



118

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

FAO-4583-2024 (O&M)
Date of Decision: November 20, 2024

Somvir @ Sombir
.....Appellant
versus
Renu
.... Respondent

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

Present:- Ms. Gursimran Walia, Advocate for the appellant.

SUDHIR SINGH, J.

Challenge in the present appeal is to the order dated 20.05.2024, passed by the Learned Principal Judge, Family Court, Jhajjar (for short ‘the Family Court’), whereby the petition under the provisions of the Guardians and Wards Act, 1890 (for short ‘the Act’) filed by the appellant, for the custody of the minor child, has been dismissed.

2. The aforesaid petition had been filed by the appellant, *inter alia*, pleading therein that his marriage with the respondent was solemnized on 24.01.2007 as per Hindu rites and out of the said wedlock, one female child, namely, Misty was born on 26.02.2012, who was in the custody of the respondent-mother. It was further asserted that the behaviour of the respondent towards the appellant and his family members was cruel. It was further asserted that in 2013, the respondent left the company of the appellant and she went to her parental home along-with the minor child. She filed a petition under Section 125 Cr.P.C. The appellant had filed a petition under Section 9 of the Hindu Marriage Act, 1955, but the said petition was withdrawn on 05.07.2016. As the

respondent had filed the divorce petition which was ultimately decreed vide judgment and decree dated 27.02.2017. It was further the case of the appellant that after passing of the decree of divorce, the respondent handed over the custody of the minor child to her brother, where the minor was subjected to the physical and mental torture. On 26.02.2018, when then appellant went to attend the birthday function of the minor child, he was not allowed to do so. It was further asserted that the future of the minor child was not safe as the respondent was doing the work of ANM trainer and would remain out of home till late hours.

3. Upon notice, the respondent-wife entered appearance and filed her written statement, admitting the factum of the marriage and the birth of the child. However, it was pleaded that on account of the harassment for not bringing sufficient dowry, the respondent had to lodge FIR No.216 dated 21.12.2014 against the appellant-husband. It was further asserted that in the petition under Section 9 of the Hindu Marriage Act, 1955, the respondent was granted maintenance *pendente lite* to the tune of Rs.8,000/- per month apart from litigation expenses of Rs.5,500/- and travel expenses of Rs.600/- but instead of paying the said maintenance amount, the petition was withdrawn by the appellant-husband. It was further asserted that even in the petition under Section 125 Cr.P.C., she was awarded a sum of Rs.5,000/- as interim maintenance. It was yet further asserted that when the harassment and humiliation at the hands of the appellant-husband and his family members did not stop, she was forced to file the divorce petition, which was decreed. The allegations of handing over custody of the minor child to her brother, were denied by the respondent-wife.

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

- “1. *Whether the petitioner is entitled for the custody of minor child, namely, Misty on the grounds mentioned in the petition? OPP*
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 himself as PW-1. On the other hand, the respondent examined herself as RW1, besides tendering documents Exhibits R-1 to R-8.

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

7. Learned counsel appearing for the appellant/husband has vehemently argued that in her testimony, the respondent-wife admitted that she had remarried and it was also deposed by her that the child used to remain with her maternal grandparents. It is, thus, argued that having contracted second marriage, the future of the child is not secured with the respondent-wife and the appellant being a man of means, can provide better future of the minor child. Thus, it is contended that the impugned order passed by the learned Family Court suffers from patent illegality.

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

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

10. The learned Family Court has found that the appellant did not pay the maintenance allowance awarded in the petition under Section 9 of the Act and the arrears were only paid when the conditional warrants of arrest were issued in the execution proceedings. It was further found that the appellant was

not even aware as to who was bearing the expenses of the minor child and he did not even know the name of the school of the child. It was further found that no evidence was led to establish that the future of the child was not secure in the company of the respondent-wife. The learned Family Court has found that the respondent-wife was capable of bringing up the child very well being qualified ANM (Auxiliary Nurse and Midwife).

11. Thus, the learned Family Court dismissed the petition filed by the appellant. But granted the appellant visiting rights qua the minor child, as noticed in Para No. 80 of the order which reads as under:-

“80. As a sequel to the finding recorded under the forgoing issue, the petition in hand preferred by the petitioner-father seeking the custody of minor child fails and is hereby dismissed with costs. Although no prayer for visitation right has been made on behalf of the petitioner during the course of arguments, yet keeping in view the fact that a child needs love and affection of both the parents and the petitioner-father is one of the natural guardians of the girl child, he is given visitation right to meet the girl child once a month, preferable on last Saturday of each month, if desired at the place of her residence while informing about his intending visit there in advance to the mother of the child telephonically, who will not raise any objection in this regard. If the respondent raises any dispute regarding his visit to the child, the petitioner would be having right to move appropriate application before the Court to facilitate his meeting with the child on some working day which may be molded as per the situation, if needed. xx xx xx”

12. While deciding the case of the custody of the children, the Court is to take into consideration the paramount welfare of the children. 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.

XX

XX

XX

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 parents patriae jurisdiction arising in such cases”.

13. In the instant case, there is no denial to the fact that the respondent has got re-married. However, the fact remains as to whether the child is happy in

the company of her mother or not. As has been noticed by the learned Family Court, the respondent, being mother of the girl child was providing better and safe environment to the child. The learned Family Court has rightly found that when the child was comfortable in the company of her mother, her custody must not be disturbed. It was further found that as the girl child age 12 years old, the respondent being mother, is the best companion and guardian to look after the child and take care of her. Accordingly, it was held that the custody of the child shall remain with the respondent till she attains the age of majority.

14. Thus, we do not find any illegality or perversity in the findings recorded by the learned Family Court. Moreover, as the appellant has been granted visiting rights *qua* the minor child, he can very well develop his love, affection and bonding with the minor child.

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

November 20, 2024

mahavir

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No