

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

FAO-5319-2022 (O&M)
Date of Decision: 03.05.2024

DEEPAK WALIA

...Appellant

Versus

SHIKHA WALIA

...Respondent

**CORAM: HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE HARSH BUNGER**

Present : Mr. Ashok Kaushik, Advocate
for the appellant.

Mr. Virat S. Rana, Advocate
for the respondent.

HARSH BUNGER, J.

Present appeal has been filed by the appellant (Deepak Walia) assailing the order dated 14.09.2022 passed by the Court of Principal Judge, Family Court, Kurukshetra, whereby an application filed by the appellant, seeking grant of permission to him and his parents to meet his minor son twice a month and also to give some gift articles to the minor child, has been dismissed.

2. Briefly, the appellant (Deepak Walia) was married to respondent (Shikha Walia) on 29.10.2009 and out of the said wedlock, one male child was born on 15.08.2015.

3. It transpires that on account of temperamental differences between the parties, they started residing separately since 01.09.2019. Subsequently, the parties entered into a compromise with each other and mutually agreed to get their marriage dissolved by a decree of divorce by way of mutual consent. It is not disputed that at the time of settlement, the

appellant had agreed to return the ornaments etc. and also to pay an amount of Rs.18,00,000/- to the respondent herein. It was further agreed between the parties that the minor son will remain in the care and custody of respondent herein. It was further settled between the parties that they will not file any case against each other in future regarding any claim in any Court of Law.

Keeping in view the settlement between the parties and after the statements of the parties were recorded in the first and the second motion, the marriage between them was dissolved by a decree of divorce dated 20.07.2021 passed under Section 13-B of the Hindu Marriage Act, 1955 (for short '*the 1955 Act*') by the Court of learned Principal Judge, Family Court, Kurukshetra.

4. Thereafter, it appears that the appellant filed a petition under Sections 7, 10, 12, 17 and 25 of the Guardians and Wards Act read with Sections 6 and 13 of the Hindu Minority and Guardianship Act (Annexure P-2), seeking custody of the minor child.

During the pendency of the afore-said petition, the appellant filed an application (Annexure P-3), seeking grant of permission to him and his parents to meet his minor son and also to give some gift articles to him; which was dismissed by the learned Family Court, Kurukshetra, vide impugned order dated 14.09.2022.

5. In the afore-mentioned circumstances, the present appeal has been filed before this Court.

6. It is submitted by the learned counsel for the appellant that although, the marriage between the parties was dissolved by way of mutual consent and as per the settlement arrived at between the parties, the appellant had paid Rs.18 lacs to the respondent for permanent alimony, maintenance

and all other claim(s) for past, present and future and the custody of the minor child was to remain with the mother i.e. the respondent herein, yet, since the respondent had joined a government job, therefore, the minor child is left with the old mother of the respondent, who is not in a position to look after the minor child. Accordingly, it is submitted that the appellant had filed the petition (Annexure P-2), seeking custody of the minor child and the application (Annexure P-3), seeking permission to meet the minor child has been wrongly dismissed by the learned Family Court, Kurukshetra, by observing that since the parties had agreed at the time of divorce that the custody of the child would remain with the mother and no visitation rights were settled then there was no occasion to allow the appellant to meet the minor child occasionally, as prayed by him. Learned counsel for the appellant submits that the right of the father (appellant) to meet his child cannot be extinguished.

Accordingly, a prayer has been made that the impugned order be set aside and appropriate directions be issued for permitting the appellant to meet the minor child.

