APPELLATE CIVIL

Before Man Mohan Singh Gujral, J.

KAMLESH,—*Appellant*

versus

RAM PAUL,—*Respondent*

First Appeal from Order No. 28 of 1970

September 22, 1970

Hindu Minority and Guardianship Act (XXXII of 1956)—Section 6—Guardian and Wards Act (VIII of 1890)—Sections 9 and 25—Hindu Marriage Act (XXV of 1955)—Sections 4 and 26—Removal of a minor child by the mother from a place A to place B—Father of the child applying for custody at A, where he resides—Courts at A—Whether competent to entertain such application—Ordinary place of residence of the child even after removal—Whether continues to be the place where his natural guardian resides and from where he is removed—Section 25 of Guardian and Wards Act, 1890—Whether impliedly repealed by sections 4 and 26 of Hindu Marriage Act, 1955.

Held, that under section 6 of the Hindu Minority and Guardianship Act, 1956, the father is the natural guardian of the boy or the unmarried girl. When the minor is removed from the custody of the natural guardian, his ordinary place of residence would continue to be the place where he was residing before he was removed. The actual place of residence of the minor at the time of the application under section 9(1) of the Guardian and Wards Act does not determine the jurisdiction of the Court as that may not be the place where the minor ordinarily resides. The expression 'ordinarily resides' lays stress on the minor's ordinary place of residence even after the presentation of the application under section 25 of the Guardian and Wards Act, 1890, and as such a place will have to be determined considering as to where the residence would have been if minor had not been removed to a different place before the application was filed. In a case where the application is filed shortly after the minor is removed, the place where the minor is residing after removal cannot be taken into consideration for the purposes of determining the jurisdiction of the Court which can entertain the application, as even in such a case the ordinary residence would continue to be the place where his natural guardian resides and from where he is removed.

(Para 3)

Held, that section 26 of the Hindu Marriage Act only empowers the Court to pass interim orders or make suitable provision in the decree in case there are proceedings pending under that Act for the custody, maintenance and education of the minor children of the parties. It does not deal with the matter which arises in case a ward leaves or is removed from the custody of the guardian which matter is entirely governed by section 25 of the Guardian and Wards Act. The matter dealt with under section 26 of the Hindu

Marriage Act not being the same as the matter which is governed by section 25 of the Guardian and Wards Act, the latter provision does not stand repealed by section 4 of the Hindu Marriage Act. (Para 9).

First Appeal from the order of the Court of Shri N. S. Bhalla, Senior Sub-Judge, Jullundur, dated 6th October, 1969 ordering for the restoration of the custody of the minor Pappu to the petitioner.

BALDEV KAPOOR, ADVOCATE, for the appellant.

H. R. AGGARWAL & H. L. MITTAL, ADVOCATES, for the respondents.

JUDGMENT

GUJRAL, J.—1. This appeal arises out of an order passed by the Subordinate Judge, Jullundur, dated October 6, 1969, whereby he allowed the application of the respondent under section 25 of the Guardian and Wards Act, 1890, for the custody of his minor son, Narinder Datt *alias* Pappu.

2. It is the common case of the parties that the marriage between the parties was solemnized in October, 1962 and on December 30, 1963, Narinder Datt *alias* Pappu was born out of this wedlock. It is also not in dispute that in January, 1967, Shrimati Kamlesh, left the house of the respondent and came to the house of her mother at Patiala and brought Narinder Datt *alias* Pappu along with her. On March 27, 1967, Ram Paul, the husband of Shrimati Kamlesh Kumari, filed the present petition under section 26 of the Hindu Marriage Act, 1955, claiming custody of the minor child who according to him had been illegally removed from his guardianship by Shrimati Kamlesh Kumari. The application was resisted on the grounds that the Court at Jullundur had no jurisdiction, that the welfare of the child demanded that he should continue to live with the mother and that the present application was not maintainable on account of the previous litigation between the parties. On the basis of these pleadings, the following issues were framed:—

"(1) Whether this Court has the jurisdiction to try this application ?

