

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

119

CRWP-9419-2022

Date of Decision: 29.10.2022

Narinder Kumar @ Nindi

... Petitioner

VS.

State of Punjab & Ors.

... Respondents

CORAM: HON'BLE MR.JUSTICE SANDEEP MOUDGIL

Present: Mr. Nakul Sharma, Advocate for the petitioner

Mr. Rajiv Verma, DAG Punjab

Mr. Bhupinder Ghai, Advocate for respondents No.4 to 6

Sandeep Moudgil, J. (Oral)

The instant petition under Articles 226/227 of Constitution of India has been filed for issuance of a writ in the nature Habeas Corpus to release the detenu namely Kunal aged 9 years, who is stated to be in illegal custody of respondents No.4 to 6, who are the members of maternal family of the petitioner's deceased wife.

Learned counsel for the petitioner contends that his wife (mother of the detenu) had committed suicide on 01.01.2020 and FIR No.01, dated 02.01.2020, under Section 302 and 306 IPC was got registered against the petitioner at Police Station City Ferozepur. He further submits that in that FIR the petitioner has been acquitted of the charges leveled against him in the charge sheet, vide judgment of acquittal dated 31.03.2022 passed by the learned Additional Sessions Judge, Fast Track Court, Exclusively dealing with Rape Cases, Ferozepur (Annexure P-4).

Notice of motion was issued on 29.09.2022 and considering the peculiar facts and circumstances, respondent No.2- Commissioner of Police,

Ludhiana was directed to produce the minor child namely Kunal in Court along-with private respondents.

Today, the minor child Kunal and his maternal uncle have come present in Court.

I have heard learned counsel for the parties and gone through record and the averments, oral as well as document, advanced on behalf of the parties.

The statutes governing the custody of a minor principally are The Guardians and [Wards Act](#), 1890 and The Hindu Minority and [Guardianship Act](#), 1956. [Section 7](#) of The Guardians and [Wards Act](#), 1890 gives power to the Court that if it is satisfied that it is for the welfare of a minor that an order should be made, it may make an order appointing a guardian of his person or property, or both, or declaring a person to be such a guardian. [Section 8](#) of the 1890 Act lays down that no order under [Section 7](#) will be made except on the application of the person desirous of being, or claiming to be, the guardian of the minor or any relative or friend of the minor or the Collector of the district in which the minor ordinarily resides or in which he has property or the Collector having authority with respect to the class to which the minor belongs. Further, [Section 17](#) of the Act enjoins upon the Court to have due regard to the personal law of the minor and specially take note of the circumstances which point towards the welfare of the minor in either appointing a guardian or declaring a guardian. If the minor is old enough to form an intelligent preference, the court may be justified to consider that preference also in coming to the final conclusion.

The Hindu Minority and [Guardianship Act](#), 1956 was enacted as a law complementary to the Guardians and [Wards Act](#), 1890. The definition of word 'minor' as per the 1956 Act is “to be a person who has not completed the age of eighteen years”. 'Natural guardian', according to this Act, means any of the guardians mentioned in [Section 6](#). [Section 6](#) says that the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in the joint family property) are - (a) in the case of a boy or an unmarried girl, the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. [Section 13](#) of the Act lays down that in the appointment or declaration of any person as guardian of Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

A comparative reading of the above-reproduced provisions of the two Statutes, with the Statement of Object and Reasons, make it clear that the welfare of the minor is of predominant consideration and the legal rights of a person claiming to be the ‘guardians’ or claiming to be ‘entitled to the custody’ would play a very insignificant role in the determination by the Court.

In a [Rajeswari Chandrasekar Ganesh v. State of Tamil Nadu & Ors. 2022 SCC OnLine SC 885](#), the Apex Court in deciding a petition seeking right of habeas corpus in a matter relating to custody of a child discussed the principles relating to custody of a child in detail by referring to a catena of Indian and Foreign decisions. In the said decision, the Apex court observed that while considering the competing claims of guardianship, the

test would be to see what would best serve the welfare and interest of the child. It was also observed that, in all circumstances, the overall social and mental welfare of the minor child would prevail over the legal rights of the competing parties.

