

State Of H.P. And Ors vs Hem Singh on 13 February, 2017

Author: A.K. Sikri

Bench: A.K. Sikri, J. Chelameswar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3962 OF 2016

VIVEK SINGH APPELLANT (S)	
VERSUS		
ROMANI SINGH RESPONDENT (S)	

J U D G M E N T

A.K. SIKRI, J.

The appellant and the respondent tied matrimonial chord on November 25, 2007 as per Hindu rights and ceremonies. The appellant is an army officer posted in Meerut and the respondent is a teacher in Kendriya Vidyalaya-3, INA Colony, New Delhi. This, so-called sacrosanct alliance, alluded the couple, inasmuch as soon after the marriage, matrimonial discord surfaced, which has loosened the said knot. Both the parties blame each other for this sordid state of affairs. Over a period of time, relationship between the parties has been ruined, which is unfortunate. It is more so, as they have not been able to move on in their respective lives as well. But, what is more unfortunate is that the acrimony between the two of them, because of which they are living separately for quite some time, life of their only daughter Saesha Singh, who was born from their wedlock on October 29, 2008, is becoming more and more miserable. In the instant appeal, we are concerned with most delicate and difficult problem, namely, who should be given the custody of Saesha Singh.

It was on August 04, 2010, when the fight between the appellant and the respondent took an ugly turn forcing the respondent to leave the matrimonial house and the custody battle started from that date itself, when Saesha was not even two years of age. While leaving the matrimonial house, though the respondent wanted to take the child along, the appellant did not allow her to do so. After making certain peaceful efforts in this behalf, the respondent filed petition being GS No. 43 of 2010 under Section 25 read with Sections 10 and 12 of the Guardians and Wards Act, 1980 (hereinafter referred to as the 'Act') on August 26, 2010 for the custody and appointment of the Guardian of the minor daughter, Saesha Singh before the Principal Judge of the Family Court at Delhi at Dwarka, New Delhi. She stated in this petition that she had been in continuous possession, care and protection of the child since her birth and the respondent had no love and affection for the child. In his absence, when he is away for duty, his Orderly looks after the girl child. She also alleged that the appellant

leaves for his office at 8.30 a.m. and returns back late in the evening and, therefore, he is not in a position to look after the basic needs of the child. On the other hand, the respondent had been devoting all her time to the child after coming from the school and during her duties in the school, the child is being looked after by her parents who had been frequently visiting the matrimonial house. She pleaded that for the mental well-being and proper upbringing of the child, her custody should be given to the respondent, being her natural mother and she be also appointed as her guardian. The appellant herein contested the said petition by filing the written statement wherein he took the stand that the respondent was not in a position to look after the child as there is nobody to look after her when the respondent goes for work. He also mentioned that respondent's parents are residing at NOIDA whereas she is working and living in Delhi. On the contrary, it is the appellant who had provided all necessary expenses for the maintenance of the child, and even the respondent. He even accused the respondent for invariably getting drunk on their visits to Army Officers Mess in the parties. The trial court framed the issue which touches upon the dispute that is whether the petitioner (the respondent herein) is entitled to custody of the child. Evidence was led by both the parties who examined themselves as PW-1 and RW-1 respectively. The Principal Judge, Family Court was of the opinion that the appellant is fit person to retain the custody of the child and, therefore, dismissed the petition filed by the respondent herein. The respondent challenged the order of the Family Court by filing the appeal, i.e. FOA No. 39 of 2012 in the High Court which has been allowed by the High Court. The High Court has found it appropriate to handover the custody of the child to the respondent/mother. In the opinion of the High Court, the respondent, being mother of a girl child who was even less than five years' of age at the relevant time, was better suited to take care of the child and this course of action is in the best interest of the child. The High Court, in the process, found fault with the approach adopted by the Family Judge, which had mainly relied upon the incident of August 07, 2010 to deny the custody of the child to the respondent on the ground that she had herself abandoned the child on the said date. According to the High Court, the incident as narrated by the appellant was not believable and the version of the respondent, on the contrary, inspired confidence. The respondent had stated that though she wanted to take the child with her, the appellant had snatched her from the respondent. According to the High Court, if the intention of the respondent was to abandon the child she would not have taken her clothes with her. The High Court also observed that the Family Judge had failed to consider that from the birth of the child, i.e., October 29, 2008 till the separation of the parties on August 04, 2010 (for a period of 21 months) the child remained through out with the respondent who had been attending her school as well as taking care of the child after the school hours and there was nothing on record to show that the respondent had neglected the child for a single day during that period and it was not even the case of the appellant.