(2) Whether it is for welfare and in the interest of the minor that he should be given in the custody of the petitioner ?

(3) What is the effect of the previous litigation between the parties under the Hindu Marriage Act.

(4) Relief."

The learned trial Court found all the issues in favour of the husband and allowed the application.

3. The learned counsel for the appellant has challenged the findings on all the three issues. With regard to the jurisdiction of the Court at Jullundur, it is alleged that after the child was brought to Patiala, the ordinary place of residence of the minor should be considered to be Patiala and not Jullundur. There seems to be no merit in this contention. Under section 6 of the Hindu Minority and Guardianship Act, 1956, the father is the natural guardian of the boy or the unmarried girl. When the minor is removed from the custody of the natural guardian, his ordinary place of residence would continue to be the place where he was residing before he was removed. The actual place of residence of the minor at the time of the application under section 9(1) of the Guardian and Wards Act does not determine the jurisdiction of the Court as that may not be the place where the minor ordinarily resides. The expression 'ordinarily resides' lays stress on the minor's ordinary place of residence even after the presentation of the application under section 25 of the Guardian and Wards Act, 1890, and as such a place will have to be determined considering as to where the residence would have been if minor had not been removed to a different place before the application was filed. In a case where the application is filed shortly after the minor is removed, the place where the minor is residing after removal cannot be taken into consideration for the purposes of determining the jurisdiction of the Court which entertained the application, as even in such a case the ordinary residence would continue to be the place from where he was removed.

4. The child was removed in January, 1967. Two months later the present application was filed. Before removal the child had been living at Jullundur with his father. Considering the father to be the natural guardian the ordinary place of residence of the minor would continue to be at Jullundur even after his removal within two months before the filing of the application.

5. Under section 6 of the Hindu Minority and Guardianship Act, 1956, the father is the natural guardian of a boy and if the boy is more than five years of age, the custody is also to be normally with the father. In the present case the learned counsel appearing for the petitioner has not been able to bring out any circumstance to justify that the father should be deprived of his right to have the custody

of the boy. On the other hand we find that the mother has no source of income and is entirely dependent on her brother and mother. She has admitted in her statement that she has got no source of income and that she is not employed anywhere. This circumstance to some extent militates against letting the custody of the child continue with the mother. Moreover, the father has led convincing evidence to show that Shrimati Kamlesh Kumari did not treat the child properly. Sham Lal, A.W. 1, who was the landlord of the house in which the parties resided at Jullundur has clearly stated that Shrimati Kamlesh Kumari's treatment with the child was not good and stated that she often used to be in a bad mood and used to beat the child. It is further in his evidence that the mother of Ram Paul was very fond of the child and used to intervene with the mother whenever she maltreated the child. This witness lives in another portion of the same house and would be in a position to know about the facts stated by him. It has also not been shown that he was interested in the father. The only suggestion made to him was that in the proceedings which were pending at Patiala he had accompanied Ram Paul on one occasion. This circumstance does not detract us from the value of his testimony. If Sham Lal was aware of some facts which were material to the decision of the case pending at Patiala, no objection could be taken to his accompanying Ram Paul to Patiala for appearing as a witness. No blemish, therefore, attaches to the testimony of Sham Lal and I am of the view that his evidence can safely be accepted. Similarly Manohar Lal, a shopkeeper, who used to visit the house of Ram Paul has deposed about the bad treatment of the mother towards the child. This witness is also a disinterested witness.

6. There is another circumstance which militates against the petitioner. It is in the evidence of Maya Wanti, the mother of Ram Paul, that Shrimati Kamlesh Kumari left the house of Ram Paul when the child was eight months old and she returned after one year. It is further in Maya Wanti's statement that during this period the child stayed with her and was brought up by her. This part of statement of Maya Wanti has not been challenged in cross-examination and will have to be accepted as wholly true. Even Ram Paul has deposed about it and his evidence was also not challenged in this respect. It, therefore, clearly stands established that while the child was still few months old, the petitioner left him with the child's grandmother Maya Wanti who brought him up and looked after him for all these months. From this circumstance, it would be safe to conclude that even if Ram Paul would be out of the house during the

day the child would be properly looked after by his mother and it will be in the welfare of the child to be with the father who is an employee in the Punjab National Bank and has means to properly maintain the child.

