

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

FAO 2257 of 2018 (O&M)

Date of Decision: August 6, 2018

Sukhjeet KaurAppellant

Vs.

Gurmeet SinghRespondent

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.
HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL.

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Present: Mr.S.K.S. Bedi, for the appellant.
Mr. Nitish Bhatia, Advocate for the respondent.

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M.M.S. BEDI, J.

Appellant is the mother of Navneet Kaur who was aged about 5 years at the time of filing of a petition under Section 7 of the Hindu Minority and Guardianship Act, for short 'the Act' seeking the custody of the minor daughter till she attains majority. The application of the appellant has been dismissed on the ground that she had accepted sum of Rs.12.25 lacs as lumpsum alimony at the time of getting divorce under Section 13-B of the Hindu Marriage Act on January 10, 2014 and agreed with the custody of the minor daughter Navneet Kaur would never be claimed by her. The custody of the child had been handed over by her to the respondent on receipt of above said amount.

An application under Order 7 Rule 11 CPC was filed by respondent which has been allowed on the ground that the petition is not maintainable as the same is barred by principle of res judicata and liable to

be rejected under Order 2 Rule 2 CPC as earlier petition between the parties was dismissed as withdrawn on March 1, 2014.

Aggrieved against the order dated January 12, 2018, the present appeal has been preferred.

Briefly stated the facts relevant for the decision of the present case are that the appellant is the divorced wife of respondent. Parties had got their marriage annulled by mutual consent under Section 13-B of the Hindu Marriage Act on January 11, 2014. The appellant filed a petition for the custody of the minor daughter but she withdrew the same on March 1, 2014 because the respondent had assured that he would deliver the custody of his daughter to the appellant within 2/3 months but he did not fulfill the promise and had not delivered the custody of the child to the appellant. The lower Court has dismissed the petition by holding that the petition has been filed on the same cause of action and in view of withdrawal of the earlier petition, under Order 23 Rule 1 (4) CPC, the second petition would not be maintainable and would be barred by law of res judicata as such the application under order 7 Rule 11 CPC filed by the respondent was allowed.

The appellant – wife has challenged the order of dismissal of the petition under Order 7 Rule 11 CPC dated January 12, 2018 on the ground that without taking into consideration the pleading of the appellant in para 9 of the petition giving reasons for the withdrawal of the earlier petition, the lower Court has wrongly dismissed the petition under Section 7 of the Act.

We have heard learned counsel for the appellant as well as counsel for the respondent and gone through the facts and circumstances of

the case. Without expression of any opinion regarding the applicability of provisions of Order 7 Rule 11 CPC to the provisions of the Act, we are of the opinion that the application under Order 7 Rule 11 CPC has to be decided on the basis of the pleadings which are before the Court taking into consideration the fact whether details of the earlier litigation has been mentioned. The Court is required to see whether reason for withdrawal or dismissal of earlier petition has been explained or not. The Court is also required to see whether the second petition is based upon fresh cause of action and whether an earlier petition on the same cause of action has been decided on merits.

With the assistance of counsel for both the parties, we have gone through the petition under Section 7 of the Act which clearly depicts that the appellant is living a miserable life and missing her daughter and it is not only the requirement of the appellant but also the requirement of the minor daughter to be brought up by the mother and to live with her. It is averred in para 9 of the petition that the earlier petition had been withdrawn on March 1, 2014 as the respondent had assured the appellant that he would deliver the custody of the daughter to her within 2/3 months but on account of he having not fulfilled such promise the appellant had to file the second petition. The said fact if established by evidence would make the second petition maintainable. Even otherwise, the judgments relied upon by the lower Court do not lay down an absolute law of prohibition regarding maintainability of the second petition. The subsequent substantial changes in the circumstances and the welfare of the child are the paramount conditions which appear to be relevant for adjudication of the claim of the

appellant under law. The doors of the Court cannot be shut off to a mother to enforce her legal rights under the law. The order of the Additional Civil Judge (Senior Division), Tohana, dated January 12, 2018 dismissing the petition of the appellant is a harsh order contrary to the principles of social justice and deserves to be set aside.

The appeal is allowed. The order dated January 12, 2018 is hereby set aside. Parties are directed to appear before the Additional Civil Judge (Senior Division), Tohana, who would take up the consideration of the application of the appellant under Section 7 of the Act and any other application for interim custody of the minor child on merits afresh. Parties are directed to appear before the trial Court at Tohana on September 1, 2018. The petition of the appellant is ordered to be restored to its original number to be re-decided on merits. It is further ordered that in case any application for custody of the minor child is filed or pending, the same would be decided within a period of 10 days after the filing of the application. The parties who are represented before this Court through their respective counsel are directed to appear before the trial Court on September 1, 2018.

(M.M.S. BEDI)
JUDGE

August 6, 2018
sanjay

(ANUPINDER SINGH GREWAL)
JUDGE

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