

2024:PHHC:118553-DB



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO-882-2020 (O&M)
Date of decision: 10.09.2024

ANIL ...Appellant
Versus
SUJATA AND ANR ...Respondents

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

Present:- Ms. Alisha Soni, Advocate, for applicant-appellant.
Mr. Deepak Girotra, Advocate and
Mr. Rishab Goyal, Advocate for respondents.

SUDHIR SINGH, J.

CM-2036-CII-2020

For the reasons given in the application, the same is allowed and delay of 95 days in re-filing the appeal is condoned.

CM-2037-CII-2024

For the reasons given in the application, the same is allowed and delay of 51 days in filing the appeal is condoned, subject to all just exceptions.

FAO-882-2020

Challenge in the present appeal is to the order dated 17.05.2019, passed by the Learned Additional Principal Judge, Family Court, Rohtak (For short “the Family Court”), whereby the petition under Section 7 of the Guardians and Wards Act, 1890 (hereinafter

referred as ‘the Act’) filed by the appellant, for the custody of the minor child, was dismissed.

2. The aforesaid petition was filed by the appellant averring therein that his marriage with respondent No.1-Sujata was solemnized on 28.12.2006 according to Hindu rites and out of the said wedlock, a daughter was born on 21.12.2007. The parties fell apart, when their daughter was only 3-1/2 years. It was further averred that respondent No.1-Sujata had already contracted a second marriage and, therefore, she was not taking of the minor child and that he being the father and natural guardian, was entitled to her custody.

3. Upon notice, the respondents entered appearance and filed her written statement. The factum of respondent No.1-Sujata’s contracting second marriage was admitted, but it was asserted that respondent No.2-Anita being the maternal grandmother of the minor daughter, had been looking after the minor daughter since the date of her birth. It was further pleaded that the appellant was a man of vices and was not doing any work. It was yet further asserted that respondent No.2-Anita was a Government pensioner and was possessing means to look after and take care of the minor child.

4. On the basis of pleadings of the parties the following issues were framed by learned Family Court:-

“1. Whether the petitioner is entitled to custody of minor child on the grounds mentioned in the petition? OPP

2. Whether the petition is not maintainable?

OPR

3. Relief.”

5. In evidence, the appellant appeared as PW-1 and also examined PW2-Mahabir. On the other hand, respondent No.2-Anita appeared as RW-1 and had also examined RW-2 Sh. Narain Singh and RW-3 Smt. Indirawati, besides leading documentary evidence in the form of Ex.R1 to Ex.R3.

6. The learned Family Court, after taking into consideration the rival contentions of the parties and the evidence on record, dismissed the petition of the appellant.

7. Learned counsel appearing for the appellant has vehemently argued that at the time of separation of the parties, the issue regarding the custody of the child was not decided. It is further submitted that at that time, respondent No.1-Sujata had not contracted the second marriage, but after she had done so, the appellant being the father and the natural guardian of the minor daughter, is entitled to her custody and his preferential right could not have been negated by the learned Family Court. It is further argued that respondent No.2 i.e. maternal grandmother of the minor daughter, would have a right to the custody of the minor daughter had the appellant not been there.

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

9. The question that arises for consideration by this Court is whether the order passed by learned Family Court, requires any interference.

10. From a bare perusal of the order passed by the learned Family Court, it would be apparent that it has been noticed in the order that the Court had examined the minor daughter, who at that time was aged 12 years. She had repeatedly insisted to reside with her maternal grandmother and not with her father. It was further stated by the child that though her mother had re-married, yet she was on regular visiting terms with her mother. The learned Family Court, on that basis found that the minor daughter was comfortable in the company of her maternal grandmother and she was also on visiting terms with her mother. It was further found that the conduct of the appellant-husband in seeking the custody of the child was not serious. The learned Family Court, has observed as under:-

“7. It is worth mentioning here that the petitioner and the first respondent fell apart in the year 2011 when their daughter was of the age of about 3-1/2 years and this petition for her custody was filed on 02.02.2016 that is after about five years of the separation. The conduct of the petitioner reveals that he is not serious in claiming custody of his minor daughter. Furthermore a copy of affidavit sworn by him on 01.04.2011 is placed on record as Exhibit RX. A perusal of the said affidavit would make it clear that the issue of

custody of the minor daughter was not decided when the parties agreed to fell apart. This conduct of the petitioner also reflects that he is not serious about taking custody of his daughter.

8. It is yet again submitted that the second respondent who has superannuated is physically and mentally fit for taking a good care of the minor daughter of the petitioner. She is a government pensioner and is receiving a fit pension of about Rs.40,000/- per month; whereas there is no proof of income of the petitioner.”

11. It is settled law that while deciding the question regarding the custody of the minor child it is the paramount welfare of the minor, which is to be taken into consideration and nothing else.

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 liberally 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 *parens patriae* jurisdiction arising in such cases.”

12. In the instant case respondent No.2 is the maternal grandmother of the minor child. The minor was 12 years of the age, when the when the impugned order was passed by the learned Family

Court. Taking said fact into consideration, by now, the child would be about 16-17 years of the age. Respondent No.2 being maternal grandmother of the minor has been taking care of her since her birth and the minor child had also expressed her desire to remain with her maternal grandmother. Thus, this Court does not find any infirmity in the impugned order. In our opinion, the findings recorded by the learned Family Court do not require any interference by this Court.

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

10.09.2024
Himanshu

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