

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

FAO-909-2024 (O&M)

Date of decision: 21.03.2024

Santosh

.....Appellant

Versus

Madan Lal

.....Respondent

**CORAM: HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE HARSH BUNGER**

Present: Mr. Wazir Singh, Advocate, for the appellant.

SUDHIR SINGH, J.

Present appeal is directed against the order dated 16.12.2023 passed by the Family Court, Panipat, whereby the petition under Section 7 of the Guardians and Wards Act, 1890 (for short 'the Act') filed by the appellant-wife was partly allowed and she was granted the visiting rights as regards both the children, as stipulated in para no.29 of the order.

2. The brief facts of the case are that the marriage between the parties was solemnized on 02.02.2006 according to Hindu rites. Out of this wedlock, two female children were born. Due to temperamental differences between the parties, they started living separately from 2017. The appellant-wife filed a petition under Section 7 of the Act in 2019 seeking the custody of both the minor daughters on the ground that the respondent-husband was serving in Haryana Police; he did not have enough time to take care of the children; the appellant was highly educated and able to take care of the children and bear their study expenses. It was further averred

children, should be given the custody of the children, especially when the daughters feel comfortable in the company of their mother and not the father. It was further alleged that the respondent-husband did not prove to be a good husband and therefore, he can never be a good father to the children.

3. Upon notice, the respondent appeared and filed his written statement before the Family Court. The factum of birth of female children was admitted. However, it was stated that the appellant-wife was jobless and had no source of income to sustain the children, meet out their expenses and take care of their studies. It was further averred that the appellant-wife had left the matrimonial home without thinking about the welfare of the children. The elder daughter (Shreya), who was born on 27.12.2008, has been suffering from muscular dystrophy and is bed ridden and the younger daughter (Anu), who was born on 31.12.2013, is a student of Class 5th and she is studying in a reputed school, therefore, for the overall welfare of the children, their custody should be allowed to remain with the respondent-husband.

4. On the basis of the pleadings of the parties, the trial Court framed the following issues:-

- “1. Whether the petitioner is entitled for custody of minors? OPP
2. Whether the present petition is not maintainable? OPR
3. Whether the petitioner has no cause of action? OPR
4. Relief.

The parties led their respective evidence.

5. After hearing the rival contentions of the parties and considering the evidence on record, the trial Court partly allowed the petition, as noticed above.

6. Learned counsel for the appellant has vehemently contended that both the children are females and therefore, custody thereof should be granted to the mother. It is further submitted that it is settled law that as regards the custody of a female child, there cannot be any substitute of mother. It is yet further submitted that the learned Family Court, while passing the impugned order, has erred in law in comparing the financial capabilities of the parties and holding that the respondent-husband is possessed of means and resources to maintain and take care of the children and their studies. Learned counsel further argued that the appellant is highly educated possessing the B.Ed. degree and has also cleared CTET and HTET etc. Therefore, the finding of the Family Court that the appellant-wife is not in a position to maintain the children, is unwarranted. While referring to the fact that the respondent-husband is working in Haryana Police, it is argued that the duties of police personnel are arduous in nature and performance thereof is required at odd hours. Therefore, the finding of the Family Court that the overall welfare of the children lies with the respondent-husband, is wrong and liable to be set aside.

7. We have heard learned counsel for the appellant and have also gone through the impugned order passed by the learned Family Court.

8. The only challenge raised before this Court, is as regards the custody of the children. On the basis of evidence on

record, the learned Family Court came to the conclusion that both the children have been living with the respondent-husband since their birth. The appellant-wife left the matrimonial home in 2018. Immediately thereafter, she had filed the custody petition. It has also come on record that during the pendency of the custody petition, by way of interim relief, the appellant-wife had been granted the visitation rights as regard both the children. However, she had admitted in her testimony that within a period of 2 to 3 years, she had visited the children only once. There was no explanation forthcoming, as to why, she did not bother to visit the children despite the fact that she had been granted visitation rights by the Court. It has also been noticed by the learned Family Court that the appellant-wife was jobless; has no source of income and had been getting maintenance under Section 125 Cr.P.C. from the respondent-husband. It has further been noticed by the learned Family Court that the appellant-wife has been living with her father, who owns a 100 sq. yards residential house and in the said house itself, her mother, brother and sister-in-law, all are residing. On the other hand, it was found that the respondent-husband was not only having the sound financial capacity to maintain the children, but he was possessed of sufficient resources and means for the overall welfare of the children. It was further noticed that the elder child had been suffering from muscular dystrophy since her birth and therefore, her treatment expenses could very well be meted out by the respondent-husband. As regards, younger daughter, the learned Family Court has noticed in para no.25 of its order to the following effect:-

“25. The younger daughter named Anu is studying in 5th class in Sunrise Public School, Madlauda. The undersigned talked to the child for a long time. The child is around 10 years of age. She came across as intelligent and confident child. She answered all the questions of the undersigned very confidently. She stated that after coming back from the school, she was devoting a lot of time to her studies. Her father was sending her for tuitions in the evening. She stated that she wanted to be a doctor in life. Her grandmother was there in the house to take care of her. In free time, she was playing with her friends in the neighbourhood. She also stated that she wanted to stay with her father.”

9. It is settled law that while deciding the question of custody of the children, the warring nature of the parents is not to be gone into. The care, protection and welfare of the children should be of paramount consideration. While deciding such issue, another factor, which requires the attention of the Court, is the parallel financial capacities and resources of the parties. In the instant case, it stood established before the Family Court that the respondent-husband has been taking care of the children since their birth. It could not be established by the appellant-wife that the respondent-husband is lacking, in any manner, except the fact that he is serving in Haryana Police. It has come on record that apart from respondent, his mother and sister, both are taking care of the children. This case does have peculiar circumstances in view of the fact that the elder child, namely Shreya has been suffering from muscular dystrophy and is completely bed ridden. The

factum of onerous parental duties to such a child, has also attracted the attention of this Court. The appellant-wife has failed to prove on record that the said child is not being looked after or not provided medical care and treatment by or at the instance of the respondent-husband. From the interaction of the Family Court with the younger child (as noticed in para no.25 extracted above), we find that the said child has nowhere expressed her desire not to live in the company of her father. The Family Court, while declining the custody of the children to the appellant-wife, has granted her the visitation rights.

10. We, thus, find that the impugned order passed by the trial Court thereby allowing the respondent-husband to retain the custody of the children and granting visitation rights to the mother, does not suffer from any illegality or perversity, so as to warrant interference of this Court, in the present appeal.

11. In view of the above, we do not find any merits in the present appeal and the same is hereby, dismissed.

(SUDHIR SINGH)
JUDGE

(HARSH BUNGER)
JUDGE

21.03.2024
Ajay Prasher

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