

**REPORTABLE**

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**CM(M) No.2993/2005**

**Date of Decision: May 13, 2010**

SANGEETA SARIN ..... Petitioner  
through Mr. Alok Kumar Aggarwal, Advocate

versus

KAMLENDRA MALIAH ..... Respondent  
through Mr. Surender Kumar Gupta, Advocate

**CORAM:**  
**HON'BLE MISS JUSTICE REKHA SHARMA**

1. Whether the reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in the 'Digest'? Yes

**REKHA SHARMA, J. (ORAL)**

This petition has been preferred against the order of Additional District Judge, Ms. Anju Bajaj Chandna dated October 05, 2005, dismissing the application of the petitioner filed by her under Order 7 Rule 11 of the Code of Civil Procedure. By virtue of the application, the petitioner who was defendant in the trial Court, had opposed a petition filed by the respondent under Section 7 of the Guardians & Wards Act, 1890 and prayed that the same be rejected as not maintainable in view of an earlier order dated May 02, 2002 passed by a matrimonial Court on a mutual consent petition filed by the petitioner and the respondent granting them a decree of divorce as

well as granting custody of their minor child Yashoda to the petitioner.

It is not in dispute that a decree of divorce dated May 02, 2002 was passed by the Court of the Additional District Judge on a joint petition filed by the petitioner and the respondent. It is also not in dispute that both the petitioner and the respondent had made separate statements before the matrimonial Court and that the respondent, who is the father of the child, agreed that he had no objection if the custody of the child was given over to the petitioner exclusively and absolutely. The matrimonial Court relying upon the statement so made by the respondent, while passing the decree of divorce, observed in its order that the parties had agreed that the custody and guardianship of the child Yashoda would remain absolutely with the mother and she would be responsible for upbringing and education of the child. The Court further observed that the respondent had undertaken not to interfere with the permanent and exclusive custody of the child under the guardianship of the petitioner at any stage. Not only this, the Court also observed that the respondent had also stated that in the event of anything happening to the petitioner, the child Yashoda would remain in the absolute and exclusive custody and guardianship of the parents of the petitioner.

The respondent inspite of having agreed before the matrimonial Court and inspite of having given the statement and undertaking that the custody of their minor child Yashoda shall remain with the petitioner absolutely and that he shall not interfere with the exclusive

and permanent custody of the child, filed a petition under Section 7 of the Guardians & Wards Act, 1890 praying for an order appointing him as the guardian of the person and property of the minor.

The question that falls for consideration in this petition is, whether in the background of the facts noticed above, was it open to the respondent to file a petition under Section 7 of the Guardian & Wards Act, 1890?

It is submitted by the learned counsel for the respondent that no order passed with respect to the guardianship of a minor child can ever be treated as final and that the parties can always move for variation of the same. It is further submitted that the proceedings before the matrimonial Court having come to an end, the Guardians & Wards Act, 1890 is the only Act under which the respondent could seek any further order with regard to the guardianship of the person or property of the minor.

As against the above submissions of the learned counsel for the respondent, learned counsel for the petitioner has relied upon Section 26 of the Hindu Marriage Act, 1955. Before I proceed further, it is necessary to reproduce Section 26 of the said Act. This is how it runs:-

“26. Custody of children.— In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court

may also from time to time revoke, suspend or vary any such orders and provisions previously made”

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.”

It will be seen from what is laid down in Section 26 of the Hindu Marriage Act, 1955 that it not only empowers the Court to pass interim orders with regard to the custody, maintenance and education of minor children but also gives the power to make such provision in the final decree as well. It also lays down that even after the passing of the decree, the Court may, from time to time, revoke, suspend or vary any order passed in relation to the custody, maintenance and education of the minor children.

The respondent herein had not once but twice made statements before the matrimonial Court that the custody of the minor child shall remain with the petitioner absolutely without any interference on his part. The first such statement was made on filing of the petition under Section 13B(1) and the second on filing of the petition under Section 13B(2) of the Hindu Marriage Act, 1955. The matrimonial Court accepted the statements of the parties which were in the nature of undertakings and based on those statements, passed a decree of divorce dated May 02, 2002 and also passed the order with regard to the custody of the child. In the wake of these facts, any petition filed by the respondent under Section 7 of the Guardians & Wards Act seeking to appoint himself as the guardian of the person and property of the minor was in the breach of the undertaking given by him to the matrimonial Court. There was no justification on the part of the

respondent to have approached the Guardian & Wards Court for the relief as aforesaid. However, as noticed above, Section 26 of the Hindu Marriage Act empowers the matrimonial Court to vary its order even after the passing of the decree with regard to the custody of the minor children and in view of this section, the proper course for the respondent was to have moved the same Court for any variation in the order but he chose to initiate fresh proceedings with regard to the custody of the child which issue stood settled in view of the order passed by the matrimonial Court dated May 02, 2002. I feel that the act of the respondent in filing the petition under the Guardians & Wards Act was not bonafide and was an attempt to reopen a settled issue.

It is submitted by the learned counsel for the respondent that the matrimonial Court made no provision with regard to the property of the minor child, to which the learned counsel for the petitioner states that the petitioner is not interested in the property of the minor child and that the respondent may take the same.

For what has been noticed above, I am of the view that the impugned order passed by the Guardian Judge dismissing the application under Order 7 Rule 11 of the Code of Civil Procedure is liable to be set-aside. Hence, I do so. Consequently, the petition under Section 7 of the Guardians & Wards Act by the respondent is also dismissed.

The petition is disposed of.

**REKHA SHARMA, J.**

**MAY 13, 2010**  
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