7. Per contra, learned counsel for the respondent has opposed the afore-said prayer made on behalf of the appellant by submitting that the proceedings initiated by the appellant, seeking custody of the minor child, after the grant of divorce by way of mutual consent; is nothing but an abuse of process of law and with an ulterior motive to harass the appellant. It is submitted that the appellant had entered into a settlement with the respondent, wherein it was clearly agreed that the custody of the minor child would remain with the mother i.e. the respondent, and it was further agreed that none of the parties shall file any case against each other in future

regarding any claim(s) in any Court of Law. Learned counsel for the respondent further submits that while entering into the settlement, no visitation rights were agreed upon between the parties and therefore, the proceedings for custody of minor child initiated by the appellant are in contravention of the settled terms of agreement. It is further submitted that the appellant and his parents have no love and affection for the minor child. It is yet further submitted that in case the appellant and his parents had any bonding with the minor child, then they would not have agreed to give the custody of minor child to the respondent. Learned counsel for the respondent contends that the appellant has not come to Court with clean hands, which is evident from a perusal of the pleadings made by appellant in his application (Annexure P-2) wherein on the one hand, it is stated that it was agreed that the minor child would remain in the custody of respondent (mother) and on the other hand, it is stated that the custody of the minor child was given to the respondent under pressure for the time being and not forever. It is also submitted that in case the application filed by the appellant is allowed, then the same would reopen the dispute between the parties and would certainly affect the mind and surroundings of the minor child, who is living with the mother and the same would not be in the interest of the minor. Accordingly, a prayer for dismissal of the appeal has been made.

8. We have heard learned counsel for the parties and perused the paper-book with their able assistance.

9. It is trite law that the statutes, namely, the Guardians and Wards Act, 1890 and also the Hindu Minority and Guardianship Act, 1956, make it clear that the welfare of the children is a predominant consideration. It is to be noted that a child is a person within the meaning of Article 21 of the

Constitution. Admittedly, a child has a right to his/her life as guaranteed by Article 21 of the Constitution. As a matter of fact, a minor child cannot express his/her preferences. The paramount welfare of the child is the governing factor. It cannot be gainsaid that the welfare of the child is not to be measured by the physical comfort provided by a party, by spending money on the child. Taking into account all facts and circumstances of a given case; a Court of Law will have to consider the moral/spiritual welfare of the child and at the same time also keep in mind the psychological, physical and other needs of a minor child.

10. The Hon'ble Supreme Court in ***Mousami Moitra Ganguli v. Jayanti Ganguli (2008) 7 SCC 673*** observed that while deciding the issue as to which parent the care and control of a child should be committed, the first and paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute.

11. The Hon'ble Supreme Court further in ***Tejaswini Gaud and others v. Shekhar Jagdish Prasad Tewari (2019) 7 SCC 42*** held that the Court while deciding the custody cases of the child, is not bound by the mere legal right of the parents or guardians. It held that though the provisions of the special statutes govern the rights of the parents or guardians, yet the welfare of the minor is the supreme consideration in cases concerning the custody of minor child. Therefore, the paramount consideration should be the interest and welfare of the child. In the aforesaid judgement, Hon'ble Supreme Court reiterated the view taken in ***Nil Ratan Kundu v. Abhijit Kundu reported in (2008) 9 SCC 413*** and emphasized that the paramount consideration should be the welfare of the child and due weight

should be given to the child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings.

12. It also needs no reiteration that the custody cases of child cannot be decided on documents, oral evidence or precedents without reference to "human touch".

In **Gaurav Nagpal v. Sumedha Nagpal (2009) 1 SCC 42**, the Hon'ble Supreme Court, while dealing with custody of children, held as under:-

"30. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is 'welfare of the child'.

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*32. In **Mc Grath, Re, (1893) 1 Ch 143 : 62 LJ Ch 208**, Lindley, L.J. observed;*

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded.

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36. The Guardians Act, consolidates and amends the law relating to guardians and wards. Section 4 of the said Act defines "minor" as a person who has not attained the age of majority. "Guardian" means a person having the care of the person of a minor or of his property, or of both his person and property. "Ward" is defined as a minor for whose person or property or both, there is a guardian. Chapter II (Sections 5 to 19 of Guardians Act) relates to appointment and declaration of guardians. Section 7

thereof deals with 'power of the Court to make order as to guardianship' and reads as under:

"7. Power of the Court to make order as to guardianship. - (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made--

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

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50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the

moral and ethical values have also to be noted. They are equal if not more important than the others.

