

347

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

CR-3198-2022 (O&M)

Reserved on : 16.01.2023

Date of Decision : 20.01.2023

Jatinder Singh

...Petitioner

VERSUS

Supreet Kaur

.....Respondent

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Amit Bansal, Advocate for the petitioner.

Mr. Sukesh Kumar Jindal, Advocate for the respondent.

ALKA SARIN, J.

The present revision petition has been filed under Article 227 of the Constitution of India by the petitioner-father challenging the order dated 03.08.2022 passed by the Family Court directing the handing over the interim custody of the minor children to the respondent-mother.

The brief facts relevant to the present *lis* are that the parties to the *lis* were married on 22.02.2009. On 19.07.2010 a son was born who is now 12 years old and studying in 6th Class in St. Anne's Convent School, Sector 32, Chandigarh. On 12.06.2014 a daughter was born who is now 8 years old and studying in 2nd Class in the same school. The respondent-mother is stated to have left the matrimonial home in July 2020 leaving both the children. On 12.08.2020 an FIR No.0050 dated 12.08.2020 was lodged under Sections 323, 406, 498-A of the Indian Penal Code, 1860 at Police

Station Thanesar, District Kurukshetra against the petitioner-father and his father. Subsequently, CRWP-541-2021 was filed by the respondent-mother. However, the said petition was dismissed as withdrawn vide order dated 09.02.2021 granting liberty to the respondent-mother to approach the Family Court for grant of custody of the minor children. The petitioner-father herein was also directed to permit the respondent-mother herein to talk to the minor children by way of video calling facilities every Saturday for about ½ hour from 5:00 p.m. to 6:00 p.m. and to visit the minor children and take them for an outing between 10:00 a.m. to 2:00 p.m. every Sunday. It is the case set up by the respondent-mother that in view of non-compliance of the order dated 09.02.2021, a contempt petition (COCP-1639-2021) was filed by her and vide order dated 10.12.2021 this Court had ordered that the respondent-mother may visit the children at House No.3307, Sector 21-D, Chandigarh every Sunday between 10:00 a.m. to 2:00 p.m. On 11.01.2022 the respondent-mother filed a petition under Sections 7, 10, 12, 17 and 25 of the Guardians and Wards Act, 1890 (in short the '1890 Act') for custody of the minor children. Along with the said petition, an application was filed under Section 12 of the 1890 Act for interim custody. Reply was filed to the said application by the petitioner-father. Vide the impugned order dated 03.08.2022, the said application was allowed and the petitioner-father was directed to hand over the custody of the minor children to the respondent-mother. The petitioner-father was, however, given visitation rights to meet the children on every Sunday from 10:00 a.m. to 2:00 p.m. It was also directed that the respondent-mother shall arrange for accommodation at Chandigarh so that the education of the minor children does not suffer.

The matter came up before this Court on 16.08.2022 and the

operation of the impugned order was stayed and the parties were directed to

remain present in Court on the next date of hearing. Vide order dated 20.09.2022 Dr. Garima Sharma, Counsellor, was appointed as Amicus Curiae to interact with the children and to assess them. It was reported by the Counsellor that the minor boy seemed to be under pressure and was maintaining no eye contact. There was no clarity of thought. Further, he could not recall any pleasant memories with his father. Regarding the minor girl, it was reported that she was also unable to maintain eye contact. It was observed that there was a communication gap between the mother and the daughter and that the child was not able to express herself freely and was quiet and reserved. This Court made several efforts to try and ensure that the respondent-mother is able to spend some quality time with the children so that the gap between the mother and the children, which had crept in since the respondent-mother had left the matrimonial home, could be bridged. However, all efforts to try and get the children to spend some quality time with the mother failed inasmuch as the children were unable to interact with the respondent-mother and to open-up to her. The children had on all meetings remained reserved. The Counsellor, who was present at one of the meetings between the respondent-mother and the children which took place on 26.11.2022, reported that the children refused to make eye contact with the respondent-mother and that the minor son started crying. Yet again another effort was made and this time the children were to meet the respondent-mother at the house of the Amicus Curiae appointed by this Court. However, the said effort also failed inasmuch as the children refused to interact with the respondent-mother. The case was thereafter heard on merits. An affidavit was also filed on behalf of the respondent-mother stating her monthly salary and her work timings.

Learned counsel for the petitioner-father has contended that the respondent-mother left the matrimonial home in July 2020 and after a gap of almost 1½ years the custody of the children was directed to be handed over to the respondent-mother. It is further the contention that the respondent-mother had no source of income and that she had filed a petition under Section 125 CrPC where she claimed to be a destitute. It is further the contention that the petitioner-father is working from home and has been looking after the children, who are faring very well in their studies.

Per contra, learned counsel for the respondent-mother has contended that the petitioner-father is disobeying the orders of the Court and in fact a contempt petition was also filed. It is further the contention that the arrangement of work from home is a temporary arrangement and that there is no one to look after the children. It is further submitted that the minor daughter is suffering from *Atopic Dermatitis* and that she needs the love and affection of the respondent-mother. Learned counsel for the respondent-mother also contended that the respondent-mother has since shifted to Chandigarh and taken up a property on rent and was also working and drawing in hand salary of Rs.1,63,872/- per annum.

On a query put by this Court as to what is the rent being paid by the respondent-mother it has been stated by her counsel that an amount of Rs.19,000/- has been paid as rental towards the property.

Heard.

In the present case for the welfare of the minor children, which is of paramount importance, various efforts have been made by this Court through a Counsellor appointed as *Amicus Curiae* and also through an Advocate appointed as *Amicus Curiae*, to try and bridge the gap between the

minor children and the respondent-mother. It is difficult to point to any

particular reason as to why the minor children, because of being tutored or otherwise, did not open up to the respondent-mother despite numerous efforts. Not even on a single occasion did the minor children have a meaningful conversation with the respondent-mother. In a situation where the minor children are 12 years and 8 years old and who do not appear to be comfortable with the respondent-mother for whatsoever reasons and are refusing to open up to her, it would be a drastic measure to handover their interim custody to the respondent-mother. The children are not pawns in the hands of the parents. Their welfare is of paramount importance and it needs to be assessed before handing over the interim custody to any parent. The effect of such an order on the physical and mental well being of the children has to be considered by the Court. Repeated efforts were made by this Court only to try and bridge the gap between the minor children and the respondent-mother and to gauge as to how comfortable the minor children would be living with the respondent-mother. However, keeping in view the reaction of the minor children on each meeting, they were not comfortable with the respondent-mother nor they did open up to her. Additionally, the petitioner-father at the moment is working from home and also has an aunt, who is living with him, to look after the children. The respondent-mother on the other hand is living in a rented accommodation and paying an amount of Rs.19,000/- towards rent per month. Her monthly in-hand salary is less than the rental which she is paying. Though it has been contended by learned counsel for the respondent-mother that the parents of the respondent-mother would be helping her in looking after the children, however, at this stage, keeping in view the income of the respondent-mother and her office timings, which are 10:00 a.m. to 6:00 p.m., as also the welfare of the children, this

Court is not inclined to hand over the interim custody of the minor children to the respondent-mother.

In **Mausami Moitra Ganguli vs. Jayant Ganguli [(2008) 7 SCC 673]** the Supreme Court while dealing with a case regarding custody of a minor child observed :

“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 view of the discussion above, the present revision petition is allowed. The impugned order is set aside. In view of the reluctance and discomfort of the minor children with the respondent-mother, when they did open up to her leave alone spending time with her, this Court is not inclined to grant interim visitation rights to the respondent-mother. However, as an interim measure, the petitioner-father is directed to facilitate the respondent-mother to interact with the children through video calling between 05:00 p.m. to 6:00 p.m. everyday. Further, the Family Court is requested to dispose off the main petition expeditiously, preferably within a period of six months from the date of passing of this order.

Disposed off accordingly. Pending applications, if any, also stand disposed off.

It is made clear that any observation made herein shall not be treated as an expression of opinion on the merits of the case.

20.01.2023

Yogesh Sharma

**(ALKA SARIN)
JUDGE**

NOTE : Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO