



1* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: August 04, 2023

Pronounced on: September 26, 2023

+ **MAT.APP.(F.C.) 32/2023 & CM APPL. 4831/2023 & 4832/2023**

TIRPAT SINGH BANSAL Appellant

Through: In person with Ms. Seema Seth &
Mr. Shreya Maggu, Advocates

Versus

JAGWANT KAUR Respondent

Through: In person with Mr. Bipul Kumar,
Advocate

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT

SURESH KUMAR KAIT, J

1. The order dated 17.01.2023 passed by learned Family Court, Delhi in G.P. No.61/2020 titled as '*Jagwant Kaur vs. Tirpat Singh Bansal*' has been assailed by the appellant in the present appeal. By the impugned order dated 17.01.2023, learned Family Court while deciding application under Section 12 of Guardians & Wards Act r/w Section 6 of the Hindu Minority & Guardianship Act, 1956 r/w Section 151 CPC in respect of interim custody of the minor girl child of the parties, has *inter alia* granted her interim custody to the respondent-wife.



2. The back forth of the case, as spelt out in the present appeal, are that the marriage between the parties was solemnised on 01.11.2017 as per Hindu Rites and ceremonies, and out of this wedlock, a girl child was born on 08.01.2019 at Dehradun, at the maternal home of respondent-wife.

3. The appellant in the present appeal has averred that respondent-wife who has been working as Geologist with the Geological Survey of India, has to spend about 100 days in the field in remote areas in a span of 8 months. The appellant has averred that on 07.01.2020, when respondent-wife was away due to field work and had carried the girl child with her, he surprisingly visited them on the birthday of the child and found that one of her colleague was sharing her premises.

4. According to appellant, on 01.03.2020, the respondent-wife went to Pune for her field job, leaving behind the child with the appellant and thereafter, abandoned her. In July, 2020, he claims to have received a call from respondent-wife that she wanted divorce and also wanted to take the child to Dehradun with her.

5. In August, 2020, the appellant-husband filed a Guardianship Petition being G.P. No.24/2020 seeking injunction to restrain the respondent-wife from forcibly taking the child away. On 31.08.2020, a consent order was passed by the learned court wherein the respondent-wife was permitted to have virtual meeting with the child for half an hour every day.

6. Thereafter in December, 2020, a Guardianship Petition being G.P. No.61/2020, under Section 23 of the Guardians and Wards Act, was filed by respondent-wife wherein an application under Section 12 of the Act and Section 6 of the Hindu Minority & Guardianship Act, 1956 was also filed.

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In the said petition, vide order dated 15.01.2021, learned Family Court allowed the respondent-wife to meet the child in City Mall, Sector-21, Dwarka for one hour. Vide order dated 27.02.2021, the learned Family Court granted custody of the child for one week to the respondent-wife. The appellant-husband thereafter withdrew G.P. 24/2020.

7. The appellant has asserted that pursuant to order dated 27.02.2021, the custody of the child was given to respondent-wife and when the child came back after a week, she was in a pitiable condition and looked extremely weak, traumatised and shocked.

8. Learned Family court vide order dated 02.06.2021 further permitted the respondent-wife to meet the child on every Saturday, except second Saturday in the children's room at Family Courts, Dwarka in the presence of Court Counsellor.

9. Thereafter, vide order dated 17.01.2023, learned Family Court granted interim custody of the child to the respondent-wife till pendency of the petition or till the child attains majority, whichever is earlier, directing the appellant-husband to handover custody of the child within one week.

10. Challenging the aforesaid order dated 17.01.2023, present appeal has been filed. When this appeal came up for hearing before this Court, vide order dated 02.02.2023 this Court granted respondent-wife interim access to the child, permitting her to take the child to her parents' house at Dehradun and the matter was referred to the mediation.

11. The learned Mediator of Delhi High Court Mediation & Conciliation Centre, vide her report dated 10.03.2023 informed that despite best efforts,



no settlement could be arrived at.

12. Parties were not able to reconcile their disputes and so, the present appeal against the impugned order dated 17.01.2023 was heard by this Court.

13. The primary ground challenging the order dated 17.01.2023 by the appellant-husband is that the learned Family Court has erred in not properly appreciating the interest and welfare of the child. The appellant has pleaded that respondent-wife is working with Geological Survey of India and for discharging her official duties, she has to travel to interior region for several weeks, where the family cannot live due to lack of amenities and in such a situation, she will not be able to provide good education and upbringing to the child. Appellant has averred that he is a Cost Management Accountant and works from home and is in a good position to take care of the minor daughter, whereas the learned Family Court has fallen in error by observing that appellant had no source of income.

14. During the course of hearing, learned counsel appearing on behalf of the appellant-husband submitted that respondent has never contributed towards upbringing of the child and all the expenses have been borne by the appellant-husband. He also submitted that the respondent-wife has a financial liability to the tune of Rs.40 lakhs and so, it cannot be said that she is in a better financial position to provide good upbringing to the child. It was submitted that the impugned order dated 17.01.2023 granting interim custody of the child to the respondent-wife during the pendency of the petition, is bad in law and deserves to be set aside.