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. "

Therefore, it is only the paramount consideration of the child that would be the deciding factor.

13. From the material on record, the following facts would emerge:
- (i) The minor child was born on 15.08.2015.*
 - (ii) On account of temperamental differences between the appellant and respondent, they started residing separately since 01.09.2019.*
 - (iii) On 20.07.2021, the appellant and respondent obtained divorce by way of mutual consent under Section 13-B of Hindu Marriage Act.*
 - (iv) As per settlement arrived at between the parties at the time of taking mutual consent divorce, the appellant paid Rs.18 lacs to the respondent as permanent alimony, maintenance and all other claim(s) for past, present and future and had also agreed that the custody of the minor child will remain with the mother i.e. the respondent herein.*
 - (v) It was further settled between the parties that they will not file any case against each other in future regarding any claim in any Court of Law.*
 - (vi) After 3 months from the date of grant of divorce; the appellant filed petition under Sections 7, 10, 12, 17 and*

25 of the Guardians and Wards Act read with Sections 6 and 13 of the Hindu Minority and Guardianship Act(Annexure P-2), seeking custody of the minor child.

(vii) Respondent is stated to have got a Government job in Environment Court, Kurukshetra.

(viii) Minor has been residing with his mother (respondent herein) since 01.09.2019 i.e. prior to divorce between the parties and even subsequent thereto, till date.

14. Evidently, it is the respondent, who has all along taken care of the minor and even at the time of taking divorce by way of mutual consent, it was agreed between the parties that the custody of the minor would remain with the mother (respondent herein). The above conduct of the appellant does not go to show that he is really interested in the welfare and upbringing of the minor. Had it been so, he would have agreed for “shared parenting” or atleast agreed for visitation rights, however nothing of the sort was done.

15. Furthermore, in the application (Annexure P-2), appellant has taken the following stand in para 4 thereof:

“4. That at the time of compromise in the petition under section 13-B of the Hindu Marriage Act, which was decided by this Hon'ble Court vide judgment and decree dated 20.07.2021, the respondent threatened the petitioner that she will commit suicide with the child, in case, the custody of child is not given to her and due to this reason, the custody of child was given to respondent under pressure for the time being and the custody of the child was not forever...”

Even if the above extracted stand of the appellant is to be assumed as correct, then in that eventuality, the appellant should have filed an appropriate application before the concerned Court seeking modification

in the judgment dated 20.07.2021, whereby mutual consent divorce was granted after noticing the fact that the custody of the minor shall remain with the respondent herein and also observing that there is no dispute left between the parties in respect of permanent alimony, custody of child and return of dowry articles.

Apparently, no such recourse was taken by appellant to seek modification of the judgment dated 20.07.2021.

16. Be that as it may, keeping in view the above referred judicial pronouncements and upon considering the facts and circumstances of this case, especially the stand taken by the appellant in para 4 of his application (Annexure P-2), we are of *prima facie* view that in case, the application filed by the appellant, seeking grant of permission to him and his parents to meet his minor son twice a month and also to give some gift articles to the minor child, is allowed; then the possibility of appellant and/or his parents to pollute the mind of the minor against his mother (respondent) cannot be ruled out, which would in turn be counter-productive for the welfare of the minor. As noticed above, welfare of the child is not to be measured by the physical comfort provided by a party, by spending money on the child or giving gift articles to minor. Minor has been residing with his mother (respondent herein) since 01.09.2019 i.e. prior to divorce between the parties and even subsequent thereto, till date. Except the bald assertions of the appellant, it has not been shown as to how the minor is not being looked after well by the respondent.

17. Considering the totality of circumstances, we do not find any illegality or perversity in the impugned order dated 14.09.2022, which

may call for any interference by this Court. Resultantly, the instant appeal fails and the same is accordingly dismissed.

18. All pending applications (if any) shall also stand closed.

(SUDHIR SINGH)
JUDGE

(HARSH BUNGER)
JUDGE

May 03, 2024
gurpreet

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