is what nature has evolved over a period of generations. So long as the mother does not suffer from any disqualification, she

does not disentitle herself to bring up her child. It is only because of her own misconduct or misdeeds or when she is not in a position to take care of the child due to reasons financially or otherwise, the custody should be shifted from the mother. Neither the father nor any other person can endow the same kind of love, affection, care and sympathies to a child that as of a mother. Company of a mother may be in fact much more valuable particularly to a growing up female child and until and unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother. The question is not so much as to whether father or mother gets the custody of the child, but as to whether the child should be deprived of the company of the mother. In fact, it can be presumed as a proposition of considerable weight and justification that the company of the mother is always in the welfare of the minor child until and unless the contrary is established. This basically we think, should be the approach of any Court while considering the question of granting the custody of a minor child to either of the parents. The mother, because of her position alone, scores over the father and to alter this position, it calls for definite material indicating the disqualification or disentitlement on the

part of the mother vis-a-vis the adverse interest to the child or the welfare of the child being put to jeopardy.”

While deciding the issue of custody of minor, the Court is to see the welfare by considering it as first and paramount consideration and not the legal right of any particular party. While making such order for appointing a guardian for the person of minor, the test requires to see as to what order and under what circumstances for securing the welfare and happiness of the minor can be. It is to be seen as to with whom the minor will be happy. It is also to be seen as to who is most likely to contribute to the well-being of the minor and also as to who is likely to bring up and educate the minor in the manner required to develop the entire personality, worthy of living, keeping the interest, well-being and happiness of the minor. The proper custody depends upon the circumstances, and in particular, upon the minor's position and prospects in life.

Hon'ble the Apex Court in ***Dhanwanti Joshi vs Mahadev Unde, 1999(1) Femi-Juris CC 336 (SC)*** has held as under :-

*“ ...The welfare of the child is not to be measured by money alone nor by physical conform only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.” ... As to the “secondary” nature of material considerations, Hardy Boys, J., of the New Zealand Court said in ***Walker v. Walker and Harrison,****

*(See 1981 N.Z. Recent Law 257) (cited by British Law Commission, working paper No.96, para 6.10)...
“Welfare is an all-encompassing word. It includes material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationship, that are essential for the full development of the child’s own character, personality and talents.”*

In a case of custody of a minor child, the dominant factor for consideration before this Court is the 'welfare' of the child, which cannot be measured by money or by physical comfort alone. The word 'welfare' has to be taken in its widest sense. The moral and religious 'welfare' of the child as well as his physical well being and the tie of affection are not to be disregarded.

In ***Gaurav Nagpal vs. Sumedha Nagpal, 2008(4) RCR (Civil) 928*** holding that the paramount consideration is welfare of the child and not right of parents under a statute, the law enunciated by the Apex Court was summed up as under:-

“(1) Grant of custody of minor child by court--

Though the provisions of the special statutes which govern the right of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases.

(2) Father is natural guardian, but for custody of child paramount consideration is as to what is conducive to welfare of minor.

(3) When conflicting demands are made by parents, court then should not give emphasis on what the parties say - Court has to exercise a jurisdiction which is aimed at welfare of minor.

(4) Children are not mere chattels nor are they toys for their parents.

(5) Even if father loved the children and was not undesirable person would not necessarily lead to conclusion that welfare of children would be better promoted by granting custody of children to father.

(6) In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship."

Similarly, Hon'ble the Apex Court in ***Mausami Moitra Ganguli vs. Jayant Ganguli, (2008) 7 SCC 673*** has observed as under: -

"19. The principles of law in relation to the custody of a minor child are well settled. It is trite 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. Indubitably the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the

Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

In the present case, all the factors have been taken into consideration and a detailed speaking order has been passed. It cannot be said in any manner that the findings are perverse or stand of the appellant has not been taken into consideration. Although there are allegations of adultery but the same have not been proved. Minor son is residing with the respondent-wife since the time of separation of the parties. Moreover, two minor daughters are already residing with the appellant-husband.

Accordingly, keeping in view the facts as well as the ratio of judgments as discussed above, we find no merit to interfere with the impugned judgment and the present appeal is hereby dismissed. However, keeping in view the interest of children and the parties, the appellant-husband along with both the daughters is given visitation rights to meet the minor son once in a month i.e. second Sunday of every month between 2:00 pm to 5:00 pm in a nearest Mall to the house of the respondent-wife in

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Ludhiana. It is also directed that the respondent-wife will not prevent the child from receiving any gift that may be given by the appellant-husband. In addition to visit, which is once in a month, the appellant-father along with both the daughters is also at liberty to meet the minor son on festival like Raksha Bandhan, Diwali and Holi.

(DAYA CHAUDHARY)
JUDGE

11.02.2020
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(MEENAKSHI I. MEHTA)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes