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(203) (Proceedings through Video Conferencing/WhatsApp)

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

Date of Decision: 25.02.2021

Reserved on 05.02.2021

1. FAO No.4545 of 2017

Rajat Agarwal ...Appellant (Father)

Versus

Sonal Agarwal ...Respondent (Mother)

2. CREF-3-2018

Rajat Agarwal ...Appellant (Father)

Versus

Sonal Agarwal ...Respondent (Mother)

Present: Mr.Rajat Agarwal, appellant in person
Mr.Shrey Goel, Advocate for respondent

**CORAM:- HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE ASHOK KUMAR VERMA**

ASHOK KUMAR VERMA, J.

1. This order will dispose of FAO No.4545 of 2017 and CREF No.3 of 2018 as common questions of law and facts are involved in both the cases. FAO No.4545 of 2017 arises out of the judgment dated 30.5.2017 passed by the Family Court, Gurugram whereby petition under Sections 7 and 25 of the Guardian and Wards Act, 1890 (for short "Act of 1890") read with Section 6 of the Hindu Minority and

Guardianship Act, 1956 (for short “Act of 1956”) filed by the respondent-mother was allowed against the appellant-father thereby giving the custody of the minor girl, namely, Dishita to the respondent-mother. The Civil Reference (CREF No.3 of 2018) arises out the applications filed by the appellant/father-Rajat Agarwal for interim custody of the girl child before the Court of learned District Judge, Family Court, Gurugram, which were transferred to this Court from the Family Court vide order dated 5.4.2018 passed by this Court in TA No.851 of 2017.

2. The foundation of a happy marital home is love, sharing of joys and sorrows, and not in that sense bricks and concrete. There should be cementing of hearts and not cementing of floors and walls. Ultimately, in the fight between the partners, the victims more often than not are the children. It is unfortunate that in their fight more often on account of egoism and misunderstandings/misconceptions, the children suffer, more particularly when the child is a girl. The child has practically no role in the discord of the marriage, but he or she suffers. The marital discord sometimes reaches such a height that the parties are unmindful of what psychological, mental and physical impact it has on child/children. The best way to make children good is to make them happy.

3. A brief reference to the factual aspects leaving out the maiz of unnecessary facts would suffice. The parties got married on 17.4.2006 at Gurugram and out of the said wedlock, a female child, namely, Dishita was born on 15.1.2008. After some time of the marriage, the relations between the appellant and the respondent ran into rough weather. The

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respondent-wife has lodged an FIR dated 21.10.2016 under Sections 498-A and 406 IPC against her husband and his parents. The respondent-wife also filed a complaint in the month of February, 2017 under the provisions of the Protection of Women from Domestic Violence Act, 2005. The respondent-mother filed petition under Sections 7 and 25 of the 1890 Act read with Section 6 of the Act of 1956 before the Family Court, Gurugram for the custody of the minor female child on the ground that the appellant-father was not taking care of the minor girl and further schooling and career of the minor was unsafe etc. From the pleadings of the parties, the Family Court framed the following issues:-

“1. Whether the petitioner is entitled to the custody of the minor Dishita Agarwal, as prayed for?OPP

2. Whether the petition is frivolous and vexatious. If so its effect?OPR

3. Relief.”

4. In support of her case before the Family Court, the respondent-mother examined herself as PW1 and her father, namely, Sushil Goyal as PW2. She adduced the documents which are Ex.P1 (copy of report card of minor daughter Dishita Agarwal), Ex.P2 (copy of orders of school case), Ex.P3 (copy of petition under DV Act case) and Ex.P4 (a certified copy of charge sheet in FIR No. 625 of 2016).

5. On the other hand, the appellant-father examined himself as RW-1 and his father, namely, Anand Parkash Agarwal as RW2. He adduced the documents in evidence which are Ex.R1 and Ex.R2 (Copies of Bank statements).

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6. The Family Court, after hearing both the parties, allowed the petition of the mother vide its judgment dated 30.5.2017 and gave the custody of the minor girl- Dishita to her mother. Hence, the appellant-father has filed the present appeal under Section 19(1) of the Family Courts Act, 1984.

