

2024:PHHC:122018-DB



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO-4305-2024 (O&M)
Date of decision: 10.09.2024

MADHVI @ MADHVI BADHAN

...Appellant

Versus

PARDEEP BHATIA

...Respondent

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

Present:- Mr. Suneet Pal Singh Aulakh, Advocate,
for applicant-appellant.

SUDHIR SINGH, J.

CM-15743-CII-2024

For the reasons given in the application, the same is allowed and delay of 90 days in filing the appeal is condoned, subject to all just exceptions.

FAO-4305-2024

Challenge in the present appeal is to the judgment and decree dated 06.03.2024, passed by the Learned Principal Judge, Family Court, Pathankot (for short the Family Court'), whereby the petition under Section 25 of The Guardians and Wards Act read with Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as 'the Act') filed by the appellant-wife for the care and custody of the

minor son of the parties, has been dismissed. However, the appellant-wife has been granted visiting rights, as indicated in Para No.23 of the said order.

2. Shorn of all unnecessary details, the facts of the case are that the marriage between the parties was solemnized on 14.02.2014, as per Hindu rites and out of the said wedlock, a male child was born on 25.06.2017. The appellant-wife had filed the aforesaid petition for the custody of the minor child *inter-alia*, on the grounds that she had been thrown out of the matrimonial house soon after the birth of the child. The respondent-husband and his family members shifted the appellant-wife in a rented accommodation in 2019, and the parties lived together with the minor child for a period of one year. Thereafter, the father of the respondent-husband asked the parties to come and live in the joint family with an assurance that he would construct a separate house for them, but at the time of starting of the construction, the respondent-husband and his family members had called upon the appellant-wife to bring a sum of Rs.70 lakh from her parents for the construction of the said house. However, the appellant-wife was unable to meet with such demands of the respondent-husband and his family members and when in April, 2021, they had started harassing her, the mother of the appellant-wife had extended a financial help of Rs.3,50,000/- to the respondent-husband on 12.05.2021, by making withdrawal from her savings accounts. Thereafter, the respondent-husband and his family members had again shifted the appellant-wife to a rented accommodation wherein the parties had resided together for two months. The respondent-husband

used to record the conversation of the appellant-wife illegally with a motive to harass her and the father of the respondent-husband used to interfere in their matrimonial life besides using foul and filthy language. It was further stated that again the appellant-wife along with minor son went to the matrimonial home, but she was not allowed to enter the said house and she started residing with her parents. It was further alleged that the respondent-husband and his family members never extended any financial help for bringing up the minor child and towards his maintenance. On 26.11.2021, when the appellant-wife along with the minor child was coming in the car from the school, the respondent-husband stopped her car and had forcibly snatched the minor child from the lawful custody of the appellant-wife and the said incident had been recorded in the CCTV cameras of the KLM School, Pathankot. It was further alleged that the respondent-husband had got filed false and frivolous civil suits against the appellant-wife with a *suo motu* to harass her. It was further stated that the appellant-wife had filed a CRWP-11952-2021 before this Court, but the same was decided on 28.09.2022 with liberty to her to file a custody petition. It was further stated that the appellant-wife, being the mother of the child, was entitled to the custody of the child, aged 4 years and at such a tender age, there cannot be any substitute of the motherly love to the minor child.

3. Upon notice, the respondent-husband entered appearance. The factum of the marriage and birth of the child was admitted. The allegations regarding the giving of dowry articles were denied. The factum of filing of CRWP-11952-2021 and its dismissal vide order

dated 28.09.2022 was also admitted. It was further stated that the appellant-wife had trespassed into the house exclusively belonging to the father of the respondent-husband, which had led to the filing of the civil suit(s) and the complaints to the higher police authorities. It was further averred that vide judgment and decree dated 04.07.2023, the civil suit filed by the father of the respondent-husband was decreed by the Civil Judge (Junior Division), Pathankot and that on 29.12.2021, the appellant-wife trespassed the house with a knife and forcibly manhandling the brother of the respondent-husband and his family members. A representation in this regard was made to the SHO, Police Station Division No.2, Pathankot. The said incident was captured in the CCTV footage. The brother and sister-in-law (Bhabhi) of the respondent-husband had filed a Criminal Writ Petition before this Court seeking protection of life and liberty, which was disposed of vide order dated 28.09.2022. It was further alleged that 31.07.2023 at about 02:30 PM, the appellant-wife along with her brother Aashish, Gagandeep Singh @ Goldym, Vikramjit Singh @ Vinky, Sukhwinder Singh @ Sunny, Pardeep Malpotra, Chintu @ Pintu @ Sahil Malpotra along with some unidentified persons, stopped the School Bus bearing registration No. PB06-BE-3064 at Saili road in order to kidnap the minor child and also gave beatings to the driver. As the minor child had not gone to the school on that day, the aforesaid persons could not achieve their target of kidnapping the child. The School authorities informed the respondent-husband about the said incident on 01.08.2023 and CCTV footage of the same was also given on 31.07.2023 and thereafter, FIR No.105 dated 03.08.2023 under

Sections 323, 341 read with Section 34 IPC was registered at Police Station Division No.2, Pathankot. Thereafter, on the representation of the respondent-husband, the police had incorporated Sections 365, 511, 120-B IPC in the aforesaid FIR. Accordingly, CRWP-9553-2023 filed by the respondent-husband was disposed of vide order dated 30.10.2023 and it was directed in the said order that since the attempt was made on earlier occasion to kidnap the child, the State will provide security to the respondent-husband and the minor child on payment of dues as applicable, subject to periodic review of the threat perception to the respondent-husband and the minor child. It was further alleged that the brother of the appellant-wife was habitual drunkard and two criminal cases have been registered against him. It was further averred that the respondent-husband was providing all the basic amenities to the minor and the joint family, consisting of the parents, two brothers and two sisters-in-law, has been taking well 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 the custody of minor child? OPP
2. Whether the petitioner has not come to the Court with clean hands? OPR
3. Relief.”

