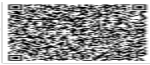


2024:PHHC:116173-DB



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO-4190-2024 (O&M)
Date of decision: 04.09.2024

JYOTI ...Appellant
Versus
SHAMSHER AND ANR ...Respondents

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

Present:- Mr. Yajat Gill, Advocate for
Mr. S.S. Gill, Advocate, for the appellant.

SUDHIR SINGH, J.

Challenge in the present appeal is to the order dated 29.05.2024, passed by the Learned Principal Judge, Family Court, Jhajjar (For short “the Act”), whereby the petition under the provisions 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. However, she was granted visiting rights qua the minor child.

2. The appellant, being the mother of the minor child, Keshav aged 10 years, had filed the aforesaid petition, *inter alia*, averring therein that she was married to Sanjeet on 22.11.2011, according to Hindu rites. Out of the said wedlock, a male child, namely, Keshav, was born on 26.03.2015. Her husband passed away

on 26.08.2017. After the death of her husband, she and her minor child, had stayed at her matrimonial home at Village Khaparwas but their arose disputes between the appellant and her parents-in-law. On 22.07.2018, she along with the minor child, had been turned out of the matrimonial home. Thereafter, she along with her minor child came to reside at her parental home i.e. Village Ukhachana Kot District Jhajjar and the minor child was got admitted in Adarsh Sr. Secondary School (Kids Wing) at Village Ukhachana Kot in August, 2018. It was further asserted that on 23.12.2018, a Panchayat of Villages Ukhachana and Khaparwas, was convened in which, a written compromise was effected between the parties, vide which the custody of the minor was given to the respondents (parents-in-law). But, neither the appellant was present in the said Panchayat nor her consent was taken before handing over the custody of the child to the respondents. It was further asserted that on 30.01.2019, the appellant visited her matrimonial home to bring back the child, but the respondents outrightly refused to hand over the custody of the child to her and they did not even allow her to meet the minor, which led to the filing of an application for the custody of the minor child before the Protection Officer, Jhajjar on 04.02.2019. However, the appellant was advised to file the petition for custody of the minor children before the Court. It was further averred that the future of the child was not safe in the company of his grandparents and the appellant being graduate could educate the child in a better manner as compared to the respondents, who were illiterate. It was further averred that the

appellant, being the mother and natural guardian of the minor, had a preferential right qua the custody of the minor child.

3. Upon notice, the respondents entered appearance and filed their joint written statement. The factum of the relationship between the parties and the death of the husband of the appellant (son of the respondents) was admitted. The allegations of the disputes arising between the parties and turning the appellant out of the matrimonial home, were denied. It was further pleaded that after the death of her husband, the appellant used to pick up quarrels with the respondents. It was further asserted that the Panchayat of the two Villages i.e the village of the appellant and that of the respondents, was convened on 23.12.2018, wherein she had refused from staying in her matrimonial home and had further agreed to hand over the custody of the minor son Keshav (aged 3 ½ years then) to the respondents in the said Panchayat. It was further agreed and settled in the said Panchayat that the appellant would be at liberty to re-settle in her life by performing a second marriage and will have no concern with the estate and family of her deceased-husband. The said compromise/writing dated 23.12.2018, was signed by the father of the appellant as there had been a practice in the community that signatures of the ladies were not obtained on any writing in the Panchayat, but before executing the said writing she was duly consulted. It was yet further asserted that since then, the minor child has been in the custody of the respondents. The rest of the allegations were denied.

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

“1. Whether the petitioner is entitled for the custody of minor child Keshav on the grounds mentioned in the petition? OPA

2. Whether the present petition is not maintainable in the present form? OPR

3. Whether the petitioner has no locus standi to file the present petition? OPR

4. Relief.”

5. In evidence, the appellant examined herself as PW-1, whereas her father Ram Singh was examined as PW-2, besides leading documentary evidence in the form of Ex. P1 to P8. On the other hand, respondent No.1-Shamsher stepped into the witness box as RW1 and he had further examined one Bijender Singh, Director M.D. High School, Chadwana, Tehsil Matanhail, District Jhajjar, as RW-2 and Roshan Lal, Ex-Sarpanch of Village Ukhalchana as RW-3. Apart from that, documentary evidence in the form of Ex. R2 and Ex.R3 and Mark- R1 was led by the respondents.

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. However, the appellant was granted visiting rights as regards the minor child.

