

2024:FHHG:150868-D8



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

FAO-1684-2024 (O&M)

Date of decision: 18.11.2024

Ajay Sharma

...Appellant

Versus

Neha

...Respondent

**CORAM: HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE JASJIT SINGH BEDI**

Present:- Mr. Vinod K. Kaushal, Advocate,
for the appellant.

SUDHIR SINGH, J.

CMs-6320-21-CII-2024

For the reasons stated in applications, same are allowed. Delay of 171 days in filing and 16 days in re-filing the appeal is condoned.

FAO-1684-2024

Challenge in the present appeal is to the judgment dated 21.07.2023, passed by the Learned Additional Principal Judge, Family Court, Amritsar (for short the 'Family Court'), whereby the petition under Section 25 of the Guardian and Wards Act, 1890 filed by the appellant for the custody of minor son (Arav Kumar) of the parties, has been partly allowed by holding the

appellant not entitled to the custody of the minor child, but giving him visiting rights qua the said child, as indicated in Para No.9 of the said order.

2. The appellant-husband had filed the aforesaid petition, *inter alia*, pleading therein that his marriage with the respondent was solemnized on 19.04.2017, according to Hindu rites and out of the said wedlock one male child, namely Arav, was born. It was further stated therein that since the very inception of the marriage, the behaviour of the respondent had not been good towards the appellant and his family members. She was a quarrelsome lady and used to leave the matrimonial home without any reason. On 05.03.2018, the respondent went to her parental home along with minor child, while secretly taking along gold ornaments and cash. At that time, she assured that she would come back after few days. However, the respondent did not return to her matrimonial home. Efforts were also made to bring back the respondent and the minor child, but to no avail. It was further pleaded that the respondent was not having sufficient means to support herself and the minor child. On the other hand, the appellant was having adequate financial resources, besides his own house and that he could look after and take care of the minor son in a better way than the respondent. It was further asserted

that the respondent had filed a petition under Section 13 of the Hindu Marriage Act, 1955, against the appellant, which was dismissed by the learned Family Court. It was further pleaded by the appellant that the respondent without getting legally separated from the appellant, had performed a second marriage with one Krishan Kant Sharma, which was a void marriage. Accordingly, the custody of the minor child was sought for.

3. Upon notice, the respondent, failed to appear before the Family Court despite due service. Accordingly, she was proceeded against ex-parte vide order dated 19.09.2022.

4. In ex-parte evidence, the appellant himself stepped into the witness box as PW-1 and examined his father Sohan Lal as PW-2 and Nutam Kumar as PW-3, besides tendering into evidence Ex.PW-1/1 to Ex.PW-1/6 and Mark 'A' to Mark 'G.'

5. The learned Family Court, after taking into consideration the contentions of the appellant and the evidence on record, has partly allowed the petition filed by the appellant, as noticed above.

6. Learned counsel appearing for the appellant has vehemently argued that the appellant had produced before the learned Family Court sufficient evidence to establish that the minor child is not being provided the

proper care, love and affection. It is further argued that the respondent-wife is not possessed of sufficient means so as to provide proper education to the minor child and, thus, the future of the child is compromised. It is further argued that the respondent has already performed second marriage with one Krishan Kant Sharma without obtaining divorce from the appellant and, therefore, she is not able to look after the minor child properly. It is further argued that the appellant is a man of means and he can provide a better future to the minor child (Arav Kumar), besides giving him proper care, love and affection.

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

8. The only issue that arises for consideration is whether the impugned order passed by the learned Family Court requires any interference.

9. So far as the factum of solemnization of second marriage of the respondent-wife is concerned, the learned Family Court has found that the photographs tendered by the appellant-husband were not sufficient to hold that the respondent-wife had performed marriage with one Krishan Kant. It was also found that the respondent is the mother of minor child, who was just four years old

and at this tender age, the child requires the motherly love and affection. Although the appellant was financially more secure than the respondent, yet it was not a ground to deprive the mother of the custody of minor child. However, as noticed above, the appellant was granted visiting rights qua the minor child. The relevant part of the order would read as under:-

“9. ...I find that though it would not be for the welfare off the child to give his custody to the petitioner, his father, but petitioner is entitled to have visitation rights of the child to shower his love and affection upon the minor child. To enable petitioner to do so, respondent is directed to bring the minor child to the Shahida Sahib Gurudwara every second and fourth Sunday from 3.00 PM to 5.00 PM or to any other convenient place to be decided mutually by both the parties and petitioner is further entitled to have the right to meet the minor child one day prior to Diwali & Lohri festival from 3.00 PM to 6.00 PM. Accordingly, petition off the petitioner stands partly allowed. Memo of costs be prepared.”

10. We find that the learned Family Court, while partly allowing the petition filed by the appellant, has taken into consideration all the relevant factual aspects of the matter and concluded that the welfare and betterment of the child is safe in the company of the respondent. It is settled law that while deciding the custody of the minor children, the sole consideration is

the paramount welfare of such children. The Hon'ble Supreme Court has held that for the custody of the minor child, it is the paramount welfare of the minor child, which is to be taken into consideration and nothing else.

11. In **Sheoli Hati v. Somnath Das, (2019) 7 SCC 490**, while laying emphasis on the paramount welfare of the child in the custody matter, it was held by the Hon'ble Supreme Court as under:-

“17. It is well settled that while taking a decision regarding custody or other issues pertaining to a child, welfare of the child is of paramount consideration. This Court in *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1, had the occasion to consider the parameters while determining the issues of child custody and visitation rights, entire law on the subject was reviewed. This Court referred to English Law, American Law, the statutory provisions of the Guardians and Wards Act, 1890 and provisions of the Hindu Minority and Guardianship Act, 1956, this Court laid down following in paras 43, 44, 45, 46 and 51 (SCC pp. 55-57):-

“43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the “welfare of the child” and not rights of the parents under a statute for the time being in force.

44. The aforesaid statutory provisions came up for consideration before courts in India in several cases. Let us deal with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well-being as paramount consideration.

45. In *Saraswatibai Shripad Vad v. Shripad Vasanji Vad* [Saraswatibai Shripad Vad v. Shripad Vasanji Vad, 1940 SCC OnLine Bom 77 : ILR 1941 Bom 455 : AIR 1941 Bom 103, the High Court of Bombay stated :

‘... It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the court. *It is the welfare of the minor and of the minor alone which is the paramount consideration ...*’

46. In *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840 , this Court held that object and purpose of the 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The *power* and *duty* of the court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

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51. The word “welfare” used in Section 13 of the Act 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 *parents patriae* jurisdiction arising in such cases”.

12. We find that the child can be given better parenting by both the parents. While the custody has been held to remain with the respondent, the appellant

has been granted visiting rights and he can very well visit the child and grant him love, care and affection. Thus, we do not find that the impugned order suffers from any illegality or perversity.

13. No other point has been urged.

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

15. Pending application(s), if any, shall also stand disposed of.

[SUDHIR SINGH]
JUDGE

[JASJIT SINGH BEDI]
JUDGE

18.11.2024
Ajay Prasher

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No