

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

FAO-7246-2019 (O&M)
Date of decision: 16.05.2022

Balwinder Kaur

...Appellant

Vs.

Rajinder Kumar @ Raju

...Respondent

**CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MR. JUSTICE ASHOK KUMAR VERMA**

Present: Mr. Arun Singla, Advocate,
for the appellant.

Mr. Arjun Veer Sharma, Advocate,
for the respondent.

Ritu Bahri, J. (oral)

The present appeal has been filed against the judgment dated 18.09.2019 passed by the Additional Principal Judge, Family Court, Jalandhar, whereby petition filed by Balwinder Kaur-petitioner (appellant herein) under Section 6 of the Hindu Minority and Guardianship Act, 1956 and the Guardian & Wards Act, 1890, for taking custody of the minor children namely, Anjna and Pratham (date of birth 20.03.2010 & 22.11.2011 respectively) from Rajinder Kumar @ Raju-respondent, has been dismissed.

Marriage between the parties was solemnized on 16.03.2008 at Mehatpur, Tehsil Nakodar, District Jalandhar, as per Hindu rites and rituals. Out of this wedlock, both the above named children were born. It was stated that approximately 10/15 days prior to filing of the petition before the Family Court, she (Balwinder Kaur) was kicked out of the matrimonial house by the respondent and his family members namely, Darshna-mother,

Davinder-brother and Jyoti wife of Davinder. Both the children were forcibly kept by them in the matrimonial house. Hence, the petition.

Upon notice of the petition, respondent-husband (respondent herein) filed written reply taking preliminary objections with regard to maintainability; non joinder of necessary parties; estoppel; concealment of facts etc. Case pleaded by the respondent was that his father-in-law did not have any son and he wanted his son-in-law to stay with him. His wife had left the matrimonial house without any cause. In that regard, he had filed a complaint before the police, however, the matter was compromised and the wife (appellant) had agreed to join the company of respondent. It was further stated that during the pendency of petition before the Family Court on 09.02.2017, an attempt was made by his wife and her father to take the custody of both the children. But, due to the intervention of inhabitants of the locality, they could not do so. The said matter was also reported to the police. All other allegations levelled by the petitioner-wife were denied and prayer for dismissal of the petition was made.

From the pleadings of the parties, following issues were framed:

1. Whether the petitioner is in capacity to look after the minor children Anjana and Pratham in a better way? OPP
2. Whether the petition of petitioner is barred by provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956? OPR
3. Whether petitioner has not come to the Court with clean hands and has concealed the material facts from the Court?
OPR.

4. Whether petition is bad for non-joinder of necessary parties?

OPR

5. Whether petitioner is estopped to file the present petition by her act and conduct? OPR

6. Whether present petition is not properly valued for the purpose of Court fee and jurisdiction? OPR

7. Whether petition is not maintainable in the present form?

OPR

8. Relief.

In order to prove her case, petitioner-wife (appellant herein) herself stepped into the witness box as AW-1 and reiterated her version as given in the petition.

On the other hand, respondent-husband appeared into the witness box as RW-1 and tendered into evidence copy of visit slip Ex.R1, information received under the Right to Information Act Ex.R2, copy of complaint moved by the respondent to the police Ex.R3 and certified copy of the application under Section 24 of Hindu Marriage Act as Ex.R4. Respondent also tendered some more documents i.e. certified copy of order dated 23.10.2017 Ex.RA, certified copy of the application for maintenance Ex.RB, certified copy of the application for interim maintenance Ex.RC, copy of birth certificate of Anjana Ex.RD and copy of birth certificate of Pratham Gill as Ex.RE.

Family Court, after going through the evidence led by the parties, dismissed the petition on the ground that as per cross-examination of petitioner-wife (AW-1), it transpired that she did not have sufficient means to look after the children. She had admitted that the minor children

were living with the respondent since 05.08.2016 and were regularly attending the school. On the other hand, respondent-husband was living in his own house. He is owner of one shop of Radium Number Plates. Petitioner-wife (AW-1) further admitted that income of respondent-husband was about Rs.1000/- to Rs.1500/- per day, whereas her own income was hardly about Rs.3000/- to Rs.4000/- per month. She also admitted that both the children were above the age of 5 years and every facility was available at the place, where her husband was living. However, she did not have all the facilities at the place, where she was living. She further stated that she did not want to live with the respondent-husband because he did not give her maintenance and his house was small. She also admitted that respondent-husband had filed a complaint at Police Station, Mehatpur, where the matter was compromised between the parties, but admittedly, she did not join the company of the respondent. The Family Court, thereafter, referred to Section 6 (a) of the Hindu Minority and Guardianship Act, 1956, which is reproduced as under:-

“(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.”

As per the above provision, custody of the minor child, who has not completed five years, shall ordinarily be with the mother. Since, both the children were above five years of age, the father has been held to be the natural guardian of the minor children. The reason stated by the petitioner-wife for not staying with her husband was that he (respondent) did not give her any maintenance and his house was small. This ground of the petitioner-appellant was not sufficient to leave her matrimonial home.

