

***Before M.M.S Bedi & Gurvinder Singh Gill, JJ.***

**ASHU—Appellant**

*versus*

**ASHOK—Respondent**

**FAO (M) No.27 of 2017 (O&M)**

February 23, 2018

***Hindu Marriage Act, 1955—S.26—Welfare of child paramount—Father working as conductor—Unable to give quality time—Mother housewife—Her care for child indispensable—Father to maintain both wife and child—Appeal allowed.***

*Held that* it goes without saying that for healthy growth of a child, the love and tender care of the mother is essentially right from infancy and the childhood remains incomplete without love and care of mother. Since the respondent is serving as a Conductor in Haryana Roadways and such an assignment is extremely demanding in terms of time and labour, he would certainly not be able to give quality time to the minor child. In these circumstances, the mother's care for upbringing of the child is indispensable. It is the welfare of the child which is of paramount consideration and such welfare demands that the minor, in his infancy, is looked after and taken care of by the mother.

(Para 9)

*Further held that* even if, the appellant does not have sufficient means and sources of income, the respondent-husband is duty bound to maintain not only his wife but also his child and would be expected to make adequate provisions for maintaining them out of his earnings.

(Para 10)

Sandeep Lather, Advocate  
*for the appellant.*

Kanhiya Soni, Advocate  
*for the respondent.*

**GURVINDER SINGH GILL, J.**

(1) The appellant Ashu (wife) assails order dated 12.1.2017 passed by the learned Additional District Judge, Jind, whereby an application filed by her under Section 26 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') seeking custody of her minor

child namely Daksh has been dismissed and she has been granted visitation rights only to meet her minor son on every Saturday/Sunday between 10 A.M. to 1 P.M. at residence of her husband or at the hospital, after seeking permission from the doctor concerned.

(2) A few facts, necessary to notice for disposal of this appeal, are that marriage of the parties was solemnized on 23.4.2015 and a child namely Daksh was born out of the wedlock on 6.4.2016. However, differences having crept in the relationship of the parties, the respondent-husband filed a petition under Section 13 of the Act seeking dissolution of his marriage with the appellant. Since the minor son was staying with respondent, the appellant moved an application under Section 26 of the Act seeking custody of minor son.

(3) The appellant, in her application under Section 26 of the Act averred that she is natural guardian of her minor child Daksh and that the respondent had forcibly and without her consent taken away custody of the minor child and she was not even permitted to meet the child, who is of tender age. It is further averred that though a Panchayat had been convened on 22.5.2016 wherein her husband had agreed to take her back to matrimonial home but subsequently he refused to do the same. The appellant, thus, prayed for handing over custody of minor to the applicant with a further direction to allow her to meet the child.

(4) The respondent-husband, in his reply to the aforesaid application, took a stand that when his parents went to bring the appellant to the matrimonial home in seventh month of pregnancy, the appellant stated that she would give birth to the child and hand over the child to respondent as there was no relation between them and that the appellant accordingly after giving birth to the child, left hospital leaving the child to die after delivery. It is further asserted that the child had born on 6.4.2016 at 8:10 A.M. and was in a critical condition in Sanjeevni Hospital, Jind and it was at about 11:30 A.M. that the respondent was informed about the birth of the child and his serious condition. Upon advice of doctor, the child was rushed to Aastha Hospital, Jind where he remained in ICU due to his critical condition. It is further averred that though the appellant was called for breast-feeding the child but she did not turn up. Due to deterioration of the condition of the child, he was taken to Jindal Hospital, Hisar where he is still under treatment and is in custody of the respondent-husband. The respondent further asserted therein that the appellant threatened to involve him in false criminal case regarding demand of dowry etc. and

that an application was in fact made to the police, which was subsequently withdrawn on the ground that as per decision of panchayat she had agreed to join company of her husband but she did not return to her matrimonial home. The respondent, thus, took a stand that the appellant cannot take advantage of her own wrongs and prayed for dismissal of the application.

(5) The learned lower Court upon considering the pleadings and contentions of the parties held that the custody of the minor cannot be ordered to be given to appellant observing therein that she has no source of income and was unable even to maintain herself. The appellant was, however, granted visitation rights vide impugned order dated 12.1.2017.