We may also mention, at this stage, that since the petition of the respondent herein had been dismissed by the trial court, because of this reason, custody of the child remained with the appellant, during the pendency of the appeal in the High Court, though by interim arrangement visitation rights were given to the respondent. Since the appeal stood allowed by the High Court as per which custody of the child was to be handed over to the respondent, the High Court in turn granted visitation rights to the appellant, father of the child, in the following manner:

“33. Since the child is a school going child and respondent is living at Meerut, in these circumstances, respondent will be at liberty to take the child from the appellant on every 4th Friday of the month at 5.30 p.m. and the child shall spend two days with the respondent. The child shall remain with the father on Friday followed by Saturday and Sunday. The child shall be returned safely to the mother on Sunday at 6.00 P.M.

34. Each year during Summer vacation custody of Baby Saesha Singh would be entrusted by the appellant to the respondent for a period of 15 days to be inter-se agreed upon between the parties and in case of any non-agreement, the dates to be decided by the learned Family Court.

35. Each year during Winter vacations Baby Saesha Singh would be entrusted by the appellant to the respondent for a period of 4 days to be inter-se agreed upon between the parties and in case of any non -agreement, the dates to be decided by the learned Family Court.

36. On the birthday of child, custody of Baby Saesha Singh would be entrusted to the respondent for a period of 4 hours in the evening, the exact hours to be mutually agreed upon by the parties.” In special leave petition (now converted into instant appeal) notice was issued on July 01, 2013. As the appellant had not complied with the direction of the High Court, it had resulted in filing contempt petition by the respondent against the appellant. While issuing the notice, this Court stayed those contempt proceedings as well. Consequence thereof is that the custody of child has remained with the appellant. Visitation rights of the respondent, however, as per interim arrangement vide orders dated February 21, 2012 by the High Court during the pendency of the appeal were restored. Thereafter, this Court has passed certain orders for handing over the custody of the child during festivals or vacations.

The instant appeal came up for arguments on November 22, 2016 when this Court directed that the child be brought to the court on November 23, 2016 so that the Court is able to interact with her. On November 23, 2016, after some interaction, it was felt that since Saesha has remained in the company of her father for all these years, influence of the appellant on the child is predominant. She had even expressed her desire to remain with the appellant. In order to have proper psychological and sociological analysis of the desires of the child, this Court deemed it appropriate to take the services of Ms. Iti Kanungo, who is Principal Counsellor attached to the Family Court, Patiala House, New Delhi. She was also requested to come to the Court on that day. As Ms. Iti Kanungo was also present, she interacted with the child for quite some time and, thereafter, informed the Court that some more interaction was needed. For this purpose, a meeting on November 26, 2016 was fixed when the child was to be produced before her at the Family Court, Patiala House, New Delhi. After interaction with the child, Ms. Kanungo has submitted her report dated December 12, 2016 stating that the child is more interested in living with her father as she does not want to change her present living environment. The report also indicates that bitter relationship between her parents discomforts her and she wants to sleep, play and study as per her own desire like any normal kid. At

the same time, the report also observes that the child is in a very sensitive phase of mental and physical growth.

After receiving this report, we had heard the counsel for the parties at length. Mr. V. Shekhar, learned senior counsel appearing for the appellant took umbrage under the aforesaid report of the Counsellor and submitted that since this was the wish of the child as well, the appellant should be allowed to retain the custody of the child. He emphasised the fact that with effect from October 05, 2010 when the child was only 21 months' old, it is the father who has taken care of the child and, therefore, it was in the best interest of the child that this arrangement is not disturbed. Ms. Geeta Luthra, senior counsel appearing for the respondent, countered the aforesaid submissions of the appellant by contending that the High Court had discussed all the pros and cons of the issue and arrived at a conclusion that the respondent/mother was best person to take care of the child. She emphasised that having regard to the present age of the child, who was little more than 8 years of age, her welfare demands that she be under the care and protection of the mother who is in a better position to look after her. She also submitted that the High Court had, by impugned judgment rendered on April 02, 2013, entrusted the custody to the respondent and only because of the stay of contempt proceedings given by this Court, the respondent is deprived of the custody of the child for all these years, and she should not be made to suffer the prejudice thereof. She narrated the comparative circumstances of the job profile of the appellant and the respondent in an endeavour to strengthen her aforesaid submission with emphasis on the fact that normally a girl child wants to be with her mother. Here, the respondent being a teacher herself, is in a much better position to take care of her education needs as well.

We have given our utmost serious consideration to the respective submissions which a case of this nature deserves to be given. In cases of this nature, where a child feels tormented because of the strained relations between her parents and ideally needs the company of both of them, it becomes, at times, a difficult choice for the court to decide as to whom the custody should be given. No doubt, paramount consideration is the welfare of the child. However, at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts.

The Hindu Minority and Guardianship Act, 1956 lays down the principles on which custody disputes are to be decided. Section 7 of this Act empowers the Court to make order as to guardianship. Section 17 enumerates the matters which need to be considered by the Court in appointing guardian and among others, enshrines the principle of welfare of the minor child. This is also stated very eloquently in Section 13 which reads as under:

“13. Welfare of minor to be paramount consideration.

(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is

of opinion that his or her guardianship will not be for the welfare of the minor.” This Court in the case of *Gaurav Nagpal v. Sumedha Nagpal*[1] stated in detail, the law relating to custody in England and America and pointed out that even in those jurisdictions, welfare of the minor child is the first and paramount consideration and in order to determine child custody, the jurisdiction exercised by the Court rests on its own inherent equality powers where the Court acts as 'Parens Patriae'. The Court further observed that various statutes give legislative recognition to the aforesaid established principles. The Court explained the expression 'welfare', occurring in Section 13 of the said Act in the following manner:

“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.

52. The trump card in the appellant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs.

The High Court has referred to these aspects in detail in the impugned judgments.” We understand that the aforesaid principle is aimed at serving twin objectives. In the first instance, it is to ensure that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of family/custody disputes according the optimal growth and development of the child primacy over other considerations. The child is often left to grapple with the breakdown of an adult institution. While the parents aim to ensure that the child is least affected by the outcome, the inevitability of the uncertainty that follows regarding the child's growth lingers on till the new routine sinks in. The effect of separation of spouses, on children, psychologically, emotionally and even to some extent physically, spans from negligible to serious, which could be insignificant to noticeably critical. It could also have effects that are more immediate and transitory to long lasting thereby having a significantly negative repercussion in the advancement of the child. While these effects don't apply to every child of a separated or divorced couple, nor has any child experienced all these effects, the deleterious risks of maladjustment remains the objective of the parents to evade and the court's intent to circumvent. This right of the child is also based on individual dignity.

Second justification behind the 'welfare' principle is the public interest that stand served with the optimal growth of the children. It is well recognised that children are the supreme asset of the nation. Rightful place of the child in the sizeable fabric has been recognised in many international covenants, which are adopted in this country as well. Child- centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation. It has been emphasised by this Court also, time

and again, following observations in *Bandhua Mukti Morcha v. Union of India & Ors.*[2]:

“4. The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood — socially, economically, physically and mentally — the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development.” Same sentiments were earlier expressed in *Rosy Jacob v. Jacob A. Chakramakkal*[3] in the following words:

“15. ...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...” It hardly needs to be emphasised that a proper education encompassing skill development, recreation and cultural activities has a positive impact on the child. The children are the most important human resources whose development has a direct impact on the development of the nation, for the child of today with suitable health, sound education and constructive environment is the productive key member of the society. The present of the child links to the future of the nation, and while the children are the treasures of their parents, they are the assets who will be responsible for governing the nation. The tools of education, environment, skill and health shape the child thereby moulding the nation with the child equipped to play his part in the different spheres aiding the public and contributing to economic progression. The growth and advancement of the child with the personal interest is accompanied by a significant public interest, which arises because of the crucial role they play in nation building.

In the instant case, the factors which weigh in favour of the appellant are that child Saesha is living with him from tender age of 21 months. She is happy in his company. In fact, her desire is to continue to live with the appellant. Normally, these considerations would have prevailed upon us to hold that custody of Saesha remain with the appellant. However, that is only one side of the picture. We cannot, at the

same time, ignore the other side. A glimpse, nay, a proper glance at the other side is equally significant. From the events that took place and noted above, following overwhelming factors in favour of respondent emerge.

(a) For first 21 months when the parties were living together, it is the respondent who had nursed the child. The appellant cannot even claim to have an edge over the respondent during this period, when the child was still an infant, who would have naturally remained in the care and protection of the respondent - mother, more than the appellant – father.

Finding to this effect has been arrived at by the High Court as well. This position even otherwise cannot be disputed.

(b) The respondent was forcibly deprived by the custody of Saesha from August 04, 2010 when she was forced to leave the matrimonial house. As per the respondent, on that date the appellant in a drunken state gave beatings to her and threw her out of the house. The respondent had called the police. The police personnel called the military police and a complaint was lodged. The respondent had also called her parents who had come to her house from NOIDA. Her parents took hold of the child and the appellant and when they were about to leave, the appellant pulled out the child from the hands of her mother and went inside the house and locked himself. He was drunk at that time. The police suggested not to do anything otherwise appellant would harm the child. It was assured that the child would be returned to her in the morning. In any case, the respondent and the appellant were instructed to come to the police along with the child, next morning. The appellant did not bring the child and threatened that he would not give the child to her. Since then, she had been running from pillar to post to get the child back but respondent had been refusing.

The respondent, therefore, cannot be blamed at all, if the custody of the child remained with the appellant, after the separation of the parties.

(c) Within the few days, i.e. on August 26, 2010, the respondent filed the petition seeking custody of the child and for appointment of her guardian. She did not lose any time making her intentions clear that as a natural mother she wanted to have the custody of the child. It was her mis- fortune that the trial court vide its judgment dated December 07, 2011 dismissed her petition. Though, she filed the appeal against the said judgment immediately, but during the pendency of the appeal, the custody remained with the appellant because of the dismissal of the petition by the Family Court. The High Court has, by impugned judgment dated April 02, 2013 granted the custody to the respondent. However, the respondent has not been able to reap the benefit thereof because of the interim orders passed in the instant appeal. It is in these circumstances that child Saesha from the tender age of 21 months has remained with the appellant and today she is 8 years and 3 months. Obviously, because of this reason, as of today, she is very much attached to the father and she thinks that she should remain in the present environment. A child, who has not seen, experienced or lived the comfort of the company of the mother is, naturally, not in a position to comprehend that the grass on the other side may turn out to be greener. Only when she is exposed to that environment of living with her mother, that she would be in a position to properly evaluate as to whether her welfare lies more in

the company of her mother or in the company of her father. As of today, the assessment and perception are one sided. Few years ago, when the High Court passed the impugned judgment, the ground realities were different.

While coming to the conclusion that the respondent as mother was more appropriate to have the custody of the child and under the given circumstances the respondent herein was fully competent to take care of the child, the High Court proceeded with the following discussion:

“31. The role of the mother in the development of a child's personality can never be doubted. A child gets the best protection through the mother. It is a most natural thing for any child to grow up in the company of one's mother. The company of the mother is the most natural thing for a child. Neither the father nor any other person can give the same kind of love, affection, care and sympathies to a child as that of a mother. 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. The company of the mother is always in the welfare of the minor child.

32. It may be noticed that the stand of the appellant is that since August 04, 2010 she had been pursuing for the custody of her child. She had also visited the police station and approached the CAW Cell. It is also admitted position that within 22 days, i.e., on August 26, 2010 the petition for the grant of custody of child was filed by her. Had she abandoned the child of her own she would not have pursued continuously thereafter for getting the custody of the child. Even she had requested the learned Principal Judge, Family Court for interim custody of the child which was given to her in the form of visitation rights thrice in a month and she and her family had been meeting the child during that period. After filing the appeal, the appellant has been taking the interim custody of the child as is stated above. In these circumstances, it cannot be said that the appellant has not care for the child. Further, respondent is an army Officer. During the course of his service he will be also getting non-

family stations and it will be difficult for him to keep the child. Further, even though as per him his parents are looking after the child but when the natural mother is there and has knocked the door of the court without any delay and has all love and affection for the child and is willing to do her duty with all love and affection and since the birth of the child she has been keeping the child. In these circumstances, she should not be deprived of her right especially considering the tender age and child being a girl child. The grandparents cannot be a substitute for natural mother. There is no substitute for mother's love in this world. The grandparents are old. Old age has its own problems. Considering the totality of facts and circumstances, the welfare of the child lies with the mother, i.e., appellant who is educated, working and earning a good salary and after school hours has ample time to spend with the child. In these circumstances, impugned order is set aside and the request of the appellant for the grant of custody of the said child to her being natural mother is allowed and the appellant is also appointed as guardian of her child being a natural guardian/mother.” The aforesaid observations, contained in para 31 of the order of the High Court extracted above, apply with greater