7. Learned counsel appearing for the appellant has vehemently argued that the child is aged 10 years and the appellant, being the mother and natural guardian of the minor child, has a

preferential right to have the custody of said child. It is further contended that there is no substitute to the motherly love in this world and grandparents howsoever loving and affectionate they might be, cannot provide the minor, the care protection and love of a mother. It is further submitted that it was the pleaded case of the appellant before the learned Family Court that the alleged Panchayatnama was never signed by the appellant and as a matter of fact, no consent of the appellant was sought in respect of handing over the custody of the minor child to the respondents in the said Panchayat/writing. It is yet further submitted that respondents in their written statement had admitted that the writing dated 23.12.2018, did not bear the signatures of the appellant and rather the same was signed by her father. On the basis of the aforesaid submissions, it is contended that the impugned order passed by the learned Family Court, is not tenable in the eyes of law and the same is liable to be set aside.

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

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

11. It may be noticed that in Para 53 of its order, the learned Family Court, has noticed that the child was produced in the Court and the Court had interacted with him exclusively for around 20-25 minutes in the Chambers, but the child did not show any inclination to join the company of his mother. The Family Court, thereafter recorded the statement of the child, wherein the child had clearly stated that he

had no desire to go back to his mother. It was on the basis of the aforesaid circumstances that the learned Family Court, found that the custody of the minor child should not be disturbed. The relevant extracts from the order of the learned Family Court, would read as under:-

“53. On 10.04.2024, the respondent No.1 produced the child before the Court, who is now more than 9 years of age. The Court interacted with the child exclusively for around 20-25 minutes in the Chamber but the child did not show inclination to join the company of his mother (Jyoti) and rather insisted on staying with his grand-parents. The Court also observed that the child was visibly happy and comfortable in the care and company of his grand-father. The statement suffered by the child was recorded by the Court on the same day, i.e. on 10.04.2024, which is reproduced as under:

Statement of child Keshav:

“ I am residing with the grand-parents and want to live with them only. I do not want to live with my mother. When I was a kid, I was staying along with my mother at the place of my maternal grand-parents but my mother sent me to my grand-father. I have asked my mother in the Court to stay with us in my home situated at out native village but she is not ready to reside with me in my

home. I am studying in 4th class and I will not go to my mother.”

54. In these circumstances, the Court is of the opinion that it will be in the best interest of the child to keep him under the care and custody of his grand-parents, who have both the bonding and the required means of experience to liberally spend quality time with their grandchild. It shall be highly detrimental to the interest of the minor to uproot him from his current investment in which he has been staying since the last more than 5 ½ years, when his custody was handed over by his mother to his grandparents.

55. xx xx xx

56. The respondents, who are the grand-parents of the child having the liability of the child only, are providing better and safe home to him which is in the interest and welfare of the child. The all round welfare and development of the child lies with the grand-parents in the given scenario.

57. xx xx xx

58. xx xx xx

59. The Court also tried to persuade child Keshav while interacting with him in the chamber to go to his mother to live with her for some time.

In view of his tender age, but he refused to do so.

After talking to the child and assessing his state of mind, this court is of the view that it would not be in the interest and welfare of the child to hand over his custody to his mother Jyoti.”

11. There is no debate as regards the statutory provision that mother, being the natural guardian of the minor child, has a preferential right regarding the custody of such child. However, in the instant case, as noticed above, the learned Family Court, had interacted with the child when he was produced in the Court and had also recorded his statement. The minor child stated that he did not want to go with his mother and rather wanted to remain with his grandparents. The child is aged 10 years now and he has expressed his desire to remain in the company of his grandparents. Thus, when the minor child himself does not want to live in the company of his mother and rather is happy in the company of his grandparents and there is no circumstance or evidence on record to show that the overall welfare of the child does not lie in the company of his grandparents, we find that the impugned order does not require any interference.

13. It is settled law that while deciding the question regarding 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.

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.

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 *parens patriae* jurisdiction arising in such cases.”

14. The learned Family Court has granted the appellant visiting rights qua the minor child and has also observed that the respondents will raise no objection to the meetings between the mother and the minor child. Thus, the findings recorded by the learned Family Court do not require any interference by this Court.
15. No other point has been urged.
16. In view of the above, we do not find any merit in the present appeal and the same is hereby, dismissed.
17. Pending application(s), if any, shall also stand disposed of.

[SUDHIR SINGH]
JUDGE

[JASJIT SINGH BEDI]
JUDGE

04.09.2024
Himanshu

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