REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 10771 of 2018
[Arising out of SLP(C) No.21786/2018]

DR. AMIT KUMAR ….APPELLANT

versus

DR. SONILA & ORS. ….RESPONDENTS

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. Leave granted.

2. The appellant and respondent No.1 were married according to Hindu rites on 7.5.2004 and, from the wedlock were born a son (respondent No.2) and a daughter (respondent No.3), who are now about

11 years and 8 years respectively. It appears that the marriage ran into problem at some stage and all endeavours for reconciliation failed. The appellant and respondent No.1, both, are qualified doctors, who were deployed with the CRPF throughout, which position exists even today.

3. The appellant and respondent No.1 ultimately agreed for a decree of divorce by mutual consent and filed a petition under Section 13B of the Hindu Marriage Act, 1955. The first motion was filed in June, 2016 and after the expiry of the statutory period of six (6) months, the second motion was passed and a decree of divorce was granted on 9.12.2016.

4. The two relevant terms of the decree of divorce for the purposes of this present appeal are extracted as under:

> "5) That, petitioner No.1 and 2 are at liberty to marry with any other person of their choice. In future petitioner No.1 has no any right of husband over petitioner No.2, so also petitioner No.2 has lost right as wife over petitioner No.1 today.
>
> 6) That, petitioner No.1 and 2 both are agree to custody of both the children's residing with petitioner No.1. Petitioner No.1 will provide education, medicines, and marriage of Aarokya Kumar s/o Amit Kumar. Petitioner No.2 will provide education, medicines and marriage of Riya Kumar d/o Amit Kumar."

5. A perusal of the aforesaid shows that para 5 was a natural corollary

to the decree of divorce, i.e., that either parties could re-marry. Clause 6 provides for an agreement *inter se* the appellant and respondent No.1 *qua* the issue of custody of both the children, which was agreed to be with the appellant. However, possibly in view of their similar financial strength, it was agreed that the appellant would provide for education, medicines and marriage of the son while respondent No.1 would do the likewise for the daughter.

6. The parties at the relevant time were posted in Nanded and, thus, initially the arrangement for custody worked out fine. The issue, however, arose once the appellant was transferred out of Nanded. The appellant was transferred to Jammu**,** which apparently necessitated him to make arrangements for admission of respondent Nos.2 & 3 to a boarding school in Pune, while he assessed the possibility of bringing the children to live with him in Jammu. The undisputed fact is that at no point of time did respondent No.1 make any financial contributions towards her obligations, in terms of the decree of divorce by mutual consent. The appellant sent a legal notice dated 28.3.2017 to respondent No.1 pointing out this fact and demanding the payment of unpaid amounts, apart from the amount required for securing admission and

meeting the living expenses of the daughter in the boarding school at Pune. It is this demand which seems to have triggered off the present dispute.

7. Respondent No.1 sent a reply to the aforesaid notice through her counsel on 15.4.2017. The said reply raised the issue that the consent decree was not acceptable to her, and hence her counsel had advised her to seek a modification of the terms & conditions of the decree regarding the custody of the children. It was also alleged that the transfer of respondent Nos.2 & 3 to the boarding school was a unilateral act of the appellant and that the expenses quoted were exorbitant.

8. Respondent No.1 filed an application dated 31.5.2017 under Section 6 of the Hindu Minority and Guardianship Act, 1956, seeking custody of her minor children. In the application, it is alleged that respondent No.1 was mentally disturbed regarding the future of respondent Nos.2 & 3, who are of a tender age, and that at the time of the divorce, the appellant forced and coerced the applicant "to dance on his tunes though not acceptable to the applicant." It is further pleaded that respondent No.1 had not asked for absolute custody of the children only

so that they do not get disturbed in their education. This application also admits that the trigger has been the notice dated 28.3.2017, sent by the appellant through his counsel, whereby respondent No.1 was for the first time informed that the children were being put in a boarding school. A reference has also been made to the communication, where it was alleged by the appellant that the respondent No.1 wanted to get rid of the custody and responsibility of the children and that is the reason why she had given their custody to the appellant as respondent No.1 had decided to get re-married. There are certain other allegations made *qua* the problem of the visiting rights of respondent No.1 vis-a-vis the appellant but they are not germane to the controversy in question.