force today, when Saesha is 8 years' old child. She is at a crucial phase when there is a major shift in thinking ability which may help her to understand cause and effect better and think about the future. She would need regular and frequent contact with each parent as well as shielding from parental hostility. Involvement of both parents in her life and regular school attendance are absolutely essential at this age for her personality development. She would soon be able to establish her individual interests and preferences, shaped by her own individual personality as well as experience. Towards this end, it also becomes necessary for parents to exhibit model good behaviour and set healthy and positive examples as much and as often as possible. It is the age when her emotional development may be evolving at a deeper level than ever before. In order to ensure that she achieves stability and maturity in her thinking and is able to deal with complex emotions, it is necessary that she is in the company of her mother as well, for some time. This Court cannot turn a blind eye to the fact that there have been strong feelings of bitterness, betrayal, anger and distress between the appellant and the respondent, where each party feels that they are 'right' in many of their views on issues which led to separation. The intensity of negative feeling of the appellant towards the respondent would have obvious effect on the psyche of Saesha, who has remained in the company of her father, to the exclusion of her mother. The possibility of appellant's effort to get the child to give up her own positive perceptions of the other parent, i.e., the mother and change her to agree with the appellant's view point cannot be ruled out thereby diminishing the affection of Saesha towards her mother. Obviously, the appellant, during all this period, would not have said anything about the positive traits of the respondent. Even the matrimonial discord between the two parties would have been understood by Saesha, as perceived by the appellant. Psychologist term it as 'The Parental Alienation Syndrome'[4]. It has at least two psychological destructive effects:

(i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

(ii) Second, the child is required to make a shift in assessing reality.

One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality. The aforesaid discussion leads us to feel that continuous company of the mother with Saesha, for some time, is absolutely essential. It may also be underlying that the notion that a child's primary need is for the care and love of its mother, where she has been its primary care giving parent, is supported by a vast body of psychological literature. Empirical studies show that mother infant "bonding" begins at the child's birth and that infants as young as two months old frequently show signs of distress when the mother is replaced by a substitute caregiver. An infant typically responds preferentially to the sound of its mother's voice by four weeks, actively demands her presence and protests her absence by eight months, and within the first year has formed a profound and enduring attachment to her. Psychological theory hypothesizes that the mother is the center of an infant's small world, his psychological homebase, and that she "must continue to be so for some years to

come.” Developmental psychologists believe that the quality and strength of this original bond largely determines the child's later capacity to fulfill her individual potential and to form attachments to other individuals and to the human community.

No doubt, this presumption in favour of maternal custody as sound child welfare policy, is rebuttable and in a given case, it can be shown that father is better suited to have the custody of the child. Such an assessment, however, can be only after level playing field is granted to both the parents. That has not happened in the instant case so far. It is also to be emphasised that her mother is a teacher in a prestigious Kendriya Vidyalaya school. Saesha is herself a school going child at primary level. If Saesha is admitted in the same school where her mother is teaching, not only Saesha would be under full care and protection of the mother, she would also be in a position to get better education and better guidance of a mother who herself is a teacher.

We, thus, find that the factors in favour of respondent are weightier than those in favour of the appellant which have been noted above. It is a fit case where respondent deserves a chance to have the custody of child Saesha for the time being, i.e., at least for one year, and not merely visitation rights.

New academic session would start in April, 2017. At this time, the process of fresh admissions in schools is underway. We are confident that the respondent shall be able to have Saesha admitted in her school where she is teaching inasmuch as wards of the teachers are accorded such preferences. Therefore, the respondent is allowed to process the case of admission of Saesha in Kendriya Vidyalaya, INA Colony, New Delhi and for this purpose appellant shall fully cooperate. In case she is able to secure the admission, custody of Saesha shall be handed over to the respondent by the appellant one week before the next academic session starts. Custody shall remain with the respondent for full academic year. The matter shall be listed in the month of March, 2018 for further directions when this Court would assess as to how the arrangement devised above has worked out. We, however, give liberty to both the parties to move application for variation of the aforesaid arrangement, in case consequences of the aforesaid arrangements turn out to be such which necessitate alteration or modification in the aforesaid arrangement.

It is ordered accordingly.

.....J. (J. CHELAMESWAR)J. (A.K. SIKRI)
NEW DELHI;

FEBRUARY 13, 2017.

[1] (2009) 1 SCC 42 [2] (1997) 10 SCC 549 [3] (1973) 1 SCC 840 [4] The Parental Alienation Syndrome was originally described by Dr. Richard Gardner in "Recent Developments in Child Custody Litigation", The Academy Forum Vol. 29 No. 2: The American Academy of Psychoanalysis, 1985).