15. To controvert the pleadings made on behalf of the appellant-husband,
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the respondent-wife submitted that while adjudicating the issue of interim custody of the girl child to her, the learned Family Court has considered the statutory provisions contemplated under Section 6 of the Hindu Minority & Guardianship Act, 1956, which stipulates that the interim custody of the child below the age of 5 years has to be with the mother.

16. Learned counsel appearing on behalf of the respondent-wife submitted that learned Family Court has rightly placed reliance upon Hon'ble Supreme Court's decision in **Roxann Sharma Vs. Arun Sharma** AIR 2015 SC 2232 wherein the proviso to Section 6 of the Hindu Minority & Guardianship Act, 1956 have been dealt with and it is held that custody of a child less than 5 years of age should ordinarily be with the mother and this expectation can be deviated from, only for very strong reasons.

17. Learned counsel submitted that this fact cannot be ignored that the girl child of the parties was in the custody of her mother until she was 1 year and 1 month old and she was taking good care of the child. Since respondent-wife on 01.03.2020, had to leave for her field duty, she had left the child in the custody of the appellant-husband. In July, 2020, the respondent –wife wanted custody of the child, however, in August, 2020, the appellant preferred Guardianship Petition being G.P. No.24/2020 seeking injunction against the respondent-wife.

18. It was submitted that the respondent-wife is a Government servant and during her pregnancy and birth of the child, it is only the family of the respondent who has supported her and not the appellant-husband or his family members. It was contended that a working woman's work commitments cannot be held against her to deny her custody of a child of



tender age. It was submitted that respondent-wife has been pursuing the case for custody of the child during lockdowns despite office constraints. It was also submitted that appellant-husband has not come to this Court with clean hands, as he alongwith his family went missing and took away the child from her deceitfully, in respect whereof respondent-wife had filed a complaint in Crime Against Women Cell, Dehradun. It was contended that respondent-wife being a government employee is living in A class city like Pune, Dehradun, etc. and has good medical facilities and high end facilities available to her. On the other hand, appellant-husband is not working and has no source of income except for depending on his retired father who is taking care of house hold requirement. It was submitted that service conditions of respondent-wife were already in the knowledge of appellant-husband even prior to their marriage and her transferable and field job has been used against her to deny interim custody of the baby girl child. It was submitted that the Guardian Court first allowed the visitation right to the respondent-wife and thereafter, has granted interim custody of the child in the welfare of the child and also that the impugned order is well reasoned and does not call for any interference by this Court.

19. Submissions advanced by learned counsel representing both the sides have been considered and the impugned order as well as decision relied upon and material placed before the learned trial court, has been perused.

20. At the first instance, we note that the present appeal against the order dated 17.01.2023 on an application made by respondent-wife under the provisions of Section 12 of the Guardians & Wards Act r/w Section 6 of the Hindu Minority & Guardianship Act, 1956 r/w Section 151 CPC, relates to



“interim custody” of the girl child of the parties during pendency of the guardianship petition and is not a final order, thence, the facts of the present case *prima face* have been considered only to this narrow compass.

21. It is not in dispute that appellant-wife, who is working as Geologist in Geological Survey of India, had left the child in the custody of appellant-husband in March, 2020 to attend her field job. It is admitted by appellant-husband that in July, 2020 respondent-wife had sought custody of the child, to which he refused and filed Guardianship Petition 24/2020 seeking injunction to restrain respondent-wife from forcibly taking the child. It is also admitted by the appellant-husband that since the birth of the child on 08.01.2019 till 01.03.2020, the girl child has been in the custody of respondent-wife, whether she was at her matrimonial home, parental home or at the field of his official duty. It is apparent that the respondent-wife on 01.03.2020 had left the child in the custody of appellant-husband while she had left for her official obligations. Thereafter, parties entered into litigation in respect of custody of the child.

22. Upon perusal of orders dated 15.01.2021; 27.02.2021 and 02.06.2022 passed in G.P. No.61/2020 we find that the learned Family Court had first permitted the respondent-wife to meet the child once through video conferencing for half an hour; thereafter permitted to meet the child in City Mall for one hour and in addition half an hour virtual meeting every Sunday; interim custody of one week was given and thereafter, permitted the respondent-wife to meet the child in the Children Room, Family Court, Dwarka for two hours.

23. While passing the impugned order dated 07.01.2023 granting interim



custody of the child to respondent-wife, the learned Family Court has observed that the fact that respondent-wife is working cannot be construed to unfavourably judge her suitability to have the custody of minor and that respondent has admitted that he is jobless and has not disclosed his source of income. The trial court has also relied upon Section 6 of the Hindu and Guardianship Act, 1956 to observe that in the case of custody of children of tender age, the custody of the mother appears more natural and conducive for the development of the child.

