

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

CR-993-2019

Reserved on : September 01, 2022
Pronounced on : September 06, 2022

Dr. Priyanka Dahiya

....Petitioner

Versus

Dr. Manish Raj

....Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Aman Pal, Advocate
for the petitioner.

Ms. Sonia G. Singh, Advocate
for the respondent.

ARVIND SINGH SANGWAN, J.

Prayer in this petition is for setting aside the order dated 8.1.2019 passed by the District Judge, Additional Family Court, Karnal vide which an application filed by the petitioner-wife under Order 7 Rule 11 C.P.C. to dismiss the petition filed by the respondent-husband under Section 25 of the Guardianship and Wards Act, 1890 read with Section 6 of the Hindu Minority and Guardian Act, 1956 for claiming the custody of 'A' (name not disclosed) was declined.

Brief facts of the case are that the marriage of the petitioner with the respondent was solemnized on 31.10.2010 and out of this wedlock, a male child 'A' was borne on 1.7.2015. Since the marriage between the parties could not pull on, both of them decided to file a petition under Section 28 of the Special Marriage Act, 1954 for granting a decree of divorce by mutual consent. The said petition was filed before the Family Court at Sonapat on 17.10.2017, i.e. just three months after the birth of the male child. In para 5 of this petition, both the parties made a joint declaration that they are living separately from each other since September, 2015 and they are unable to live together as husband and wife any more.

Para 7 of this petition reads as under :-

"7. That the parties have now mutually settled and agreed that the little male baby (namely 'A' shall remain in the custody of her mother petitioner No.1, who shall be responsible to look after him in all respect so that he may become a very good citizen of his life. The parties have also settled all their claims, assets and liabilities. The parties have no other further claim whatsoever against each other. The petitioner No.1 undertakes not to claim any kind of *istri dhan*. The articles and gifts etc. have already been taken back and received by the petitioner No.2 from petitioner No.1."

Thereafter, at the stage of first motion, on the same day, i.e. 17.10.2017, a joint statement of the parties was recorded, in which the following averments were made with regard to the custody of the minor child :-

"It has been agreed between the parties that custody of minor child, namely, 'A' shall remain with petitioner No.1.

We further undertake not to file any litigation in future pertaining to this marriage and the matters connected therewith.

Our consent for divorce is free and voluntary. The same has not been given under any force, pressure, fraud, coercion, misrepresentation of undue influence. There is no collusion between us in filling the present petition for divorce by mutual consent.

We have signed the petition for divorce after having been read over and understanding the contents of the same. We undertake to abide by the terms and conditions of settlement, in letter and spirit."

Thereafter, on 6.11.2017, at the stage of second motion, the following statement was recorded :-

"Our marriage was solemnized under Section 13 of the Special Marriage Act, 1954 before the Marriage Officer, Delhi on 31.10.2012. After the marriage, we lived together as husband and wife and a male child 'A' was born out from this wedlock. We are residing separately

even after filing this petition. There has not been any co-habitation between us since September, 2015. We cannot reside together and our marriage be dissolved as there is no chance of re-union. Everything has been settled between the parties and now nothing shall remain due towards either side and no claim of future maintenance, alimony or any right in property would be raised in either of the parties. **We both are bound by our earlier statement dated 17.10.2017.**

The marriage may be dissolved today as the mutual consent has not been obtained by force, fraud, undue influence, threat to anyone and this petition has not been presented in collusion with each other."

This was followed by a judgment and decree of granting divorce by mutual consent between the parties. In the judgment, it is specifically observed that the male child 'A' is residing with petitioner No.1, i.e. the petitioner herein, and the parties are living separately since September, 2015. The operative part of the judgment dated 6.11.2017 reads as under :-

"In view of the joint statement of the parties, the petition is allowed. **Both the parties shall be bound by their statements.** A decree of divorce dissolving the marriage between the parties by way of mutual consent is hereby passed leaving the parties to bear their own cost. Decree sheet be drawn. A copy of the decree sheet be supplied to each party free of costs. File be consigned to record room."