5. In evidence, the appellant appeared as PW-1 and also examined PW-2 Nitika Mahajan; PW-3 Smt. Nirmal Devi; PW-4 Nirmal Paul, besides tendering into evidence Ex.P1 to P-20, Ex.PA to

PI and Mark-P. On the other hand, the respondent was appeared as RW-1 and also examined RW-2 ASI Pawan Kumar, RW-3 Sh. Neeraj Kumar, Clerk, KLM International School, RW-4 ASI Sukhwinder Singh and RW-5 Dr. Sumeet Singh besides leading documentary evidence in the form of Ex.R1 to R57.

6. The learned Family Court after taking into consideration the rival contentions of the parties and the evidence on record, dismissed the petition filed by the appellant-wife but granted her visitation rights, as noticed above.

7. Learned counsel appearing for the appellant has vehemently argued that the minor child is aged 6 years and, therefore, the appellant, being the mother and natural guardian of the minor is entitled to the custody of the minor child. It is further argued that there is no substitute to mother's love and the respondent cannot provide the love care and affection to the child, which can only be provided by the mother. It is further argued that the approach of the learned Family Court, in dismissing the petition filed by the appellant-wife is totally illegal and, therefore, the impugned order 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.

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

10. A perusal of the impugned order would show that it has been noticed by the learned Family Court, that before deciding the

petition, it had interacted with the minor child, who was produced before the Court for interaction and it was found that the child had repeatedly expressed his desire to remain in the company of the father and did not even want to talk his mother. The relevant part from the order of the learned Family Court would read as under:-

“19. The child was produced in the Court on 06.02.2024. This Court interacted with the child on that day because the child was not even ready to talk to the petitioner/mother. When the Court asked the reason, the child replied that his mother raised threats to kill his father. The Court made further questions to remove the doubts whether there was any tutoring or some pressure by his father or other family members. Then the child very confidently replied that he was 06 years old and was born on 25.06. However, he could not tell the year of his birth. He further replied that he was studying in KLM, International School and the name of his teacher was Sonu Madan. He also gave the name of his grandparents as Sh. Suresh Bhatia, and Kanchan Bhatia, paternal uncle as Rajeev Bhatia and mother as Madhvi. The answers given by the child satisfied the Court that the child understands everything and gave the answers very confidently. He further stated that one day his mother started checking the school bus. When the child was asked the reason of checking the school bus by his mother, he replied that she was searching for him and he had checked the recordings to know about it. It created somewhat doubt in the mind of the Court that there might be some tutoring of the child by his father and other family members against the mother. To

make it clear, this Court asked the child whether he is to be sent to his mother for one day but the child stated that he had to live with the father only and not to go with the mother. The child repeated the same things many times. Then the parties were directed to sit for some more time to make the child comfortable. The Court again took up the file but the Court observed that the child was still reluctant to talk and meet his mother. On request of the petitioner to give her five minutes alone with the child when the Court tried so, the child started weeping. The respondent also tried to leave the child but the child was not ready for the same and did not leave the lap of his father. The child did not receive even the chocolates from his mother. The mother/petitioner stated that the child was doing so because he has not met her for the last two years but again this version of the petitioner stood nullified when she stated that he was studying. It has made one thing very much clear that child is more attached to the father/respondent and he stated whatever was in his mind. Therefore, it cannot be said that the respondent has poisoned the mind of child by showing videos to him and took undue advantage of the custody of the child with him”.

11. It was, thus, found that the child had found himself to be emotionally more attached to the respondent-father and his family members and uprooting him from such emotional and sentimental bonds would make him suffer. It was further found that the respondent-husband; his parents along with other family members to whom the minor child was emotionally attached, could take well care of the child. Irrespective of the litigations and various other

proceedings going on between the parties, it was found by the learned Family Court that the factum of the paramount welfare of the child should be taken into consideration. It was further found that the respondent-husband had stated in his written statement that whenever the appellant-wife wanted to meet the minor child, he had made all arrangements and facilitated such meetings. Thus, it was concluded that the welfare and betterment of the minor child was safe with the respondent-father and the appellant-wife was not found entitled to the custody of the minor child. However, while dismissing the petition filed by the appellant-wife, the learned Family Court had granted following visiting rights to her:-

“23. In view of finding on the above issue, the present petition is hereby dismissed. Since the child is still aged about 6 years, the petitioner-mother is entitled to visitation rights to see and meet the minor child physically every week preferably on Sundays or holidays at the time, date and place, preferably a public place near to the current address of the minor child at the relevant time, as fixed by both the parties at least two days prior to such meeting/visit and further she is entitled to meet and talk to the child by way of video calls twice a week after school hours of the child at the time as fixed by both the parties. The respondent is also directed to facilitate such meetings”.

12. We find that the learned Family Court, before dismissing the petition filed by the appellant-wife has taken into consideration all the relevant factors and concluded that the welfare and betterment of the child is safe in the company of the respondent-husband. It is

settled law that while deciding the custody of the minor children, the sole consideration is the paramount welfare of such children. If a child is living and growing in a safe environment with either of the spouses and expresses his/her desire to remain in the company of such spouse, the custody of such child should not be disturbed.

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

14. We find that the child can be given better parenting by both the parents. While the custody has been ordered to remain with the respondent-husband, the appellant-wife has been granted visiting rights and she can very well visit the child and grant him love, care and affection. Thus, we do not find that the findings recorded by the learned Family Court, suffer from any illegality or perversity.

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

10.09.2024
Himanshu

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