

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 1024 OF 2014

Ritu P. Dhariwal

Petitioner

Vs

Manish Jagdish Shah

.. Respondent

Mr. P.S.Dani, Senior Advocate, a/w Ms Tejashree Mhatre and Mr Vijay Badgujar i/b Singhania Legal Services, Advocate for Petitioner.

Mr. J.S.Kini a/w Mr. Suresh Dubey, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 02/03/2015

PC:

1. Heard Mr. P. S. Dani, learned senior counsel for the petitioner and Mr. J. S. Kini, learned counsel for the respondent at length.
2. By this Petition under section 115 of the Code of Civil Procedure, 1908 (for short, "C.P.C."), the petitioner has challenged the Judgment and order dated 25.9.2014 passed by the learned Judge, Family Court No.3, Mumbai, below Exhibit -35 in Petition No.D-85 of 2007. By that order, the Family Court rejected the application made by the petitioner under Order VII Rule 11(a) and (d) of C.P.C.
3. In support of this petition, Mr. Dani submitted that the petitioner and respondent had instituted M.J. Petition No. F-294 of 2007 for dissolving the marriage solemnized between them on

22.1.2005 by a decree of divorce by mutual consent under section 13-B of the Hindu Marriage Act, 1955. The petition was disposed of in terms of Consent Terms dated 6.3.2007. Clauses 1 and 3 of the Consent Terms read as under:

“1. Agreed and declared that the permanent and irrevocable custody of the minor son 'Poojan' shall remain with petitioner no.1.

3. Agreed and declared that the petitioner no.2 shall have no access of the minor son Poojan.”

4. Mr. Dani submitted that it was agreed between the parties that permanent and irrevocable custody of minor son Poojan will remain with the petitioner herein. The respondent agreed and declared that he shall have no access of the minor son Poojan. Mr. Dani submitted that the respondent instituted M.J.Petition No.D-85 of 2007 for declaration that he continues to be the natural guardian of master Poojan; for a permanent injunction restraining the petitioner from giving the master child Poojan in adoption to any third party; in the alternative, for handing over custody of master Poojan in the event of the petitioner intending to marry and/or intending to grant Master Poojan in adoption to any third party; for permanent injunction restraining the petitioner from changing name of master Poojan to any other name; for mandatory order directing the petitioner to give the details of whereabouts of master Poojan on a monthly basis in the event of the petitioner leaving India. Mr. Dani invited my

attention to paragraphs 8,10,11 and 12 of the petition and submitted that the respondent had prayed for various reliefs on the ground the consent decree was obtained by playing fraud upon him. He submitted that the respondent also filed M.J.Petition No.123 of 2010 for declaration that the decree of divorce passed by the Family Court in Mutual Consent Petition No.F-294 of 2007 granting a decree of divorce by mutual consent between the parties be set aside as it was passed by fraud and by playing coercion on the respondent. In that petition, the petitioner filed application Exhibit 7 for rejection of the petition under Order VII Rule 11(a) or (d) of C.P.C. By the Judgment and order dated 13.8.2012 the Family Court allowed the application and rejected the Petition No.B-70 of 2012 for want of cause of action under Order VII Rule 11(a) of C.P.C. Aggrieved by that order, the respondent preferred Family Court Appeal No.125 of 2012. By the Judgment and decree dated 1.11.2012 this Court dismissed the appeal. Aggrieved by that decision, the respondent preferred S.L.P. to Appeal before the Apex Court. By order dated 27.2.2013 the S.L.P. was dismissed. He submitted that the Family Court, while dismissing the application, observed that the respondent filed the petition on the ground that the decree of divorce was obtained by fraud and by playing coercion on him. After considering the material on record, the Family Court held that the respondent failed to establish the plea of fraud. The said

order is confirmed by this Court as also by the Apex Court.

5. Mr. Dani submitted that the petitioner thereafter filed application under Order 7 Rule 11 (d) of C.P.C. for dismissing the M.J.Petition No.D-85 of 2007 for want of cause of action. By the impugned order, the Family Court rejected the application. He submitted that once the Family Court, this Court as also the Apex Court have held that the respondent had failed to substantiate the plea of fraud, the Family Court ought to have allowed the application because on the self-same ground the respondent has claimed reliefs in M.J.Petition No. D-85 of 2007. Once the plea of fraud is negated by the Courts, the said plea cannot be gone into in the Marriage Petition No.D-85 of 2007. He, therefore, submitted that the impugned order deserves to be set aside.