Counsel for the petitioner submits that now the respondent has filed aforesaid petition under Section 25 of the Guardian and Wards Act read with Section 6 of the Hindu Minority and Guardianship Act, 1956, claiming the custody of the minor child on the ground that there was an agreement between the parties dated 13.10.2017, which was notarised at Delhi and in the agreement it was agreed that respondent will have meeting and visiting rights of Master 'A' once a week, secondly that he has a right to meet and spent time on the festivals, school functions; etc. and thirdly that in the event of marriage of the mother, the custody will be handed over to the father, if the father so desires. The petitioner, herein, appeared before the Court and filed the written statement pleading that the petition is based on forged and fabricated documents, i.e. the agreement dated 13.10.2017, which has been fabricated by the respondent as signatures or this agreement of the petitioner-mother is a result of impersonation and forgery. It was also explained in the written statement that on various earlier occasions, when the divorce petition was filed; when the first motion joint statement was recorded; when the second motion joint statement was recorded as well as when the decree of divorce was granted, the respondent-father never relied upon the said agreement dated 13.10.2017, though the aforesaid proceedings happened subsequently. Therefore, the petition is filed by fabricating the agreement dated 13.10.2017 just to harass the petitioner-mother. The counsel with reference to para 2 of the written statement submits that there are

some handwritten insertions made in this alleged agreement dated 13.10.2017 with regard to the custody of the minor.

Counsel for the petitioner has referred to Section 38 of the Special Marriage Act, 1954 which reads as under :-

"38. Custody of Children – In any proceeding under Chapter V or Chapter VI the district Court may, from time to time, pas such interim orders and make such provisions in the decree as it may seem to it to be 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, revoke, suspend or vary, 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 proceedings for obtaining such decree were still pending."

Counsel for the petitioner further submits that since the decree of divorce was granted under Section 28 of the Act by way of mutual consent falling in Chapter VI, therefore, respondent-husband had a remedy to approach the same Court in terms of Section 38 of the Special Marriage Act, 1956 and no independent suit is maintainable.

Counsel for the petitioner has next argued that the trial Court when dismissing the application under Order XII Rule 11 by not

rejecting the petition has failed to appreciate the legal preposition. The counsel for the petitioner has relied upon a Division Bench judgment of this Court in 1981 HLR 417, **Rakesh Dua Vs. Mrs. Shoba Dua**, wherein similar facts and circumstances, it was held petition that under Section 25 of the Guardians and Wards Act is not maintainable. The relevant part of the said judgment is extracted as under :-

"3. The learned counsel for the appellant, was unable to show as to how the application filed by the appellant in the trial Court, was maintainable in view of the agreement, Exhibit R.1 entered into between the parties on the basis of which the decree of divorce was passed. Section 26 of the Hindu Marriage Act (hereinafter called the 'Act'), reads as follows :-

"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, consistent with their wishes, whenever 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 or interim orders in case the proceedings 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."

In view of this provision, no application under Section 25 of the Guardians and Wards Act, could be maintainable. In case there was any breach of this agreement, the only course open to the parties was to approach the Court which passed the decree for divorce, as contemplated under i.e. above said provision. Moreover, the custody of the minor children is with the respondent mother under the agreement between the parties. Even the said agreement could be made a part of the decree granting the divorce, but in any case, it has the common case of the parties that the divorce was granted on the basis of the agreement, Exhibit R.1.”

Counsel for the petitioner has then relied upon another judgment of a Division Bench of the Calcutta High Court 1990 AIR (Calcutta) 4, **Smt. Sibani Banerjee Vs. Tapan Kumar Mukherjee**, wherein the Court observed as under :-

3. If the respondent is aggrieved because of the appellant's failure to comply with that portion of the Order forming part of the decree for divorce requiring the appellant to make the child available to the respondent every Sunday for 2 hours at the agreed place, he has his remedy under S.39A of the Special Marriage Act, whereunder all decrees and orders made by the Court in any proceeding under Chaps. V and VI of the Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its Original Civil Jurisdiction for the time being are enforced. **No remedy, therefore, can obviously lie under S. 25 of the Guardians and Wards Act, which can be invoked**

only for the return of a child who has left or is removed from the custody of a guardian of his person.

4. Here the custody of the child was given to the appellant-mother under the order of the Court. True the order was passed on the basis of mutual agreement between the parties, but the same having been made part of the decree, no longer rests on agreement alone. It is true that if a guardian by voluntary agreement vests another person with the custody of his child, he may revoke such an agreement. This is settled law since the leading decision of the Privy Council in Annie Besant v. Narayaniah AIR 1914 PC 41 where it was also nevertheless ruled that if and when such delegated authority relating to custody has been acted upon in such a way as to create associations or give rise to expectations on the part of the child, which it would be undesirable in its interest to disturb and to disappoint the child thereby, the Court may interfere to prevent its revocation. The reason is that in this jurisdiction, what governs the Courts more is not the law or legal rights flowing therefrom, but the welfare and interest of the minor. But once such a custody has been decreed or ordered by the Court, and, therefore, does not rest on the guardian's extra-cural agreement alone, the latter cannot alter or revoke such custody unilaterally and extra-judicially, but can only move the Court, which passed the decree or the order, for revocation, variation or suspension of the order, as provided under S. 38 itself.

A guardian cannot invoke the provisions of S. 25 of the Guardians and Wards Act solely for

the purpose of alteration or revocation of an order of custody made by a competent Court, even if such revocation or alteration is proved to be necessary for the welfare of the minor.

5. For invocation of S. 25 of the Guardians and Wards Act, the sine qua non is a ward leaving or being removed from the custody of his guardian. And even then, an order for return of the child is not a matter of course, but may be made by the Court only when it is further satisfied that such return would be conducive to the welfare of the ward. It is true that detention of a ward by one against the wish of its guardian may in law amount to removal of the ward from the custody of the guardian within the meaning of S. 25 of the Guardians and Wards Act. **But where, as here, the appellant-mother has been entrusted with the custody of the child by and under an order of the competent Court and the child is all along, since such order, in her custody, retention of the ward in such custody granted by the Court cannot, so long the order remains in force, amount to any removal of the child, even if such retention is now against the will of the legal guardian. As already indicated, if the respondent-father feels that there have been such developments of subsequent events which might warrant an alternation or revocation of the earlier order of custody in favour of the appellant-mother, he may, if so advised, move for the same in the Court which made the order. But an application under S.25 of the Guardians and Wards Act was entirely misconceived and the**

trial Court also went entirely wrong in invoking and applying the provisions thereof.”

The counsel for the petitioner nor has then referred to another judgment of Delhi High Court, 2016 AIR (Delhi) 156, **Anamika Khurana Vs. Rajiv Khurana**, wherein, again, it was held that if one of the parties pleads breaches of an memorandum of understanding settled between the parties, a suit was not held maintainable under the Hindu Adoptions and Maintenance Act and it was held that the right of the plaintiff-wife, as per the law, will only be by enforcing the rights on account of the breaches of memorandum of understanding and liberty was granted to the plaintiff seek enforcement of the terms and conditions of the mutual understanding. The counsel, thus, argued that the respondent had no independent right to file the petition under Section 25 of the Guardians and Wards Act and can move an application before the family Court, Sonapat, where the consent decree was passed under Section 28 of the Special Marriage Act and in case there is any default of the joint statement or the joint petition, he can seek his redressal of grievances before the same Court and not by filing independent suit under Section 25 of the Guardians and Wards Act and on the basis of an agreement dated 13.10.2017, which has never seen the day of light settle till the time a decree of divorce by mutual consent on the basis of a joint petition and joined first and second motion statement was passed.

In reply, the learned counsel for the respondent has placed reliance upon mutual agreement dated 13.10.2017 to submit that it was signed by the parties and was executed at New Delhi regarding visiting rights of the father with minor child 'A' and under Clause 7 and further clause was inserted by writing in hand 'that in the event of post-marriage of Priyanka, 'A' will be in custody of his father, if he likes.' Counsel for the respondent has submitted that in view of this agreement, once it has come on record that mother Priyanka had remarried, father Manish Raj has a right to recovery the custody of the minor. Counsel for the respondent has also argued that the jurisdiction of the Court exercising the petition under Section 25 of the Guardians and Wards Act read with Section 6 of the Hindu Adoptions and Maintenance Act, 1956 is maintainable, independently.

Counsel for the respondent has further submitted that the father has not been permitted to meet the child and even visiting rights have not been provided.

On a Court query, about the place of working of father Manish Raj, the counsel for the respondent fairly concedes that presently he is working in Dubai as an Orthopaedic Surgeon, though he visits India periodically.

To the contrary, on Court query, counsel for the petitioner submits that the petitioner is permanently residing in Karnal, where she is working in a hospital and since birth, the child is in the custody of the

mother and he has been admitted in school at Karnal and it is the mother who is taking care of the child in all respect and is financially capable to do so.

On reappraisal of pleadings and impugned order, this Court finds that the trial Court has observed that under Section VII Rule 11 (d) CPC, a duty is cast upon the Court to reject a plaint if it is barred under the provision of law, however, further observed that since the respondent father is seeking the custody of the minor child not only on the basis of the agreement dated 13.10.2017, but also on the basis, being the biological father of the child and, therefore, the plaint cannot be rejected.

It is also worth noticing that since this petition is pending since 2019 and on 10.10.2019, the co-ordinate Bench arranged a meeting of the respondent father with the child for about 01 hour in the chamber and found that the child did not recognize the respondent-father and on the request of the respondent-father, to think over the matter the case was adjourned and, thereafter it remains pending for a considerable long time and proceedings before trial Court remained stayed.