(6) We have heard the learned counsel for the parties. Admittedly, the parties are residing separately due to matrimonial discord and a petition under Section 13 of the Act is pending between the parties. The minor child Daksh was born on 6.4.2016 i.e. within one year of the marriage of the parties. The learned lower Court while dismissing the application moved by the appellant-wife under Section 26 of the Act has been swayed mainly by the fact that the appellant does not have any source of income. The relevant extract from the impugned order reads as under :-

“It is pertinent to mention here that applicant has even failed to substantiate that as to how she will provide requisite medical treatment to her child, especially when along with her written statement, she had filed an application under Section 24 of the H.M. Act with the averments that she has no source of income and unable to keep and maintain herself, as such, prayed for interim maintenance of Rs.10,000/- per month along with litigation expenses from the petitioner, though he same was got dismissed as withdrawn lateron. In fact learned counsel for the petitioner has placed on record a photocopy of an application under Section 125 Cr.P.C. for grant of maintenance allowance to the applicant/respondent, which is pending adjudication. Faced with the above, this court is of considered opinion at this stage of this case, custody of the minor can not be ordered to be handed over the applicant/respondent, however, at the most, visiting rights to the applicant/respondent deserves to be granted.”

(7) From the arguments addressed before this Court, it appears

that the appellant is apparently a house wife and does not have any independent source of income and as a result of which she was constrained to move an application under Section 24 of the Act as well as under Section 125 of Cr.P.C. for grant of maintenance. However, it is also pertinent to notice that the application for grant of interim maintenance @ Rs.10,000/- per month was admittedly withdrawn by the wife, as has been specifically noticed by the lower Court. Such an act is indicative of the fact that even though the appellant may not be gainfully employed but she does have some support either from her family or from some other quarters to sustain herself. It will not be out of place to mention that once the relations between husband and wife get strained and one of the parties approaches the Court or the police then the other party would also indulge in moving applications, petitions at all possible forums as a counter-blast. We find that undue weightage has been given by the lower Court to the aforesaid factum of withdrawal of application for grant of maintenance, which had been filed by her.

(8) Though the respondent-husband has set up a case that the appellant, immediately after delivery of the child, left the hospital leaving the child to his fate, but such a stand does not appear probable as a woman who has nurtured the child in her womb for nine months would not be so heartless so as not to even breast-feed the child and would abandon the child to his fate. In any case, in our society, the desire to have a male child is also well known which further makes it highly improbable that a mother after delivering a male child would leave her to die. The lower Court has given a presumptive finding regarding wife having left her son unfed and unattended. There is no time, date or day mentioned by the husband when she was called for breast-feeding the child in hospital. The vague allegations are not substantiated by any material evidence on record.

(9) It goes without saying that for healthy growth of a child, the love and tender care of the mother is essentially right from infancy and the childhood remains incomplete without love and care of mother. Since the respondent is serving as a Conductor in Haryana Roadways and such an assignment is extremely demanding in terms of time and labour, he would certainly not be able to give quality time to the minor child. In these circumstances, the mother's care for upbringing of the child is indispensable. It is the welfare of the child which is of paramount consideration and such welfare demands that the minor, in his infancy, is looked after and taken care of by the mother.

(10) Even if, the appellant does not have sufficient means and sources of income, the respondent-husband is duty bound to maintain not only his wife but also his child and would be expected to make adequate provisions for maintaining them out of his earnings.

(11) In view of our aforesaid discussion we are of the considered view that the appeal merits acceptance. Accordingly, while accepting the appeal, the impugned order is hereby set aside and the application filed by the appellant under Section 26 of the Hindu Marriage Act, 1955 is accepted and it is ordered that the custody of the minor child Daksh be handed over to the appellant. In order to facilitate handing over of the child to the appellant, the parties are directed to appear before the Mediation and Conciliation Centre, Hisar for a period of three days i.e. on 12<sup>th</sup> March, 13<sup>th</sup> March and 14<sup>th</sup> March, 2018, so that the transition is made comfortable for the child. The Secretary, DLSA, shall facilitate such meetings between appellant and respondent and shall do all that is needful for the same. The respondent- husband is, however, granted visitation rights and would be at liberty to meet on each Saturday at the house of the appellant between 5 P.M. and 7 P.M.

(12) It is made clear that none of the observations made above as regards the appellant having some support to sustain herself shall prejudice her right to seek maintenance for herself or for her minor child.

(13) The appeal stands accepted accordingly.

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*Payel Mehta*