Keeping in view that income of the husband was about Rs.10,000/- per month and he was bringing up the children by providing them good education and all the facilities, it was not considered for the welfare of the children to give their custody to the mother (appellant). Reference was made to the judgments passed by Hon'ble the Supreme Court in Athar Hussain vs. Syed Siraj Ahmed and others, 2010 (1) Apex Court Judgments 371 (SC) and Jagdish vs. Smt. Sunita, 2014 (2) Civil Court Cases 644 (P&H) (DB).

Learned counsel for the appellant has referred to the judgments passed by Hon'ble the Supreme Court in Mrs. Ritika Sharan vs. Sujoy Ghosh, 2020 (4) RCR (Civil) 894; Vivek Singh vs. Romani Singh, 2017 (1) RCR (Civil) 1063 and Roxann Sharma vs. Arun Sharma, 2015 AIR (SCW) 2925 to state that custody of the children should be given to the mother.

The judgment passed in Ritika Sharan's case (supra) will not be applicable to the facts of the present case. In that case, the child was staying with the mother at Bengaluru. She was working in Nike Global Trading and in September, 2017, she was posted in Singapore. The child was staying with the grand-parents at Bengaluru and ever since the husband and wife had started living separately, the child was in the care and custody of the mother. The wife had sought passport of the child from the husband and at that stage, he made an application restraining the wife from removing child outside Bengaluru. Hon'ble the Supreme Court permitted the mother to take the child with her to Singapore. In the facts of the present case, appellant-mother is not even competent to bring up the child.

In Vivek Singh's case (supra), husband and wife had stayed together for 21 months after the birth of the child and thereafter, she was

turned out of the matrimonial home. During litigation, the child became eight years of age. Hon'ble the Supreme Court held that it was a fit case where wife deserved a chance to have the custody of child, at least for a period of one year. The matter was to be considered after one year.

In the facts of the present case, after separation of the husband and wife in the year 2016, both the children are staying with their father (respondent), who is providing all the facilities to them. Further, in **Roxann Sharma's** case (supra), Hon'ble the Supreme Court was dealing with a matter pertaining to the custody of minor child, who was below five years of age. The mother had been given interim custody as she was highly qualified than the husband and had regular income from salary. In that case, visitation rights were given to the father. Hon'ble the Supreme Court held that the child, who was below five years of age, will ordinarily remain with the mother. In that case, the mother was competent to bring up the child. All the above said judgments are not applicable to the facts of the present case.

In the present case, both the children are above five years of age. Their mother did not have the capacity to look after them properly, as she was having less income than the respondent (husband). This fact was admitted by the appellant during her cross-examination before the Family Court.

Hon'ble the Supreme Court in **Prateek Gupta vs. Shilpi Gupta and others**, 2018 (1) RCR (Civil) 210, was considering a case, where High Court of Delhi had given direction to the father to hand over the custody of the child, Master Aadvik, aged about 5 years, to the mother. The child was born on 28.09.2012 and stayed with his parents till 07.11.2014. Thereafter,

from 07.11.2014 till 06.03.2015 he stayed with the mother in United States of America. On 24.01.2015, when they were in U.S.A., father took away the child from USA to India without any prior information to the mother. Thereafter, he had been staying with the father. The Delhi High Court had allowed the application of the mother and given direction to give the custody of minor child to the mother. However, the said judgment was set aside by Hon'ble the Supreme Court.

On 10.03.2022, respondent-Rajinder Kumar @ Raju was present in Court along with minor children, namely Anjana and Pratham. On a specific query, both the children stated that they were happily residing with their father. Both of them had travelled on that day from Nakodar to Chandigarh with their father. However, appellant-Balwinder Kaur did not come present in Court on that day. Both the children have been staying with their father since separation of the appellant and respondent in the year 2016. They were born on 20.03.2010 and 22.11.2011 respectively. As of now, they are above five years of age. As per Section 6 (a) of the Hindu Minority and Guardianship Act, 1956, in case of a boy or an unmarried girl, custody of minor child shall be with the father and after him, with the mother. Provided that the custody of a minor, who has not completed the age of five years shall ordinarily be with the mother. In the present case, both the children are above the age of five years, therefore, father is the natural guardian of them. The mother (appellant) had admitted that she had no money to litigate in the matter. During cross-examination, the appellant had stated that a compromise had been effected between them in the police station and she had decided to live together with her husband (respondent) and children, but ultimately, she did not join the company of her husband.

Since, the husband was in a better position to look after the minor children and they were above five years of age, no case is made out to interfere in the impugned judgment passed by the Family Court. Resultantly, finding no merit in the present appeal, same is hereby dismissed.

(RITU BAHRI)
JUDGE

(ASHOK KUMAR VERMA)
JUDGE

16.05.2022
ajp

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No