

8th March, 1995 to 13th February, 1996 when he was released on bail. Thus, he had already undergone more than 11 months of substantive imprisonment. He prayed that he may be let off with the imprisonment already undergone by him under Section 29. In the circumstances of the case, his conviction is upheld. We are satisfied that ends of justice would be met if he is let off with the sentence already undergone by him. Ordered accordingly.

(50) In view of the above, Murder Reference No. 2 of 1998 is accepted and the death sentence awarded to Ram Kishan is confirmed. Criminal Appeal Nos. 188-DB, 189-DB of 1998 and Criminal Revision No. 722 of 1998 are dismissed. Criminal Appeal No. 325-SB of 1998 is partly allowed in respect of the sentence. Otherwise, the conviction is up-held.

S.C.K.

Before S.S. Sudhalkar, J.

SMT. RAMA ALIAS RAM KALA,—Appellant

versus

ANIL KUMAR JOSHI,—Respondent

F.A.O. No. 1142 of 1999

29th October, 1999

Hindu Marriage Act, 1955—Guardian and Wards Act, 1890—Ss. 10 and 25—Wife remarried after divorce—At the time of divorce, custody of children handed over to the husband—After one year, wife filed petition for custody of her minor child inter alia on the ground that the respondent does not have financial capacity to maintain the minor—Before trial Court children refused to go with the mother—Whether better economic position should be the paramount consideration in deciding the custody of the minor—Held, no—Trial Court's order upheld with liberty to mother to file petition in future if minor wishes to go with her.

Held, that remarriage does not disentitle from having custody of the children from the earlier marriage. However, it can be seen that in the case in hand, the appellant had given the custody of the minor to the respondent when she took the divorce. Now she wants the custody. She can be satisfied that she can bring up the minor in a better economic position than her prior husband. However, better economic position

should not be the paramount consideration in deciding the custody of the minor. One can live happy with less income than those who have fat income and the circumstances of each case have to be examined from the fact of each case. In the present case, it will be harsh to snatch the minor from the custody of the father. It will not only be harsh to the father and brother of the minor but to the minor as well.

(Para 13)

Further held, that the finding in this appeal confirming the dismissal of the petition will be for the present time only. If subsequently the minor wishes to go with the mother and if a petition is filed by the mother in this regard, the above finding shall not come in her way.

(Para 14)

Anjana Gosain, Advocate, for the appellant

Ashok Saini, Advocate, for the respondent

JUDGEMENT

S.S. Sudhalkar, J

1. Contention of the appellant is that she was married with the respondent and out of the said wedlock two children were born, namely, Karan Joshi on 30th November, 1986 and Mohit Joshi on 1st September, 1992. The appellant has filed petition for custody of the younger son Mohit Joshi which was dismissed by the learned Additional District Judge on 15th February, 1999 and hence this petition has been filed.

2. The contention of the appellant is that she was married with the respondent and the two children were born out of the marriage. However, there was divorce between the parties and after the divorce, she was remarried with Mr. S.S. Dewan who is retired as a Major from the Army and is having good income. It is the contention of the petitioner that minor Mohit Joshi (hereinafter referred to as "the minor") is not being looked after properly by the respondent and that he is unable to take care of the maintenance and study of the minor and that the petitioner is in a better position to give the minor best maintenance and the opportunity of studies and hence it is prayed that the custody of the minor be given to the petitioner. As stated above, the said petition was dismissed by the learned Additional District Judge and hence this appeal :

3. I have heard learned counsel for the parties.

4. The question that is to be decided involves the consideration of welfare of the minor. Learned counsel for the appellant argued :

- (1) that the respondent does not have financial capacity to maintain the minor;
- (2) that the respondent does not care for the study of the minor;
- (3) that the respondent does not have proper accommodation for the minor; and
- (4) that the petitioner will be in a position to bring up the minor in a better atmosphere than the respondent."

(5) Regarding the first point, the appellant has examined Mr. S.S. Dewan, her new husband as PW4 who has stated regarding his income. It is not disputed that the new husband of the appellant is having a good income. Mr. S.S. Dewan PW4 has stated in his deposition that he is working in a private company and also getting pension of Rs. 6000 from the Army. The appellant has stated that Mr. Dewan is having lakhs of rupees. However, Mr. Dewan when examined as PW4 has not so stated. The respondent has been examined as RW3 and he has stated in his deposition that he is doing business for supply of pasturised milk and he has installed a counter at the bus stand at Nalagarh. He has stated that he is not sale agent of any specified milk company. He has also stated that he also collects milk and sells, there and his monthly income from selling the milk is between Rs. 6000 to 7000 per month. He has also stated that he has three brothers and two sisters and that they all are separate and are having separate business. His sisters are married and that they are settled in the house of their in-laws. He has also stated that his one brother is employed at Ludhiana and the other brother is practising as an Advocate at Batala. He has also stated that his father and mother are alive and they are permanently residing with him. His mother is aged about 65 years and that his father is aged about 72 years. He has also stated that he is residing with his parents in a house which was purchased by him for a sum of Rs. 20,000. The respondent of course, has not been able to substantiate his income by any books of accounts or any documentary evidence. However, it cannot be taken for granted that he is not earning. The statement made by the appellant in her petition is that it has come to her notice that the respondent is not having sufficient income of his own to maintain the minor. She has not stated specifically in the the petition that the respondent is not earning. When this is the position, there is no doubt that the respondent is earning when he specifically deposed regarding the figures of his monthly income when examined as RW3.

(6) Looking to the comparative income, the appellant has stated that Mr. Dewan her new husband, has no liability. Mr. Dewan has stated in his deposition that he has no liability except two sons who are from his first wife who is no more. The two sons are residing at Delhi. They are staying in a rented premises and are paying Rs. 300 per month as rent. In the cross-examination, he has stated that he has not done something special for his children so far. With this evidence before me, I will have to consider whether the minor will not be able to get proper maintenance and proper study if he is left with the custody of the respondent. As stated earlier, the income of the respondent can be accepted. Moreover, it is the case of the appellant that the parents of the respondent are dependent on the respondent. This being the case, I do not find that the respondent does not have financial capacity to maintain the minor.

(7) Regarding the second point, the appellant has stated in her petition that she has come to know that the respondent is not providing proper education to the minor. The appellant has examined PW1 Jaswinder Pal Singh who is Accountant-cum-Clerk in Bhai Nand Lal Public School, Anandpur Sahib. He has stated that the minor was admitted in his school on 23rd May, 1996 by the appellant and that all the charges were paid by the appellant. PW2 Meena Taing is Principal of B.M. Jain Public School, Nalagarh. She has stated that Karan Joshi (elder brother of the minor) is student of his school. However, minor is not a student of his school. The respondent has stated in his deposition that the minor was got admitted in Mahabir Public School at Nalagarh. At Ex. P2 there is a certificate dated 4th September, 1997 wherein it is mentioned that the minor is a 'bonafied' student of U.K.G. Bhai Nand Lal Public School, Anandpur Sahib. The say of the respondent stands corroborated by the same. He has stated in his reply that both the children are studying in Jain Public School at Nalagarh and in the cross-examination, he has also stated that Mahabir Public School is also controlled by Jain Sabha at Nalagarh and, therefore, both the schools are called by the name of Jain Public School. From the evidence led by both the parties and considering the certificate Ex. P2, it can be seen that the minor is studying in the school and, therefore, it is not possible for me to accept that minor is not studying. Moreover, there is no reason for the father to discriminate with his two sons, by giving education to one and denying the same to other. Considering all this evidence, this point cannot be decided in favour of the appellant.

(8) Regarding the accommodation the respondent has stated that he owns a house having good accommodation at Nalagarh. In the deposition he has stated that the said house was purchased by him in

the year 1992. It is 155 sq. yards., with a room and a kitchen constructed thereon. The kitchen has been constructed by him in the year 1998. He has also stated that the room was constructed by the previous owner. The room is 18' x 8'. He has also stated that he alongwith his mother, father and both the children are living and cooking in the same room before he constructed the kitchen in the year 1998. It is, therefore, true that the house in which the respondent stays is not a big one and they all stay in the accommodation of one room and kitchen. The question will be whether it is sufficient or not. At present, the parents are staying with the respondent. By the passage of time, when the children will grow, the respondent can have better accommodation and possibility that the parents cannot live with him for all the time to come, cannot be ruled out. While considering welfare of the minor, one of the points that can be considered is whether the present accommodation is sufficient or not. Sufficiency of accommodation differs from person to person according to the needs and, therefore, even if the respondent is staying in the accommodation, he has mentioned above, it cannot be held that should be a ground for giving custody of the minor to the petitioner.