7. The appellant, who is himself a practising lawyer, has appeared in person and, inter alia, submitted that the appellant being the father and natural guardian has every right to claim the custody of his daughter-Dishita. He has vehemently contended that the Family Court has not fairly appreciated the evidence on record and allowed the petition of the respondent-mother illegally. Elaborating further, he has contended that he is a practising lawyer and can take care of his daughter properly. He further submitted that there would be irreparable damage to the welfare of the minor daughter if she is allowed to remain with the custody of the respondent-mother. He has submitted that the minor girl is in the custody of the respondent-mother since 21.5.2017. In support of his submissions, he placed reliance on Besant Vs. G. Narayaniah 1914 LR Vol. XLI 314, Thain Vs. Taylor 1925-26 Chancery Division T.1299 676, Siddiq-Un-Nissa Bibi Vs. Nizam Uddin Khan and others ILR 1931 (Vol. LIV) 128, In re: T. (ORSE H.) (An Infant) (1962) 3 WLR 1477, Rosy Jacob Vs. Jacob A. Chakramakkal (1973) 1 SCC 840, Sri Mahalinga Thambiran Swamigal Vs. His Holiness Sri La Sri Kasivasi Arulnandi Thambiran Swamigal, (1974) 1 SCC 150, Githa Haritharan Vs. Reserve Bank of India 1999 (2) SCC 228, Kumar V. Jahgirdar Vs. Chethana Ramatheertha (2004) 2 SCC 688, Mausami Moitra Ganguli

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Vs. Jayant Ganguli, (2008) 7 SCC 673, Sudarsan Puhan Vs. Jayanta Ku. Mohanty and others (2018) 10 SCC 552 and M/s Alagu Pharmacy & Ors. Vs. N. Magudeswari, 2018 AIR (SC) 3821.

8. On the other hand, learned counsel for the respondent-mother has, inter alia, submitted that the learned Family Court, after appreciation of evidence on record, has rightly allowed the petition filed by the respondent-mother and gave the custody of the minor girl to the respondent-mother which is in the interest and welfare of the girl-child. Learned counsel for the respondent has vehemently argued that the welfare of the minor daughter demands that her custody should remain with the respondent-mother who is a well educated lady and is capable of providing quality education to her daughter and providing better and safe home for her which is in the interest and welfare of her daughter. In support of his submissions, learned counsel placed reliance on Chandrakala Menon and others vs. Vipin Menon and others, JT 1993(1) SC 229, Mohan Kumar Rayana vs. Komal Mohan Rayana, (SLP(C) Nos.9821-9822 of 2009 decided on 6.4.2010), Amita Chhabra vs. State of Haryana and others, 2015(1) RCR (Civil) 43 (P&H), Bimla and others vs. Anita, FAO No.1326 of 2014 decided on 29.1.2015, Vivek Singh vs. Romani Singh, AIR 2017 (SC) 929 and Rabinder Kaur vs. Gurmit Singh, FAO No.760 of 2014 decided on 1.6.2018 (P&H).

9. We have given our thoughtful consideration to the submissions of the appellant appearing in person and the learned counsel for the respondent and perused the record of the court below. We do not find any merit in the submissions of the appellant.

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10. The moot question which arises for consideration before this Court in the present matter is whether the father or the mother should have the custody of an almost now 13 years old female child? It is not disputed that the father of the minor girl is the natural guardian, though the custody of a minor who has not completed the age of five years shall ordinarily be with the mother and has the right of custody unless the Court comes to the conclusion that the father is unfit to have the custody and that it is not for the welfare of the minor that the father should be allowed to exercise his right. Guardianship is in the nature of sacred trust.

11. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Undoubtedly the provisions of law pertaining to the custody of a child contained in either the Act of 1890 or the Act of 1956 also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant

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facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

12. Before proceeding further, we would like to advert to the evidence adduced by the appellant Rajat Agarwal before the Family Court, Gurugram and he tendered duly sworn affidavit Ex.RW1/A. The entire case set up by the appellant stands demolished from his own statement as RW1 wherein he has stated in so many words that *“I am practising an advocates (sic..adovcate) in Delhi Courts. I do not possess any chamber in any of the District Courts or High Court, Delhi. At present, I may be handling about 12 or 13 briefs- I am an income tax payee-- It is correct that marriage with Sonal-petitioner is my second marriage. My first marriage was solemnized in 1998. I did not have any child from my first wife. The divorce from my first wife was a somewhere in January, 2000-- Volunteered that she has been living on the first floor since the very first day of marriage. Dishita my daughter was born on 15.1.2008. She was born in Gurugram- At the time of birth of my daughter, I was not in any job- I do not have any social circle- I did not take Sonal to any movie-- We never go out for dinners as a family together- I never celebrated the birthday of my daughter Dishita at my residence or in the school. Dishita never make any request for calling her friends to our house on the occasion of her birthday. I had promised her in January, 2015 that we will celebrate her birthday in January, 2016, but Sonal had gone away to her parents house and did not return despite my requests-- Dishita had not gone with Sonal to Punjab. I had refused Dishita to accompany Sonal to Punjab--I do not know where the relatives*

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of the petitioner are residing-- It is correct that the custody of Dishita was given to Sonal for the exams period and that the results of Dishita have been good. It is correct that I had filed a civil suit against the school in which Dishita is studying. It is incorrect to suggest that the case has been decided against me. Volunteered that the plaint had been rejected. My parents do not come to first floor. I leave in the morning around 9.30 am and come back by 3.00 O'clock or 4.00 O'clock. Dishita goes to school by a van and come back by the same van. She comes back home by 2.15 PM. I have a maid servant but I do not know at what time she come and at what time she leaves- It is correct that the petitioner has never harmed Dishita- It is correct that since the day of Dishita's birth, the petitioner has been looking after all her needs, education, health etc-- It is correct that one day on my way back to Haldiram I had to go to Police Station when Dishita was alongwith me. It is correct that Sonal is an educated person and used to do a job."

13. From the above depositions made by the appellant before the trial court, it transpires that appellant is very reticent and reclusive type of person who has secluded himself from the social circle and friends. He did not find anything wrong in not allowing the child to any birthday party or for interacting with friends and relatives and neighbours. The child did not even interact with the grand-parents living on the ground floor of the same building. Meaning thereby that when the appellant is out for work, the child is supposed to be all alone on the first floor. It has come on record that earlier respondent-mother was doing the job of teaching. The appellant had not produced any evidence to demonstrate

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that the daughter is not happy in the company of her mother i.e. the respondent or her parents. She appears to be in a better position to look after the daughter and provide her quality education and also to maintain her in a proper and congenial manner.

14. Similarly, Anand Parkash Agarwal who is father of the appellant appeared as RW-2 and tendered his affidavit Ex.RW2/A and bank statements Ex.R1 and Ex.R2. He has stated during his cross-examination that *“My son was married to petitioner on 17.4.2006. It is correct that it was a second marriage of my son with petitioner-Sonal. The first marriage of the respondent was dissolved by way of mutual consent of divorce after six months of the marriage. My son was unemployed at the time of marriage with the petitioner- The petitioner after the marriage started residing in matrimonial home at Gurgaon. The kitchens were separate on ground floor and first floor. I used to bear the house hold expenses after the marriage of the petitioner. My son also used to contribute- Ground floor and first floor have separate entrance-- I have no knowledge about any litigation between the parties-- I do not know whether Sonal ever did any job. I do not know that she was working in Eurokids School. Dishita was being taken care of by Sonal while she was staying with us in Gurgaon-- Rajat is residing on first floor, therefore, I do not know what time he leaves for work and what time he comes back.”*

15. The cross-examination of the father of the appellant makes it abundantly clear that the ground floor and first floor are completely independent floors. RW2 despite being father of the appellant had no

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knowledge about any litigation between the appellant and the respondent which shows that there was absolutely no interaction between the father and the son, rather he has admitted that he has no knowledge as to when the appellant used to leave for work and at what time he comes back, and therefore, nothing much is expected of the relations of the child with her grand-parents. There was no occasion when the appellant actually entrusted his parents to look after his daughter. No such version has been given by RW2. The statement of RW-2 is very objective and indifferent. It does not reveal any emotion or sentiment or desire for getting the custody of grand-daughter. Therefore, the trial court rightly concluded that the appellant-father is absolutely alone, having no friend and family to support him and he has hardly any positive points in his favour, tilting the balance in his favour qua the custody of the minor girl child.