9. The aforesaid application was resisted by the appellant by filing a reply where it was sought to be emphasised that the terms of the decree had been agreed upon, six months' time period had been granted to the parties to have a thought over the same, and only thereafter had they been incorporated in the decree of divorce. In the reply it has also been pointed out that though the marriage between the appellant and respondent No.1 was a love marriage, issues arose on account of an alleged affair between respondent No.1 and her school boyfriend, as

named in the reply. It was also alleged that she was caught red-handed, but on her begging forgiveness, the appellant decided to maintain the relationship. This, however, it is alleged, did not bring the liaison to an end. Not only this, in March 2016, she is alleged to have started an affair with a person working in the same organisation, who has been named in the application, and that on being found out, respondent No.1 even attempted to commit suicide on that account, for which medical records are available. The divorce is stated to have been agreed upon without making these allegations against respondent No.1, in order to maintain the dignity of the parties in the society at large. The District Judge disposed of the application on 04.09.2017. The court noticed that the paramount consideration was the interest of the children. The court took into consideration that both the parties were well qualified and enjoyed an equal occupation and status, and had mutually agreed to the terms and conditions of the decree for divorce after the completion of the statutory period of six months. There was, thus, no reason to deprive the appellant of the custody of the children, but visiting right arrangements were made in view of the fact that the two parties were based in different stations.

10. This order was assailed by respondent No.1 before the High Court

in WP No.12432/2017 in September, 2017. While the writ petition was still pending, respondent No.1 filed a civil suit for declaration that the decree of divorce by mutual consent passed by the Family Court had been obtained by coercion, fraud and misrepresentation and was, thus, null and void, and hence did not affect the marriage between the parties. This suit is stated to be still pending.

11. During the proceedings, mediation was also endeavoured, but it failed. The learned Single Judge of the Bombay High Court passed an order on 12.6.2018, after having interacted with the children. The learned Judge took note of the subsequent development that the appellant had married recently, prior to the order, and that there was a biological son of his second wife, borne out of her first wedlock, who is residing with them, currently. The appellant had also got the children admitted to a school in Jammu, by that point in time. The interaction with the children is stated to have led the Judge to the conclusion that the son and daughter desire to live with respondent No.1, but that they also love their father equally. The learned Judge gave preference to the desire of respondent No.1, as a mother, and directed that the children would remain in the custody of the mother for a period of one year to take

education at a school in which they would acquire admission, at the place where their mother lives and that the father would have visiting rights. A number of directions were passed *qua* the implementation of the visiting rights.

12. The appellant, aggrieved by this order, preferred SLP (Civil) No.16667/2018. Leave was granted and this appeal No.6500/2018 was disposed of on 11.7.2018, by making a reference to the clauses in the consent decree, which had not been noticed by the High Court, while passing the order. The matter was then remitted to the High Court for fresh consideration.

13. Based on the interaction with the children, the learned Single Judge of the Bombay High Court by the impugned order dated 25.7.2018, once again, directed the custody of the children to be with the mother, with visiting rights given to the father. The High Court after noticing the submission made on behalf of the appellant that the condition in the divorce decree had not been varied till date, posted the matter on 19.3.2019, to be reviewed after a year.

14. We had directed the personal presence of the appellant and the

respondents with whom we interacted. Learned counsel for the appellant drew our attention to certain pleadings which would show that proceedings had been initiated against the officer with whom the liaison of respondent No.1 was alleged. The Memorandum dated 14.3.2017 issued by the Directorate General, CRPF referred to the imputations of misconduct in support of the article of charges and it is specifically alleged that the said officer had used immoral texts during office hours while communicating with respondent No.1. The details of the same have also been set out. The inquiry is stated to be still pending. In the course of the Court's interaction, it came to light that as per the appellant and his second wife, the matrimonial arrangement was with the understanding that Respondent Nos.2 and 3 would stay with the appellant, and the second wife of the appellant would take care of them. The second wife of the appellant is an MBA graduate and was previously working with a bank, but resigned to take care of domestic responsibilities. The appellant also stated that while on the one hand no financial aid had been given by respondent No.1 to the appellant for the daughter, as per the obligations in the consent decree on other hand she had been transferring substantive amounts to the person with whom she

allegedly had a liaison. On the Court's query, respondent No.1 initially took offence to the fact that the appellant had access to her bank details, but on a pointed query admitted that she did transfer the funds to her colleague, but stated that the same was her own business. She sought to plead that it was immaterial whether she was or was not a good wife, but that she was indeed a good mother, as had become apparent in the interaction of the children with the learned Single Judge.

15. We have given deep thought to the matter. The issue is not so simple as it involves the interests of these young children, respondent Nos.2 & 3, which is of paramount concern. While saying so, it has been kept in mind that these children are still young and are of an impressionable age and the interaction can only be one of the factors to be taken into account.