The principles of law relating to the custody of a child that are relevant for the present purpose and discussed lucidly in the said judgment are reproduced herein under:-

“83. In the case of [Anjali Kapoor v. Rajiv Baijal](#), (2009) 7 SCC 322, where the custody of a minor child was being claimed by the father being the natural parent from the maternal grandmother, the mother having died in child birth, it was held that taking proper care and attention in upbringing of the child is an important factor for granting custody of child, and on facts, the child having been brought up by the grandmother since her infancy and having developed emotional bonding the custody of the child was allowed to be retained by the maternal grandmother. While considering the competing rights of natural guardianships vis-a-vis the welfare of the child, the test for consideration by the Court was held to be; what would best serve the welfare and interest of the child. Referring to the earlier decisions in [Sumedha Nagpal v. State of Delhi](#), (2000) 9 SCC 745; [Rosy Jacob v. Jacob A. Chakramakkal](#), (1973) 1 SCC 840; [Elizabeth Dinshaw v. Arvand M. Dinshaw](#), (supra) and [Muthuswami Chettiar v. K.M. Chinna Muthuswami Moopanar](#), AIR 1935 Mad 195, it was also held that the welfare of child prevails over the legal rights of the parties while deciding the custody of minor child.

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word ‘welfare’ must be taken

in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.

The question as to what would be the dominating factors while examining the welfare of a child was considered in [Walker v. Walker & Harrison, 1981 New Ze Recent Law 257](#) and it was observed that:-

"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 18 compassionate relationships that are essential for the full development of the child's own character, personality and talents." (emphasis supplied) In a matter of the child custody the court is exercising parens patriae jurisdiction. The Court is required to give due weight to the ordinary comfort of the child, contentment, intellectual, moral and physical development, health, education and general maintenance, and the favourable surroundings. The Court is not bound either by statutes nor by strict rules of evidence nor procedure or precedent. In deciding the issue of custody, the paramount consideration should be the welfare and well-being of the child¹.

It is the duty of the Court to ensure that the child is required to be kept away from negative influences and stressful atmosphere. The Court has a special responsibility to consider the welfare of the minor and to protect the minor's interest.

¹ Ratan Kundu v Abhijit Kundu reported in 2020 (12) SCC 248 at paragraph 17

The word "welfare" used in [Section 13](#) of the Hindu Minority and [Guardianship Act](#), 1956 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. Though the provisions of the special statutes which govern the rights 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. A child does not fully understand who the biological father is or who is biological mother. Child only understands his or her need satisfaction and emotional comfort and gratification.

Besides, the father's fitness to be the guardian, the love and affection of the grandparents for the minor, the environment and atmosphere prevailing at father's place as opposed to the maternal home of the mother, the education and favourable surroundings, ethical and moral values at her father's place and above all physical and mental comfort the child is likely to receive at father's place has compelled this Court to consider if the custody is to be given to the father vis-à-vis maternal uncle.

Coming to the merits of the case, this Court had a brief interaction with the minor child Kunal at the dias of the Court. The child seemed bit nervous but was open for suggestion. The Court initially made the child comfortable with the court ambience and made the child chuckle by normal conversation. When asked as to who's company the child would like to prefer: the child answered to go with the father and said that he loves his father.

Since the child only understands his or her need satisfaction and emotional comfort and gratification and keeping view the choice made by the child himself coupled with the overall moral and religious welfare of the child as well as its physical well-being and also the fact that the ties of affection cannot be disregarded, this Court has not even an iota of doubt that it would be in the fitness of things that the custody of the minor child Kunal is handed over to the father in court today itself. The child will accompany his father who has been interacted in court in person and showed happiness to go with his father with a broad smile on his face which shows satisfaction and contentment of all the lawyers present for the respective parties to the present lis.

Notwithstanding what all has been observed above, this order will not be of any kind of embargo for the child to meet his maternal uncles vis-à-vis for the maternal uncles to visit their nephew as and when they desire to share their love and affection.

This Court orders accordingly and disposes of the present criminal writ petition in view of the observations made above.

29.10.2022

V.Vishal

1. *Whether speaking/reasoned?*
2. *Whether reportable?*

(Sandeep Moudgil)
Judge

Yes/No
Yes/No