6. On the other hand, Mr. Kini supported the impugned order. He submitted that earlier the petitioner had filed application under Order VII Rule 11(d) on or about 29.3.2008 for dismissing the petition. By the judgment and order dated 16.8.2011 the Family Court dismissed the application. The petitioner instituted Writ Petition No.3284 of 2012 in this Court. The petition was also dismissed on 21.6.2012. He further submitted that in the earlier round of litigations, none of the Courts had recorded a finding that the respondent did not establish plea of fraud. The application was allowed by the Family Court on the ground that there was no cause of action. In any case, he submitted that the

respondent has prayed for declaration that he is the natural guardian of Master Poojan as also for his custody in the event of the petitioner intending to marry and/or intending to grant Master Poojan in adoption to any other third party. He submitted that while considering the issue of custody of the minor child, paramount consideration is welfare of child and not the rights of parents. He, therefore, submitted that no case is made out for invocation of powers under section 115 of C.P.C.

7. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. I have already dealt with various prayers made by the respondent in Petition No.D-85 of 2007 for custody of the child, amongst other reliefs. It is material to note that earlier the petitioner had instituted the application for dismissing the petition by filing application under Order VII, Rule 11 (d). That application was rejected by the Family Court on 16.8.2011. In paragraphs 11 and 12 the Family Court observed thus:

“11. In the facts of the present case undisputedly the earlier petition filed by the parties was decreed on 7.9.2007 by filing mutual consent terms whereby the sole custody of the minor child was given to mother of the child i.e. the respondent herein. Further undisputedly in main petition the petitioner has taken a plea that the said consent decree was obtained by playing a fraud upon him and even he has instituted a separate proceeding viz M.A. No.123 of 2010 to declare that decree of divorce passed in Petition No.F-294 of 2007 be set aside since it was obtained by fraud and by playing coercion on him.

12. On perusal of petition, it does not appear that the

statements in the petition are without any doubt or dispute shows that it is barred by any law in the force and, therefore in view of principle laid down in the matter of Popat and Kamala Vs. K.T.Eshwara Sa, cited supra, in my opinion, this is not a proper and fit case wherein the petition deserves to be rejected under Order VII Rule 11(d) of Civil Procedure Code, more particularly when it is the contention of the petitioner that the decree in divorce proceeding was obtained by fraud and by playing coercion upon him. “

The petitioner challenged that order by instituting Writ Petition in this Court. The petition was dismissed on 21.6.2012. This Court considered Section 11 of C.P.C. and observed that the earlier petition for divorce by mutual consent was disposed of in terms of the Consent Terms and was not decided on merits. It was further observed that in any event, fraud vitiates everything. Hence, if fraud is proved in execution of the consent terms, the consent stated to have been given by the respondent would not be free consent which could enjoin him to be bound by it. If that is seen, the consent to give up the custody and/or the access of the child would be of no effect. The observations made by this Court while dismissing Family Court Appeal No.125 of 2012 were considered by the Family Court. It was further observed that the order of custody and access of child are never final and those orders can be modified looking to the circumstances of the case and subsequent events. Under such circumstances, it is necessary to decide the petition on merits. I do not find that the Family Court committed any error in arriving at this conclusion. It

is settled position in law that while considering the custody of a child, paramount consideration is welfare of the child and not the rights of parents. Even if the consent decree is passed, it will not come in the way of the respondent in applying for custody if he makes out a case to that effect. In view thereof, no case is made out for invocation of powers under section 115 of the C.P.C. The petition fails and the same is dismissed. Liberty is reserved to the parties to apply for expeditious disposal of the case.

8. At this stage, oral application is made by Mr. Badgujar for stay of this order for a period of eight weeks from today. Mr. Kini has opposed this application on the ground that earlier this Court has permitted the parties to proceed with the cross examination of the respondent. In view thereof, oral application is rejected.

(R.G.KETKAR, J.)