

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

**FAO No.4195 of 2013 (O&M)
Date of decision: 26.02.2015**

Malkiat Kaur and another

.....Appellants

Vs.

Ravinder Singh

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE SNEH PRASHAR**

Present: Mr. Pankaj Bali, Advocate for the appellants.
Mr. Nitin Singla, Advocate for the respondent-husband.

Ajay Kumar Mittal,J.

CM No.10147 CII of 2014

1. Allowed as prayed for. CM stands disposed of.

FAO No.4195 of 2013

2. This appeal has been filed by the appellant-wife against the order dated 19.7.2013 passed by the Guardian Judge, Karnal whereby the petition under Section 25 of the Guardians and Wards Act, 1890 (in short, "the Act") filed by the respondent-husband for custody of minor Child Mandeep alias Harkirat has been allowed.

3. A few facts relevant for the decision of the controversy involved as available on the record may be noticed. Appellant No.1 was

married to the respondent on 5.12.2004 at Village Nadana Dera Gobindgarh Gamri, Tehsil Nilokheri, District Karnal as per Hindu rites and customs ceremonies (Anand Karaj). After the marriage, a male child namely Mandeep @ Harkirat was born on 20.9.2006. Due to temperamental differences between the parties, they filed a divorce petition under Section 13-B of the Hindu Marriage Act, 1955 (in short, "the HMA Act") by mutual consent. Vide judgment dated 20.3.2010, their marriage was dissolved. They were bound by the terms and conditions of the compromise on the basis of which decree of divorce was passed. According to the respondent, appellant No.1 solemnized second marriage on 21.5.2010 with Jasbir Singh son of Rajinder Singh, resident of Village Dharam Kot, District Yamunanagar and minor son of the appellant No.1 is living with appellant No.2. The respondent claimed that in accordance with the terms and conditions settled in divorce proceedings and judgment dated 20.3.2010, he was entitled to take the custody of the minor child. He filed petition under Section 25 of the Act. Upon notice, the appellants appeared and filed their joint written statement controverting the averments made in the petition. It was inter alia pleaded that the minor child is in custody of appellant No.2 who is mother of appellant No.1 being natural guardian and as per the agreement between the parties, the minor child will remain in the custody of the appellant No.1 till the age of nine years or till she remarries whichever is earlier. The fact regarding second marriage by appellant No.1 was denied. The trial court after considering the evidence on record allowed the petition vide order dated 19.7.2013 and directed appellant No.1 to hand over the custody of the minor child to the respondent within one month from the date of the

judgment. Hence the instant appeal by the appellant-wife.

4. We have heard learned counsel for the parties and perused the record.

5. The trial court on the pleadings of the parties framed the following issues:-

- i) “Whether the petitioner is entitled for the custody of ward Mandeep @ Harkirat as prayed for?OPP
- ii)Whether the petition is not legally maintainable in the present form?OPR
- iii)Whether the petitioner has no locus standi and cause of action to file the present petition? OPR
- iv)Whether the petitioner has not come to the court with clean hands and has suppressed the true and material facts from this Court? OPR
- v) Whether the present petition is an abuse of the process of law? OPR
- vi)Whether this court has got no jurisdiction to entertain and try the present petition? OPR
- vii)Relief.”

The respondent in order to prove his case appeared as PW1 and filed his affidavit Ex.PW1/A. He examined Satbir Kaur, Sarpanch as PW2, Satish Sharma, Record Keeper as PW3, Charanjit as PW4 and Deepak Kumar as PW5. He also placed on record documents Ex.P.1 to P.8 and Ex.PW5/A. On the other hand, appellant No.1 appeared as RW1 and tendered in evidence her affidavit Ex.RW1/A. She further examined Jasbir Singh as RW2, Jodh Singh as RW3, Hem Singh as RW4 and Rakesh, Clerk as RW5. She also produced on record documents Exs.RW5/A to RW5/D i.e. Certificate, admission and withdrawal register, admission form and attendance register.

