

Narinder Kaur Vs. Parshotam Singh

Narinder Kaur Vs. Parshotam Singh

SooperKanoon Citation : sooperkanoon.com/691430

Court : Delhi

Decided On : Dec-07-1987

Reported in : AIR1988Delhi359; 34(1988)DLT54

Judge : D.P. Wadhwa, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 47

Appeal No. : First Appeal No. 260 of 1986

Appellant : Narinder Kaur

Respondent : Parshotam Singh

Advocate for Pet/Ap. : Santosh Kalra and; Rajesh Mitra, Advs

Judgement :

D.P. Wadhwa, J.

(1) This appellant, Narinder Kaur, has come up in this appeal against the order dated 26.9.86 of the Guardian Judge whereby he reviewed his earlier order dated 18.8.86. In the First order the Guardian Judge had granted interim custody of the minor child to the appellant but subsequently he reviewed that order and allowed the custody of the minor to remain with the respondent father.

(2) The parties were married on 17.11.1982, A male child was born to the parties on 13.8.1983. He is named Gurmit @ Sonu, The provisions of the Hindu Minority and Guardianship Act, 1956 (for short 1956 Act) apply in the present case. The mother (appellant herein) filed a petition under Section 25 of Guardians and Wards Act, 1890 (for short the Act) seeking custody of the child Sonu. This petition was filed on or about 4.4.1986. In this the mother filed an application seeking interim custody of the child.

(3) Earlier also a petition under Section 25 of the Act was filed by the mother. This was on 17.9 84. There also an application seeking interim custody of the child was filed. The then Guardian Judge Mrs. Kanwalinder. by order dated 30.1.1985 granted interim custody of the child to the mother. A civil revision against that order filed by the father was dismissed by the this Court on 7.2.1985 (CR 147/85). It was contended in the first petition that the mother was forced to leave her matrimonial home in August 1984 when the child was hardly one year old. In spite of the order dated 30.1.1985 and dismissal of the civil revision of that the custody of the child was not handed over to the mother and it appears that the parties arrived at a compromise and agreed to live together though separately from the parents of the respondent father. Now it was contended that against the mother was subjected to cruelty by her husband and his parents and other in laws. She was assaulted and humiliated with the result she was made to leave the house in March 1986. Immediately thereafter the present petition under Section 25 of the Act was filed claiming custody of the minor child. In the first order dated 18.8.1986 on the application for interim custody the learned Guardian Judge/Held that the child was below five years of age and required caressing hand and affectionate company of the mother more than that of the father He also referred to the earlier order dated 30.1.1985 of Mrs. Kanwalinder, the then Guardian Judge. Reliance was also placed on a Division Bench decision of this Court in Smt. Chandra Prabha v. Prem Nath Kapur, : AIR1969 Delhi283 . The Guardian Judge therefore directed that during the pendency of the petition under Section 25 of the Act the custody of the minor child be handed over to the mother. He also gave directions for the father to meet the child on certain dates and fixed the time as well for the purpose. This order was reviewed by the impugned order dated 26.9.86 whereby the learned Guardian Judge held that the custody of the minor child be kept with

the father. In pursuance to the earlier order of 18.8.86 the custody of the child was not handed over to the mother and instead an application for review was filed which led to the passing of the impugned order. The learned Judge observed that certain relevant facts were not brought to his notice when he passed the first order. He held that in the absence of any rejoinder being filed by the mother to the reply of the husband controverting the allegations made by the husband it had to be held that there was no sufficient accommodation with the parents of the mother with whom she was living and also that the mother did not feed the child on her breast. The Guardian Judge was, therefore, of the view that it would not be congenial for the child to be kept with the mother in that atmosphere. He held that the mother did not controvert the allegation of the father in the pleading that the child had always been with the father since his birth and further that the mother had no source of income and that she was thriving on the charity of her parents. These facts were held to be sufficient for the learned Guardian Judge to review the earlier order and he said that in doing so he exercised powers under Order 47 read with Section 114 and Section 151 of the Code of Civil Procedure.