24. Section 6 of the the Hindu and Guardianship Act, 1956 reads as under:-

“6. 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 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;”

25. On application of Section 6 of the Act, the pertinent observations of the Hon'ble Supreme Court in ***Githa Hariharan Vs. Reserve Bank of India, (1999) 2 SCC 228***, are as under:-

“7. The expression “natural guardian” is defined in Section 4(c) of the HMG Act as any of the guardians mentioned in Section 6 (supra). The term “guardian” is defined in Section 4(b) of the HMG Act as a person having the care of the person of a minor or of his property or of both, his person and property, and includes a natural guardian among others. Thus, it is seen that the



definitions of “guardian” and “natural guardian” do not make any discrimination against mother and she being one of the guardians mentioned in Section 6 would undoubtedly be a natural guardian as defined in Section 4(c). The only provision to which exception is taken is found in Section 6(a) which reads “the father, and after him, the mother”. (emphasis ours) That phrase, on a cursory reading, does give an impression that the mother can be considered to be the natural guardian of the minor only after the lifetime of the father. In fact, that appears to be the basis of the stand taken by the Reserve Bank of India also. It is not in dispute and is otherwise well settled also that the welfare of the minor in the widest sense is the paramount consideration and even during the lifetime of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of the court, where to do so would be in the interest of the welfare of the minor.

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10. *We are of the view that Section 6(a) (supra) is capable of such construction as would retain it within the constitutional limits. The word “after” need not necessarily mean “after the lifetime”. In the context in which it appears in Section 6(a) (supra), it means “in the absence of”, the word “absence” therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to*



take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of a harmonious construction of Section 4 and Section 6 of the HMG Act, without causing any violence to the language of Section 6(a) (supra).”

26. Having regard to the pertinent observations of the Supreme Court in ***Githa Hariharan (Supra)***, this Court is of the view that the provisions of Section 6 (a) of the Act do not in any manner bound the parameters that the father shall be the natural guardian beyond the age of five years.

27. Having regard to the aforesaid provisions of Section 6 of the Act, while adjudicating issue of grant of custody of the minor child, the foremost aspect for deliberation by the Court is the ‘welfare’ of the child, irrespective of claims of father or the mother, of being better and competent than the other. While considering the ‘welfare’ of the child, the Courts are required to adjudge who out of the two shall be able to take care of the moral, mental, physical, educational and medical needs of the child in the best possible manner.

28. A Single Bench of Bombay High Court in a recent decision dated 21.07.2023 in Writ Petition No.2048 of 2023, while disposing a petition filed by the father against the decision of the Family Court directing handing over custody of eight years girl child to the mother, observed that the girl



child who is on the threshold of puberty and undergoing the hormonal and physical changes and the mother being a doctor shall be well equipped to take care of the needs of the female child.

29. Relevantly, in the present case, since the birth of the girl child, she has remained in the care and custody of her mother i.e. the respondent-wife. It is due to her official exigency that on 01.03.2020 she left the child in the custody of the appellant-husband and it cannot be said that she had abandoned the child. The claim of appellant-husband that by working from home he will be in a better position to take care of the child than respondent-wife, who due to official responsibilities may not be able to find time to take care of the girl child, is rejected in the light of the fact that respondent-wife is educated and financially stable to understand and take care of the overall welfare of the girl child. Having observed so, this Court is of the opinion that the learned trial court has rightly granted interim custody of the girl child to the respondent-wife.

30. In the present case, the child was born in January, 2019 and at the time of passing of the impugned order on 17.01.2023; she was four years old and thus, below five years of age within the meaning of Section 6 of the Act. Even though grant of custody of a child should not be discriminated on the basis of gender of the child, but while granting custody of a girl child, who shall undergo physical changes with the growing years, the Courts are required to be more considerate. Even in the present case, the girl child soon will be over the age of five years, however, in the considered opinion of this Court, the facts of the present case warrant that her custody is given to her mother.



31. Further, in Para-30 of impugned order, the learned Family Court has formulated the schedule of visitation rights of appellant-husband while observing that the minor needs love, affection, care and protection of both the parents and even if custody of minor is given to one parent, the other has the visitation rights.

32. So far as visitation rights of appellant-husband in respect of minor child are concerned, we find that the learned Family Court has not committed any error, however, for the welfare of the child and in the interest of justice, the schedule for visitation is modified as under:-

- (i) The appellant-husband shall have a right to meet the minor child in Pune or Dehradun on every Second Saturday of the month from 11:00 a.m. till 04:00 p.m. and any deviation therefrom, shall be with the prior information and consent of the parties;
- (ii) The appellant-husband shall be entitled to have the custody of the minor child for 1/4th period of vacations in the month of June and December, during which period he shall be at liberty to either take the minor child to his house or to live with the grandparents or for a trip.

33. The aforesaid interim arrangements in respect of custody and visitation of the child shall remain in force during pendency of the guardianship petition.

34. So far as allegations of adultery raised by the appellant-husband to demonstrate that respondent-wife is unworthy of claiming custody of the



child, we find that such kind of allegations are sometimes made in order to gain favourable order and even otherwise, are subject matter of trial.

35. With directions as aforesaid, the present petition is accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

SEPTEMBER 26, 2023

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