

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

FAO No.5266 of 2013 (O & M)
Date of Decision : 24.3.2015

Smt. Krishni DeviAppellant

Versus

Smt. Mariam Kamali Moaveni and anotherRespondents

CORAM: HON'BLE MR. JUSTICE M. JEYAPPAUL
HON'BLE MRS. JUSTICE RAJ RAHUL GARG

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporters?
3. Whether the judgment should be reported in the Digest?

Present : Mr. J.S. Virk, Advocate, for the appellant

Mr. Anand Chhibbar, Senior Advocate with
Ms. Harpriya Khaneka, Advocate, for respondent No.1

Respondent No.2 (already ex parte before the trial Court.)

RAJ RAHUL GARG, J.

Krishni Devi wife of Sultan Singh (mother-in-law of Mariam Kamali Moaveni) has preferred this appeal against the judgment dated 23.9.2013 rendered by Sh. K.P. Singh, Guardian Judge, Karnal, whereby the petition filed under Section 25 of the Guardianship and Wards Act, 1890 (in short 'the Act') accepted with costs and Mariam (mother of Aryana) was declared guardian of minor Aryana and Krishni Devi (grand mother of Aryana) was directed to hand over the custody of minor child-Aryana to the

petitioner Mariam within one month from the date of judgment.

Brief facts of the case are like this; that Bhim Singh son of Sultan Singh converted his religion from Hindu to Muslim on 8.6.2002. Thereafter, Mariam got married to Bhim Singh on 19.6.2002. They got their marriage registered under the Special Marriage Act, 1954 at Sonapat on 20.11.2003. Out of this wedlock, a female child, namely; Aryana was born on 10.7.2003. However, unfortunately, Mariam filed a divorce petition, which was decreed in her favour on 14.2.2006 by the Court of learned Additional District Judge, Karnal. Under these circumstances, Mariam started living separately from Bhim Singh. Aryana was living with Mariam.

Mariam filed a petition for custody of Aryana, against Bhim Singh, in which custody of the minor child was given to Bhim Singh by the order of Guardian Judge, Karnal. It is further case of Mariam that Bhim Singh was involved in a criminal case bearing FIR No. 815 dated 12.11.1994 under Sections 363, 366, 376, 342, 367 and 506 IPC, pertaining to Police Station City Karnal. He was convicted in that case along with three other co-accused on 22.12.1995 by the Court of Sh. Dharampal, the then Additional Sessions Judge, Karnal. Appeals filed by them were dismissed on 19.12.2007. Pankaj and Paramjit accused of that case, surrendered themselves as per the direction of this High Court after dismissal of their appeal but Bhim Singh did not surrender till today. He was declared proclaimed offender and due to this reason minor child Aryana has been living in the custody of her grand mother Krishni Devi at Karnal whereas she is an old lady and not able to maintain the minor child of the petitioner.

It was further alleged that Bhim Singh is a man of bad character whereas the petitioner/respondent No.1 is a highly qualified lady and has good source of income in order to look after the minor child. Under these circumstances, the custody of minor child Aryana was sought by Mariam.

Krishni Devi-appellant took some legal objections and denied the conversion of Bhim Singh from Hindu to Muslim religion. However, she admitted the marriage of Mariam with Bhim Singh. As per Krishni Devi, their marriage was solemnized as per Hindu Rites and ceremonies at Village Mohana, District Sonapat on 19.6.2002 and was registered on 20.11.2003 as per Special Marriage Act, 1954. She also admitted the fact that one female child was born to them. Factum of decree of divorce was also admitted by her in favour of Mariam.

As per case of Krishni Devi/appellant, after taking the custody of minor child, Bhim Singh had left the house and the custody of the minor child remained with her and she has been looking after the minor child with care, love and affection. It was averred that the appellant is having agriculture land and has source of her independent income to maintain the minor child. It is also case of the appellant that Mariam was convicted in FIR No. 88 dated 25.11.1998 under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, pertaining to Police Station GRP Kurukshetra, and was sentenced to RI for a period of ten years and fine of ₹ one lakh. With these allegations, dismissal of petition with costs was prayed.

From pleadings of the parties, following issues were framed :-

- “1. Whether the petitioner is entitled for the custody of minor Aryana, as prayed for? OPP

2. Whether the petitioner has got no locus standi and cause of action to file the present petition? OPR
3. Whether the present petition is misuse of the process of law and as such is liable to be dismissed? OPR
4. Whether the present petition is bad for mis-joinder and non-joinder of necessary parties? OPR
5. Whether the petitioner has concealed the true and material facts from this Court? OPR
6. Relief.”