(9) The consideration of the fourth point may, to some extent, require repetition of observations made in the points above. The fact is that the respondent is able to give education to the minor and maintain him. House accommodation with the respondent is not sufficient but it cannot be said that it is a case of no accommodation for the minor. In this case, the fact to be considered is that the appellant is living with her new husband. The appellant herself may be able to live happily with her new husband or that the new husband is willing to keep the minor but the question is whether the minor is willing to go to the house of the new husband of her mother. The minor besides living with the respondent is studying with his elder brother. The question is whether it will be proper to separate both the children by giving custody of the minor to the appellant. It appears from the judgement of the trial court that both the children were asked whether they were ready to go with the mother and they refused and this fact was not rebutted during the course of arguments. Minor will be able to lead a better economic life if he stays with the appellant but at the same time the position is that money is not everything in the life. If the respondent is a pauper, then certainly the fact would have been considered. In the present case, there are divorce deeds Ex. P4 and Ex. R1. In the said deeds it is mentioned by the parties that the elder son is staying with his father from the beginning and that the appellant is handing over the custody of the younger son to the respondent. I am at present not deciding the validity of the divorce deeds because it has nothing to do

with the welfare of the minor. Both the parties have executed the divorce deed, though by separate documents. The divorce deeds are executed in the month of July, 1996 while the petition for custody of the minor was filed by the appellant in the month of July, 1997.

(10) Learned counsel for the appellant cited the case of *Ms. Githa Hariharan and Anr. v. Reserve Bank of India and Anr.* (1) and argued that mother can be a natural guardian in absence of the father. It has been held in that case that the word "after" appearing in S. 6(a) does not necessarily mean "after the life time of father". In the interest of welfare of minor, even the mother can act as natural guardian in "absence" of father, due to any reasons.

(11) Learned counsel for the appellant has also cited the case of *Sheela v. Jeevanla* (2), wherein it has been held that the second marriage of wife with christian could not be a negative factor to have custody of children from her earlier marriage.

(12) Learned counsel for the appellant has also cited the case of *Anokh Singh v. Smt. Gurnam Kaur and another* (3). It has been held in that case that mere fact that a Hindu woman remarries does not disentitle her to the custody of her minor children.

(13) In the present case the petition filed by the appellant was not dismissed because the appellant remarried and that I agree with the principle laid down in the case of *Anokh Singh v. Smt. Gurnam Kaur* (Supra) that remarriage does not disentitle from having custody of the children from the earlier marriage.. However, it can be seen that in the case in hand, the appellant had given the custody of the minor to the respondent when she took the divorce. Now she wants the custody. The idea behind asking for custody seems to be an oblique one. She can be satisfied that she can bring up the minor in a better economic position than her prior husband. However, better economic position should not be the paramount consideration in deciding the custody of the minor. One can live happy with less income than those who have fat income and the circumstances of each case have to be examined from the fact of each case. In the present case, it will be harsh to snatch the minor from the custody of the father. It will not only be harsh to the father and brother of the minor but to the minor as well.

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- (1) J.T. 1999 (1) S.C. 524
 - (2) A.I.R. 1988 A.P. 275
 - (3) 1969 C.L.J. 872 (Punjab & Haryana)

(14) I may mention that the finding in this appeal confirming the dismissal of the petition will be for the present time only. If subsequently the minor wishes to go with the mother and if a petition is filed by the mother in this regard, the above finding shall not come in her way.

In view of the above discussion, I find that there is no reason to disturb the finding of the court below. This appeal is, therefore, dismissed.

R.N.R.

Before N.K. Sodhi and N.K. Sud, JJ.

M/S NARESH KUMAR AND CO. AND OTHERS,—*Petitioners*

versus

UNION OF INDIA AND OTHERS,—*Respondents*

C.W.P. No. 15583 of 1999

22nd February, 2000

Constitution of India, 1950—Art. 226—Income Tax Act, 1961—S. 206-C—Punjab Liquor Licence Rules, 1956—RL.1—Petitioners L-14A Licence holders—Notice issued requiring licence holders to deposit 10% of licence fee u/s 206C(1) of the 1961 Act being buyers of liquor—L14-A licensees sell liquor other than Indian Made Foreign Liquor in retail after purchasing the same from wholesalers—Sale in favour of L-14A licence holders is second sale—Whether petitioners L-14A licence holders fall within definition of ‘buyers’ u/s 206C(1) of the Act—Held, no-Term ‘buyer’ explained—Respondent not entitled to collect 10% of licence fee.

Held, that perusal of the provisions of S.206—C of the Income Tax Act, 1961 makes it clear that every person who sells alcoholic liquor for human consumption other than Indian made foreign liquor is required, at the time of debiting the amount payable by the buyer to his account or at the time of receipt of such amount from the buyer in cash or by cheque or draft or by any other mode, to collect from the buyer a sum equal to 10% of the amount payable by the buyer as income tax at source. The word ‘buyer’ has been defined in the Explanation to mean a person who obtains in any sale by way of auction, tender or any other mode, goods of the nature specified in the Table or the right to receive any such goods but does not include a buyer in the further sale of goods obtained in pursuance of such sale.