7. In rebuttal the petitioner has only produced his brother and has made her own statement. This evidence is of an interested nature and even otherwise no circumstance has been brought out which would disentitle the father to obtain the custody of the child as he is the natural guardian. The fact that the child is studying at Patiala cannot imply that it would be in the welfare of the child to continue to live at Patiala. The child is only six years old and being student of nursery class, admission can be arranged for him at Jullundur easily and there would be no interruption in his studies.

8. For the reasons indicated above I hold that it was in the interest of the minor to live with the father and the learned trial Court was justified in coming to this conclusion.

9. Lastly it was canvassed before me that section 25 of the Guardian and Wards Act had been impliedly repealed by section 4 of the Hindu Marriage Act, 1955, which provides that any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with reference to any matter for which provision is made in this Act. On the basis of this provision, it is contended that as section 26 of the Hindu Marriage Act provides for the custody of the children during the pendency of the proceedings under that Act, section 25 of the Guardian and Wards Act shall cease to have effect as it deals with the same matter. In my opinion, this contention is wholly without merit as section 26 of the Hindu Marriage Act only empowers the Court to pass interim orders or make suitable provision in the decree in case there are proceedings pending under that Act for the custody, maintenance and education of the minor children of the parties. It does not deal with the matter which arises in case a ward leaves or is removed from the custody of the guardian which matter is entirely governed by section 25 of the Guardian and Wards Act. The matter dealt with under section 26 of the Hindu Marriage Act not being the same as the matter which is governed by section 25 of the Guardian and Wards Act, the latter provision does not stand repealed by section 4 of the Hindu Marriage Act. The application under section 25 of the Guardian and Wards Act filed by Ram Paul is, therefore, not incompetent.

10. No other point is urged before me.

11. The result is that this appeal fails and is dismissed but without any order as to costs.

B. S. G.

REVISIONAL CRIMINAL

Before H. R. Sodhi, J.

MADAN LAL,—*Petitioner*

versus

THE STATE OF PUNJAB,—*Respondent*

Criminal Revision No. 189 of 1969

September 24, 1970

Code of Criminal Procedure (V of 1898)—Section 369—Bar of review under—Whether applies to interlocutory orders—Criminal Courts—Whether have inherent jurisdiction to review such orders.

Held, that section 369, Criminal Procedure Code prohibits review of a judgment only. Judgment in a criminal case means a judgment of conviction or acquittal or any final order passed at the conclusion of the trial resulting in disposal of the case. There are variety of orders required to be passed by a trial Court before the trial is concluded. The trial Court is not barred from subsequently reconsidering those orders and modifying the same, according to the circumstances as may come to light afterwards. To this extent, all criminal Courts have inherent powers though not given by any specific provision in the Code. The exercise of power to correct its own mistake is inherent in every judicial and quasi-judicial authority unless it amounts to reviewing a judgment which has finally adjudicated the rights of the parties. (Para 2).

Petition under section 439 of the Cr. P. C. for revision of the order of Shri C. S. Tiwana, Sessions Judge, Sangrur, dated 13th February, 1969 affirming that of Shri G. D. Hans, Judicial Magistrate, 1st Class, Sunam, dated 8th January, 1969 disallowing the accused for sending a sample for further chemical analysis of the opium u/s 251 A(9) of Cr. P. C. and allowing the accused to receive back the amount of Rs. 60 deposited by him as a fee of the Public Analyst.

ASHOK BHAN, ADVOCATE, for the petitioner.

N. S. BHATIA, ADVOCATE, FOR ADVOCATE-GENERAL, PUNJAB, for the respondent.