In the aforesaid petition Bhim Singh/respondent No.1 was ex parte. Oral as well as documentary evidence of both the parties were taken on record. After hearing learned counsel for both the parties, it was held by learned Guardian Judge, Karnal, that petitioner Mariam is entitled to the custody of minor child and was thus, declared her as guardian of Aryana and respondent No.2 appellant/Krishni Devi was directed to hand over the custody of the minor child to the petitioner within one month from the date of judgment.

Aggrieved by the aforesaid judgment dated 23.9.2013, Krishni Devi has come up in this appeal on the grounds that she is the grand mother of minor child. Custody of the minor child was given by Court to Bhim Singh, her son, and since he has left the house, therefore, she, being grand mother of the child and having sufficient source of income to support the minor child, is the guardian of the minor child and is also entitled for the guardianship of the minor child. The minor child has been living with her since long.

It was contended by learned counsel for the appellant that the appellant has sufficient source to maintain the minor child. She has got

agricultural land. In support of this contention Ex.R-9, copy of Jamabandi for the year 2008-09 was referred. Further referring documents Ex.R-10 to R-16 copies of Western Union receipts, learned counsel for the appellant wanted to show that the appellant has been receiving money from his son, who is living in Canada and thus, the appellant can look after the minor child very well.

It was also argued by learned counsel for the appellant that since respondent No.1-Mariam wanted to get Indian Citizenship, therefore, she now intends to take the custody of Aryana, which earlier she had herself given to Bhim Singh in case No. 83 of 2006 decided on 20.1.2007.

The above contentions of learned counsel for the appellant-Krishni Devi are not sustainable as in custody cases, welfare of minor is the paramount consideration. The appellant is a widowed lady of the age of 70 years. She has given her age as 70 years when she was examined as RW-2 in the Court of learned Guardian Judge, on 1.5.2013. Besides this, the custody of the minor child was given to her after Bhim Singh. Undisputedly, Bhim Singh is not residing in the house with the minor child. As per version of the appellant herself, that after getting custody of the minor child, he (Bhim Singh) left the house. Mariam-respondent No.1, categorically pleaded in Para No. 5 of the petition that Bhim Singh was involved in a criminal case bearing FIR No. 815 dated 12.11.1994 under Sections 363, 366, 376, 342, 367 and 506 IPC, pertaining to Police station City Karnal. He was convicted in that case with other accused namely; Vanita, Ranjit, Paramjit and Pankaj, vide judgment dated 22.12.1995. Appeal preferred by the aforesaid four accused was dismissed vide order

dated 19.12.2007. Krishni Devi could not deny specifically the aforesaid facts rather stated that these facts need no written statement being matter of record. It was contended by learned counsel for respondent No.1-Mariam that after the dismissal of the appeal, Pankaj and Paramjit surrendered themselves as per the orders of this High Court but Bhim Singh did not surrender himself till date. Under these circumstances, when Bhim Singh has been convicted finally in the aforesaid case and is absconding, the welfare of the minor child cannot be said to be in his hands. Krishni Devi, at no point of time, ever sought the custody of the minor child from the Court. She is otherwise a widowed and old aged lady.

Though as per compromise, custody of minor child was earlier given to Bhim Singh vide order dated 20.1.2007 yet under the above discussed subsequent events, as per the provisions of Section 39 of the Act, Bhim Singh is liable to be removed as guardian of the minor child whereas her mother is entitled to be appointed as her guardian.

It is the settled preposition of law that father is the natural guardian of the minor and after him mother can only be the guardian of the minor. It is only when father and mother are dead or not available then another person can claim to be the guardian of the minor child, if he or she is able to show that the welfare of the minor child is in his hands. Mariam/respondent No.1 being mother of the minor, is entitled to be appointed as guardian of the minor child after the removal of Bhim Singh as guardian of the minor child.

Learned Guardian Judge while deciding the petition in favour of Mariam has also taken into consideration her financial resources and

further, the fact that she has already executed FDR in favour of her minor child and also nominated her in her insurance policy. Though it was alleged that Mariam was convicted in an NDPS Act case yet during the course of arguments it was admitted by learned counsel for the appellant that she was acquitted by this High Court. Even Mariam has said so when appeared as witness in this petition. When she has been honourably acquitted then her conviction does not come in her way while considering the present case of custody in her favour.

For the reasons recorded above, we find no illegality in the impugned judgment dated 23.9.2013, rendered by Sh. K.P. Singh, Guardian Judge, Karnal. As such, finding no merit in this appeal, it is ordered to be dismissed. Custody of the minor child Aryana be handed over to respondent No.1/Mariam within one month from the date of judgment.

(M. JEYAPPAUL)
JUDGE

(RAJ RAHUL GARG)
JUDGE

24.3.2015

Ashwani