As on today, the age of the child is about 07 years and since his birth, the child is residing in the custody of the petitioner-mother continuously.

After hearing learned counsel for the parties and on going through the record, I find merit in this petition.

Though it is well settled principle of law that for the purpose of deciding an application under Section VII Rule 11 CPC, the contents of the plaint/petition is to be seen, however, in the previous divorce petition filed by both the parents on the basis of the mutual consent under Section 28 of the Special Marriage Act (as there was marriage was performed under the said Act) needs to be scrutinized carefully regarding their voluntarily statement of father for giving the custody of the child to the mother and not pleading the agreement dated 13.10.2017 till the time the decree was passed. Moreover, it is a case of not deciding the rights of the parents but the custody of minor child, therefore, the Court cannot ignore the paramount consideration as held by the Hon'ble Supreme Court in a number of judgments that the welfare of the child should be the paramount consideration, while dealing with the custody of a minor child and, therefore, the circumstances from the date of birth of the child till date needs to be appreciated.

Thus, the following undisputed facts emerges on the basis of which this petition deserves to be allowed :-

- (a) The respondent No.1, who is a highly educated person, being Orthopaedic Surgeon filed a joint petition with petitioner, who is also a doctor for dissolution of the marriage by way of a decree of divorce with mutual

consent and in which in para 7 of the same, it is specifically stated that the male baby 'A' shall remain in custody of his mother.

- (b) In the first motion statement recorded on 17.10.2017, i.e the date when the petition was filed, again father made the statement that it is agreed between the parties that the custody of the minor child namely 'A' shall remains with the mother and an undertaking was given by him that no litigation in future will be initiated in all the connected matters.
- (c) Again, when the second motion was recorded on 6.11.2017, respondent-father acknowledges all the facts, including the date of marriage; birth of minor child 'A'; separation since September, 2015 and specific averment was made that the parties are bound with the earlier statement dated 17.10.2017.
- (d) The alleged agreement dated 13.10.2017 came in existence before filing of petition, before the first motion and the second motion statements, but the respondent-father never relied upon the said agreement or brought it to the notice of the Family Court even when his second motion statement was recorded on 6.11.2017.
- (e) Even in the judgment and decree passed by the Family Court, Sonapat, a condition was laid that in view of the joint statement of the parties, the petition is allowed and both the parties shall be bound by their statement i.e. to say that the respondent-father, never relied upon

the said agreement in those proceedings where both the parents, i.e. petitioner and respondent have settled the custody right of minor son 'A'.

- (f) Though it is also well settled principle of law that once a party has denied the existence of an agreement, the same may require evidence to prove whether it is a genuine or a forged document, however, in the instant case, once this agreement was never relied upon in the proceedings before the Family Court which culminated into the decree of divorce between the parties by way of mutual consent on the basis of the statement and this agreement was never brought to the notice of the said Court, the trial Court ought to have rejected the same by allowing the application under Order VII Rule 11 CPC.
- (g) Even otherwise in view of the judgment of a Division Bench, this Court in **Rakesh Kumar's** case (*supra*) as well as the Division Bench judgment of the Calcutta High Court in **Sibani Banerjee's** case (*supra*), in terms of Section 38 of the Special Marriage Act, the respondent-husband has remedy to approach the said Court, which has passed the decree of divorce if any terms and condition were violated and, therefore, in view of the above mentioned two judgments, the petition filed by the respondent-father in terms of under Section 25 of the Guardianship and Wards Act is mis-conceived and is liable to be rejected, being barred by the provisions of Section 38 of the Special Marriage Act.

- (h) It is not case of father that child was forcibly removed from his custody rather it is his own case that as per decree, the custody was mutually given to mother, therefore, in view of above judgments, petition under Section 25 of the Guardian and Wards Act is not maintainable.
- (i) As the competent Court under the Special Marriage Act, 1956 even after passing the decree of divorce has jurisdiction under Section 38 of the Act to pass just and proper order with respect to the custody, maintenance and education of a minor child.

Accordingly, this petition is allowed, the impugned order dated 8.1.2019 passed by the District Judge, Additional Family Court, Karnal, is set aside and the application filed by the petitioner-mother under Order VII Rule 11 C.P.C. is allowed and the petition filed by the respondent under Section 25 read with Guardianship and Wards Act, 1890 is rejected, leaving the respondent-husband to avail alternative remedy, in accordance with law.

September 06, 2022
satish

(ARVIND SINGH SANGWAN)
JUDGE

Whether speaking/reasoned : YES / NO

Whether reportable : YES / NO