(4) To my mind the learned Guardian Judge has adopted not quite correct approach. There appeared no justification in law or on the facts for him to review his earlier order. For one thing the allegations on the basis of which the Guardian Judge reviewed his order were already on record and it could not be said that these were not brought to the notice of the Judge particularly when in deciding such an application it is the welfare of the child which is of paramount consideration, In the first order the learned Judge did refer to the order Mrs. Kanwal Inder dated 30.1.85. In that the learned Guardian Judge had considered all those points to which in the impugned order it is slated that attention of the Judge was not drawn. The circumstances then existing had not changed. Rather the learned Judge in the impugned order failed to notice that the minor was being looked after mainly by the parents and sister of the father of the child. The father is an office going and is working as a clerk in an office of the Government of India.

(5) The father also made allegation against the mother that she was of unsound mind. These allegations were also made before Mrs. Kanwal Inder, the then Guardian Judge. She observed in her order that the mother had been appearing

before her and making submissions and that there was nothing in her conduct from which it could be inferred that the mother was suffering from any mental disorder disentitling her to the custody of her own child. During the pendency of this appeal on an application (CM 4365/86) Leila Seth, J. in her order dated 26.5.87 also observed that the mother had been attending the proceedings in Court and appeared to be well behaved. Before me also the mother had been appearing on various dates and she appeared to be quite normal. Merely that mother is not having any income of her own is no ground to deprive her of the custody of the minor child. No amount of wealth is substitute for the love, affection and care which a mother can bestow on her infant child. Further merely because the parents of the mother are not affluent people is again no ground to deprive the mother of the custody of the child. If the mother is not having an independent income for her maintenance and that of the child father can certainly be asked to give that maintenance but he cannot use this as a handle to deprive the mother of the custody of the child. I cannot believe the father when he says that the mother did not breast feed the child. It just appears to be his imagination.

(6) It was submitted by Mr. Mitra learned counsel for the father that the child would be attaining the age of five years in August next and although he had been living with the father. This argument is not correct. After the order dated 30.1.85 was made by Mrs. Kanwal Inder, the then Guardian Judge, the mother started living with her husband along with the child. The child is too young to form any intelligent preference. I am quite satisfied on the facts of this case that the welfare of the child lies with her mother, the appellant herein. He needs motherly love and care for his proper growth. It was also contended that the child is now school going. He can be admitted in a school near the place where his mother resides. Of course I have. also no doubt in my mind that the welfare of the child is also utmost to his father. He can therefore pay the necessary expenses for the maintenance of his child to the mother if he thinks that the mother cannot bring up the child properly on account of her having no income of her own. Section] 3 of the 1956 Act says that in the appointment or declaration of any person as guardian of Hindu minor by a court, the welfare of the minor shall be the paramount consideration. This has to be kept in view while ordering interim custody of the child as well.

(7) It was contended by Ms. Santosh Kaira learned counsel for the appellant that the learned Guardian Judge had no jurisdiction to review his order and also that even assuming if he had such jurisdiction the case did not fall with any of the clauses under Rule I of Order 47 of the Code of Civil Procedure. She said that her application for grant of interim custody of the child was under Section 151 of the Code. Section 12 of the Act provides that a court may make such order for the temporary custody and protection of a minor as it thinks proper. It is immaterial if the application is labelled under Section 151 of the Code. If the court has power under Section 12 of the Act for grant of temporary custody during the pendency of the proceedings it will have jurisdiction as well to modify that order if the circumstances so demand during the pendency of the proceedings. The Court must be deemed to possess such powers by necessary intendment and it cannot, therefore, be said that the order for interim custody of the child cannot be modified or varied though perhaps the review may not be the proper word but effect remains the same. Then Mr. Mitra learned counsel for the father said that if that be so no appeal could be filed against an order made under Section 12 of the Act. In this connection be referred to Section 47 of the Act. An order under Section 12 is not one of the orders against which an appeal would lie. This submission appears to be correct but then it is a fit case to exercise jurisdiction under Article 227 of the Constitution of India which I do.

(8) The impugned order, therefore, cannot stand. It is set aside. The appeal is, therefore, allowed with costs. Counsel fee Rs. 500.00 .