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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-21384-2024 (O&M)
Date of decision: 30.04.2024

Narender Singh

... Petitioner

Vs.

State of Haryana and another

... Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Ms. Preeti Singh, Advocate
for the petitioner.

HARPREET SINGH BRAR, J. (ORAL)

1. The present petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') for quashing of order dated 19.04.2024 (Annexure P-1) passed by learned Sub Divisional Magistrate, Tosham, Bhiwani, vide which proceedings under Section 97 Cr.P.C. have been initiated against the petitioner.
2. Briefly, the facts are that the marriage between the petitioner and respondent No.3 was solemnized on 17.11.2018 according to Hindu rites and rituals and one male child was born out of this wedlock. Due to matrimonial discord, in July, 2023, respondent No.3 left her matrimonial

home along with her minor son. Respondent No.3 lives in a PG and works at a private company in Gurgaon. She left the minor child with her mother in Village Jhanvri, District Bhiwani. The petitioner visited the paternal house of respondent No.3, he found their son to be in a pitiful condition and seeing the same, brought him back to his village Tigrana. The minor son is happily residing with the family of the petitioner. The petitioner has also filed a petition for restoration of conjugal rights before the learned Family Court, Bhiwani, which is pending consideration. Thereafter, respondent No.3 filed an application under Section 97 Cr.P.C. against the petitioner for forcibly taking their minor son, in which the impugned order was passed directing the minor child namely Aaayansh to be searched in the said address and be produced in the Court.

3. Learned counsel for the petitioner, *inter alia*, contends that the petitioner tried his best to save his matrimonial life but all in vain, as respondent No.3 refused to join his company. Rather respondent No.3 has filed multiple complaints and litigations against the petitioner and his family members. Respondent No.3 is working in a private company at Gurugram and she had left their minor son with her mother in village Jhanvri, District Bhiwani and the only brought the minor child with himself in view of his miserable condition. He further submits that learned Court below has fallen into grave error by mechanically passing the impugned order, initiating the proceedings under Section 97 Cr.P.C., without any application of judicial

mind. No offence of wrongful confinement is made against the petitioner since he is the natural guardian of the said child, being his father. The minor son of the petitioner is happily living with him. In fact, this factum has been recorded by the Child Welfare Committee in its report dated 19.04.2024.

4. Having heard the learned counsel for the petitioner and after perusing the record with her able assistance, it transpires that due to the ongoing marital dispute, the parents of the minor child-Aayansh were residing separately. The minor child in question is about 2.5 years old and was in custody of respondent No.3- mother. However, the petitioner-father took the child to his house claiming he was living in a pitiful condition.

5. While the learned counsel for the petitioner claims that the Child Welfare Committee vide its report dated 19.04.2024 (Annexure P-2) has returned the finding that the minor child is happily residing with the petitioner and his family, however, a perusal of the said report indicates no such conclusion. As a matter of fact, the Child Welfare Committee has merely recorded that the matter of custody is beyond its jurisdiction.

6. As far as the issue of retention of custody is concerned, it is not the right of the father or the mother that requires adjudication as it shall be the welfare of the minor alone which is the paramount consideration. A two Judge Bench of the Hon'ble Supreme Court in ***Gaurav Nagpal Vs. Sumedha Nagpal, (2009) 1 SCC 42***, speaking through Justice Dr. Arijit Pasayat, has held as under:-

“48. Merely because there is no defect in his personal care and his attachment for his children—which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.”

7. Reliance in this regard can also be placed on the judgments rendered by the Hon’ble Supreme Court in ***Rosy Jacob Vs. Jacob A. Chakramakkal, (1973) 1 SCC 840*** and ***Mausami Moitra Ganguli Vs. Jayant Ganguli, 2008 (4) RCR (Civil) 551***.

8. Further, a Co-ordinate bench of this Court in ***Smt. Maya Devi and another vs. Amolak Ram, 1956 PLR 557*** has categorically held that the right of the father as a natural guardian of his minor child does not automatically give him an indefeasible right to his custody. Moreover, it would amount to a violation of the child’s rights under Article 21 of the Constitution of India if a parent is given an unfettered right to custody of the minor child as the welfare of the minor remains the paramount consideration.

9. Section 6 of the Hindu Minority and Guardianship Act, 1956 (hereinafter ‘Act of 1956’) specifically mentions that the custody for a child

under 5 years of age shall ordinarily remain with the mother. The said provision is reproduced below:

Section 6: Natural guardians of a Hindu minor

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;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl--the mother, and after her, the father;

(c) in the case of a married girl the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.--In this section, the expressions "father" and "mother" do not include a step-father and a step-mother.

10. The Courts would have failed to uphold their constitutional duty to uphold the fundamental rights of its citizens, including minors, if, without due consideration qua welfare of the child, the father is allowed to forcibly remove him from the company of his mother on the pretext of being his natural guardian. In the instant matter, the minor child is merely 2.5 years of

age, hence, in keeping with the legislative intent behind Section 6 of the Act of 1956, the mother would be best suited to retain his custody. This Court is of the opinion that no one can substitute the love of mother for her children as it is unconditional, altruistic and selfless. A mother's lap is akin to God's own cradle for her children, especially children of tender years. Thus, ordinarily a child of tender age should be committed to the custody of the mother.

11. Adverting to the facts and circumstances of the case, this Court finds that the petitioner has fallen in error by forcibly removing his minor son from the custody of respondent No.3-mother. As such, the learned Court below has correctly appreciated the facts and circumstance of the case by passing the impugned order in pursuance of application under Section 97 Cr.P.C. If the petitioner was genuinely and earnestly concerned about the well-being of his minor-son, he ought to have remedied the same by taking course of the due process of law to attain his custody. However, he chose to take away the child, without any permission from or prior information to respondent No.3-mother, and such an approach cannot be appreciated by this Court.

12. In view of the facts and circumstances of the case and the discussion above, this Court finds the present petition to be bereft of any merit. Accordingly, the present petition is dismissed.

13. However, the petitioner would be at liberty to avail appropriate

remedies seeking custody of his minor-son, in accordance with law.

30.04.2024
vishnu

[HARPREET SINGH BRAR]
JUDGE

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