

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

(218)

FAO-3831-2015 (O&M)

Decided on: February 07, 2018.

Vishal Mohindra

.... Appellant

Versus

Vanita

..... Respondent

**CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI
HON'BLE MR. JUSTICE GURVINDER SINGH GILL**

Present: Mr. Vishal Mohindra-appellant in person.

Mr. Kamalpreet Bawa, Advocate, for
Mr. V.B. Aggarwal, Advocate, for the respondent.

M.M.S. BEDI, J (ORAL)

The appellant is aggrieved by order dated 21.03.2015 passed by the Family Court, Ambala, dismissing the application for restoration of application dated 10.08.2013 for the custody of the minor child.

It is admitted fact that the appellant had filed a petition under Section 13 of the Hindu Marriage Act for seeking divorce from the respondent. During pendency of the petition, he had filed an application purporting to be an application under Section 26 of the Hindu Marriage Act for custody of the minor child. He had been granted visitation rights viz-a-viz. minor daughter vide different orders passed by the Family Court. The appellant had withdrawn his petition under Section 13 of the Hindu Marriage Act on 19.07.2013. Accordingly vide order dated 19.07.2013, the petition was dismissed as withdrawn after recording the statement of the appellant. Thereafter, the appellant filed an application dated 10.08.2013 for modification of certain orders under Section 7 (1) Explanation (g) read with Section 8 (a) (c) (I) of the Family Courts Act, 1984 which was

dismissed for non-prosecution on 20.08.2013. The appellant then filed another application on 17.10.2013 for restoration of application dated 10.08.2013. The said application for restoration was dismissed vide order dated 21.03.2015 *inter alia* observing as follows:-

“7. It is not out of place to mention here that order dated 15.03.2011 passed by Sh. AS Narang, the then Additional District Judge, Ambala holding the applicant entitled to see the child on every Saturday after school hours in the school for two hours had been passed by way of interim measure. It is well settled law that all the interim orders are merged into final orders and the interim order dated 15.03.2011 of visiting rights also comes to an end by virtue of dismissal of his petition of divorce on 19.07.2013. It is pertinent to observe here that the divorce petition was not dismissed on merits or on technical ground, rather it was the applicant himself who had withdrawn the said divorce petition of his own. Not only this, the applicant has not filed any application for visiting his child. More so, the applicant has not placed on record any document to show that he could not pursue his application on account of his ill-health. He also failed to produce any medical record in this regard.

8. In view of my above discussion, I find no merit in the application, and the same is hereby ordered to be dismissed. File be consigned to the record room after due compliance”.

Perusal of the above said order indicates that the application filed by the petitioner for consideration of his application for claim regarding custody of the child in view of the provisions of Section 7 of the Family Courts Act, 1984, has been dismissed on the ground that all the rights of the appellant along with right under Section 26 of the Hindu

Marriage Act would cease to exist with the withdrawal of the divorce petition.

The appellant appearing in person has submitted that his application dated 10.08.2013 under Section 7 read with Section 8 of the Family Courts Act, 1984 had been dismissed as he was not able to pursue the same on account of his serious illness. He informs that he was suffering from renal failure at that time.

We have considered the contentions of the appellant who is appearing in person.

He has submitted that his original claim for divorce after withdrawal of his application for divorce, he had not given up his right for custody of the child.

On the query of the Court as to why he could not file application under the provisions of Guardianship and Wards Act to claim the custody or the interim custody, he submits that in the light of provisions of Section 7 (1) Explanation (g) read with Section 8 of the Family Courts Act, 1984, he has got a right to pursue the proceedings pertaining to the guardianship and custody or access to the minor. Sections 7 and 8 of the Family Courts Act, 1984 reads as follows:-

“7. Jurisdiction.-

(1) Subject to the other provisions of this Act, a Family Court shall--

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purposes of exercising such

jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation:- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

- | | | | |
|-----|------|------|------|
| (a) | xxxx | xxxx | xxxx |
| (b) | xxxx | xxxx | xxxx |
| (c) | xxxx | xxxx | xxxx |
| (d) | xxxx | xxxx | xxxx |
| (e) | xxxx | xxxx | xxxx |
| (f) | xxxx | xxxx | xxxx |

(g) a suit of proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

xxxx xxxx xxxx

8. *Exclusion of jurisdiction and pending proceedings.-*

Where a Family Court has been established for any area,-

(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),-

(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(ii) which could have been required to be instituted or

taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established”.

Prima facie, the Family Court has got jurisdiction to exercise the powers of a District Court or subordinate civil Court under any law in respect to any proceedings of the nature which are mentioned in the Explanation (a) to (g).

The claim of the appellant irrespective of its title, in relation to the guardianship of the minor child or the custody of the child or access to the minor child could have been entertained by the Family Court as jurisdiction vested in the said Court only. The Family Court has apparently evaded the performance of statutory duty while dismissing the application for restoration of application dated 10.08.2013 vide order dated 21.03.2015. The judicial propriety demands that application dated 10.08.2013 for custody of the child should be considered on merits as per law, irrespective of the petition under Section 13 of the Hindu Marriage Act having been withdrawn by the appellant. There were sufficient reasons for restoration of the application dated 10.08.2013 which had been dismissed for non-prosecution on account of unavoidable circumstances explained by the appellant before this Court.

The appeal is allowed. Impugned order dated 21.03.2015 is set aside. The application dated 10.08.2013 stands restored. Parties are directed to appear before the Family Court, Ambala on 16.03.2018 for

decision of the application dated 10.08.2013 in accordance with law irrespective of the dismissal of the petition under Section 13 of the Hindu Marriage Act by the Family Court.

(M.M.S. BEDI)
JUDGE

February 07, 2018.
harsha

(GURVINDER SINGH GILL)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No