16. Thus from the evidence on record, it is amply clear that respondent-mother is an educated lady and when the custody of the daughter was given to her mother during the examinations period, her results were good, meaning thereby, the respondent-mother is more capable of providing quality education to her daughter than the appellant-father which is the most essential ingredient for the welfare, betterment and all round developments of the minor girl. Thus, there is no occasion to displace her residence by giving custody of the girl child to the appellant-father more particularly, when it has come on record that the appellant- father had not spared even the school authorities by filing civil suit against them where the girl-child was studying, but the same was dismissed by the civil court and it was the case of the mother that due to

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this, the girl-child was greatly harassed. Same sentiments were expressed by the Hon'ble Supreme Court in Rosy Jacob vs. Jacob A. Chakramakkal, (1973) 1 SCC 840 in the following words:-

“The children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children, has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society..”

17. Keeping in view the totality of facts and circumstances of the present case, we are of the considered opinion that respondent-mother is the best person to educate and bring up her minor daughter and to effectively take care of her interest and welfare. The role of the mother in the development of a child's personality can never be doubted. Mother shapes child's world from the cradle by rocking, nurturing and instructing her child. Particularly, the company of a mother is more valuable to a growing up female child unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother.

18. Apart from that, Mother is a priceless gift, a real treasure and an earnest heartfelt power for a child, especially for a growing girl of the age of 13 years which is her crucial phase of life being the major shift in thinking biologically which may help her to understand more effectively with the help of her mother and at this crucial teen age, her custody with the mother is necessary for her growth. At this growing age,

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daughter looks for mother/a female companion with whom she can share and discuss certain issues comfortably. There would be so many things which a daughter could not discuss with her father and as such mother shall be the best person to take care of her daughter at this growing age.

19. Indeed, we have no hesitation to conclude that all round welfare and development of Dishita lie with her mother. In our opinion, for the present, it is not desirable to disturb the custody of the girl child with her mother since there is nothing on record to show that the welfare of the child is in any way in peril in the hands of the mother-respondent. From the perusal of the previous order dated 26.8.2019 passed by this Court, it appears that Dishita has been brought before a Co-ordinate Bench of this Court by her mother and the Co-ordinate Division Bench of this Court interacted with her for about 10 minutes. She apprised this Court that she met her father at Chandigarh and also responds whenever he calls. However, she has shown her reluctance to accompany with his father to Gurugram.

20. Having regard to the aforesaid discussions, we find no illegality, impropriety, perversity and irrationality in the impugned judgment of the Family Court. This is not a case where this Court can interfere with the findings recorded by the Family Court which are undoubtedly pure findings of fact and no question of law is involved in the present appeal.

21. In view of the above, we find no merit in this appeal which is hereby dismissed. The parties are left to bear their own costs.

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22. Before parting, although no prayer for visitation right has been made by the appellant either in the prayer clause of the appeal or while hearing the matter finally before this Court, but keeping in view the fact that a child needs the love and affection of both the father and the mother and anticipating optimistically that the girl child may serve as a bridge to fill the gap between the parents and the father-appellant also being the natural guardian of the girl child, the appellant-father is given visitation rights for meeting his daughter and for this purpose, he shall be at liberty to visit the child-Dishita twice a month preferably on 2nd and 4th Saturday(s) at the place and time mutually agreed between the parties and the respondent-mother shall not object to him meeting with the child and the respondent-mother will also allow the child to meet with the father during school vacations or on appropriate occasions.

23. Consequent upon the dismissal of the present appeal, no orders are required to be passed in CREF-3-2018, CM Nos.20056-57CII, 20251-CII of 2018 and 10204-CII of 2019 (applications for interim/temporary custody etc.) and Caveat Petition No.173164 of 2017 which shall stand disposed of accordingly.

(ASHOK KUMAR VERMA)
JUDGE

(AUGUSTINE GEORGE MASIH)
JUDGE

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Whether speaking/reasoned

Yes

Whether Reportable

Yes