16. In our view, it clearly emerges that the decision to give custody to the appellant, of the two children, was a conscious decision taken by the parties at the relevant stage and can hardly be categorised as a decision under force, pressure or fraud. Respondent No.1 is well-educated and is a medical practitioner. There was a six (6) months' hiatus period for the

parties to think over the terms of the settlement before the grant of the decree of divorce, which is the statutory period available for the parties to have a re-think, if they so deem it appropriate. The parties had clearly agreed as per clause 5 that they were free to re-marry. As per the terms of the custody, the said marriage does not have any effect on the custody rights, at least in the terms between the parties. The appellant has also borne all the expenses for both the children, as respondent No.1 even initially failed to contribute anything towards the expenses for the daughter, contrary to the agreement *inter se* the parties.

17. The trigger for respondent No.1 claiming custody of the children only arose when the appellant asked her to contribute financially. It was not a case of financial difficulty, but the unwillingness of respondent No.1 to contribute for her own daughter, while simultaneously transferring amounts to a colleague of hers. It does appear that the proceedings initiated initially for the custody and thereafter for seeking cancellation of the decree of divorce were clearly an endeavour to pressurise the appellant to not claim any amounts. We may also invite attention to Order II Rule 2 of the Code of Civil Procedure, 1908 specifying that where a plaintiff intentionally relinquishes, any portion of

his claim, he shall not afterwards sue in respect of the portion so relinquished. Respondent No.1 had relinquished her rights to claim custody and the suit filed by her, thus, is also highly doubtful.

18. We may hasten to add that it is not as if there can be no eventuality where such terms may require modification, but that would arise if the interests of the children so desire, and more specifically if the appellant had failed to honour his commitments, or look after the children. The second marriage of the appellant cannot be put against him, nor can the factum of the child of his second wife residing with him deprive him of the custody rights of his two children, which has been specifically conferred on him with the consent of respondent No.1.

19. A perusal of the impugned order shows that it is not as if the appellant was not looking after the children. The children showed affection for their father. It was due to the exigencies of the appellant's service condition that the children had to be put in a boarding school for some time, which exigency also does not remain at present. It was known to the parties that they were in a transferable job. A conscious decision was taken by the parties to give the sole custody to the

appellant, in the interest of the children. The second wife of the appellant is an educated lady. Merely because the appellant has decided to go ahead in life, and has had a second marriage, it provides no ground whatsoever to deprive him of the custody of the children as agreed upon between the appellant and respondent No.1, especially when he has been looking after the children and has not gone back on any of his commitments. Respondent No.1, in order to avoid the financial liability started these proceedings, resulting in the impugned order, as also a separate suit proceeding. One fails to appreciate what is it that respondent No.1 wants by filing the suit now, by claiming that the decree of divorce is null and void, when there is admission of a mutual consent for divorce and the appellant has already re-married. We are not going into the details of the allegations against respondent No.1's liaison with another man in the same service, as the inquiry is still pending and, it may not be appropriate also, to do so in the present proceedings. We, however, see no reason why the appellant has been compelled to go through this unnecessary litigation when the parties, at the threshold, after deep deliberation, and for the interest of the children, have given the custody to the appellant.

20. We are of the view that the learned Single Judge has given undue importance to the conversation with the children at a time when naturally they would prefer to stay with a parent rather than a boarding school. Respondent No.1 cannot be permitted to take advantage of the visiting rights granted for the vacation period to now claim that the children should continue to stay with her.

21. We are, thus, of the unequivocal view that the interference by the learned Single Judge, vide impugned order dated 25.7.2018, was unjustified, and the order of the Family Court dated 9.12.2016 was in order.

22. Insofar as any further facilitative directions, for the purpose of visiting rights of respondent No.1 are concerned, it would be open for the Family Court or High Court to make necessary arrangements. Respondent Nos.2 & 3 should be returned to the appellant by respondent No.1, along with all relevant documents of the children, within thirty (30) days from today, before the Family Court. In case the appellant is unable to make arrangement for a mid-term admission for the children, he may

inform respondent No.1 and in that eventuality the children will continue to study in the same school at present and continue to stay with respondent No.1 till the end of the session. This is in order to ensure that the study of the children are not disturbed. We also make it clear that the rights and obligations as envisaged in the decree of divorce by mutual consent will bind both the appellant and respondent No.1. Needless to say that after the children attain the age of majority, they would have their own choice.

23. The appeal is accordingly allowed, leaving the parties to bear their own costs.

.....J.
[Kurian Joseph]

.....J.
[Sanjay Kishan Kaul]

New Delhi.
October 26, 2018.