The respondent reiterated his statement taken in the petition. Satbir Kaur,

Sapranth PW2 deposed about the marriage of appellant No.1 with Jasbir Singh on 21.5.2010. She further deposed that out of the wedlock, male child was born on 21.6.2011. Deepak Kumar, Computer Clerk, office of Municipal Corporation, Yamuna Nagar appeared as PW5 and deposed that he had brought the summoned record pertaining to the date of birth of Paramjeet Singh and as per record, the date of birth of Paramjeet Singh is 21.6.2011. He was born in City Hospital, Jagadhri. His father and mother names are Jasbir Singh and Malkiat Kaur respectively, resident of VPO Dharam Kot, District Yamunanagar. He proved the birth certificate Ex.PW5/A. On the other hand, the appellant No.1 controverted the averments made in the petition filed by the respondent husband. Jasbir Singh RW2 deposed that he was permanent resident of Village Dharam Kot. His marriage was solemnised with Sarvjeet Kaur about three and half years back and Sarvjeet Kaur is resident of Yamunanagar. Out of their wedlock, one child namely Kulwinder was born about 2-1/4 years ago. He does not know Malkiat Kaur. He proved photographs Ex.R.1 and Ex.R.2. He further deposed that he was not married with the appellant Malkiat Kaur. Jodh Singh appeared as RW3 and deposed that marriage of Jasbir Singh was solemnised with Sarvjeet Kaur. He also deposed that Jasbir Singh was not married with Malkiat Kaur. Hem Singh appeared as RW4 and deposed that after the divorce, the appellant Malkiat Kaur is looking after her minor child properly and she has not solemnized second marriage. Rakesh Kumar, Clerk RW5 deposed that he had brought the record of Ist class admission of Mandeep Singh in which his father and mother names have been mentioned as Ravinder Singh and Malkiat Kaur respectively. He proved school register

certificate Ex.PW5/A, admission and withdrawal register Ex.RW5/B, admission form Ex.RW5/C and attendance register Ex.PW5/D. The trial court after considering the evidence and documents on record held that appellant No.1 having performed second marriage violated the terms and conditions of divorce decree and thus held entitled the husband for the custody of the minor child.

6. Vide order dated January 20, 2015, the minor child Mandeep alias Harkirat was called in the chamber for interaction alongwith both the learned counsel for the parties. On a question being put to him, he specifically stated that he is residing with his mother and also with the maternal grand parents. The child further stated that he is not able to identify his father as he has not seen him since long. Admittedly, the child at present is living with his maternal grand mother. The appellant No.1 is living with her mother. As per decree of divorce granted by the trial court under Section 13-B of the HMA Act, the custody of the child was ordered to be with the appellant No.1 till he attains the age of 9 years or she remarries whichever is earlier.

7. Welfare of the child is of paramount consideration which has to be considered in the widest sense of the term as held by the Apex Court in ***Kumar V.Jahgirdar vs. Chetana K.Ramatheertha***, AIR 2001 SC 2179. Admittedly, the child is living with appellant No.2 who is the mother of appellant No.1. All the three are residing together. As per agreement between the parties on the basis of which decree of divorce was passed, the minor child was to remain in custody of appellant No.1 till the age of nine years or when she remarries, whichever is earlier. The fact regarding

solemnization of second marriage of the appellant with Jasbir Singh does not stand proved as is evident from the evidence of RW2 Jasbir Singh, RW3 Jodh Singh, RW4 Hem Singh and Rakesh Kumar, Clerk RW5. Ex.R.1 and Ex.R.2 are the photographs showing the marriage of Jasbir Singh with Sarvjeet Kaur. Marriage Certificate Ex.R.4 is also proved on record. Hem Singh RW4 is the numberdar of Village Nadana who proved his certificate Ex.RW4/A showing that appellant No.1 has not solemnized second marriage. Thus, the trial court has erred in considering the material evidence on record and has erroneously recorded finding that appellant No.1 had remarried Jasbir Singh. It has only relied upon the evidence of Satbir Kaur, PW2, Sarpanch of Village Dharmkot, which has not been substantially corroborated. Equally, the welfare of the child has been totally ignored by the trial court.

8. After hearing the child and the parties alongwith their counsel, we are of the view that it would be in the interest of justice and also the child if his custody is allowed to be retained with the mother as per terms and conditions of the agreement between the parties on the basis of which decree of divorce by mutual consent was passed. We order accordingly. The findings recorded by the Guardian Court being based on misreading of evidence are set aside. Consequently, the appeal stands allowed and the order dated 19.7.2013 passed by the trial court is set aside.

(Ajay Kumar Mittal)
Judge

February 26, 2015
gs'

(Sneh Prashar)
Judge

