

In the High Court of Punjab and Haryana at Chandigarh

CR No. 5309 of 2017

Date of Decision: 11.8.2017

Virender Kumar

---Petitioner

versus

Suman and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. I.S.Pabla, Advocate
for the petitioner

Rekha Mittal, J.

The present petition directs challenge against order dated 25.7.2017 (Annexure P-6) passed by the Additional Civil Judge (Senior Division), Kurukshetra whereby application filed under Section 10 read with Section 151 of the Code of Civil Procedure (in short "CPC") by the petitioner for staying the petition under Section 25 of the Guardians and Wards Act, 1890 (in short "the 1890 Act") has been dismissed.

Counsel for the petitioner has submitted that the petitioner has filed a petition under Section 13 of the Hindu Marriage Act, 1955 (in short "HMA") for a decree of divorce by alleging that the respondent-wife is leading adulterous life. In those proceedings, an application under Section 26 of the HMA has also been filed for permitting the petitioner to retain custody of the children born out of the wedlock who are at present residing with the petitioner.

The respondent-wife filed an application under Section 12 read

with Sections 17 to 20, 22 and 23 of the Protection of Women from Domestic Violence Act, 2005 wherein she has also staked claim for handing over custody of the children by Virender Kumar-respondent No. 1 therein. Later, petition under Section 25 of the 1890 Act read with Section 6 of the Hindu Minority and Guardianship Act for custody of minor children namely Mehak and Vaibhav has been filed which is pending in the Court at Kurukshetra. It is argued with vehemence that as question of custody of the children is pending consideration in the petition filed under Section 13 of the HMA wherein the petitioner has also filed an application under Section 26 thereof, proceedings in the petition filed under Section 25 of the 1890 Act are liable to be stayed, in the light of provisions of Section 10 CPC.

I have heard counsel for the petitioner, perused the paper book particularly the order impugned.

Section 26 of the HMA deals with custody of children and a relevant extract therefrom reads as follows:-

“In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such

orders and provisions previously made: Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.”

Perusal of the aforesaid extract would make it evident that while deciding a petition filed under other provisions of HMA namely petition for restitution of conjugal rights, judicial separation or divorce etc., the court can pass interim order with regard to custody, maintenance and education of minor children. It is difficult to accept that since application under Section 26 of the HMA in proceedings initiated under Section 13 thereof is pending consideration before the Court of Additional District Judge, it would create a bar in continuation of the proceedings under Section 25 of the 1890 Act whereby respondent-wife has prayed for custody of the children. As a matter of fact, the question with regard to custody of the children from the point of view of their welfare would be decided only in the proceedings under Section 25 of the 1890 Act, on the basis of evidence to be adduced by the parties. In this view of the matter, I do not find any merit in contention of the petitioner that pending decision of the petition under Section 13 HMA as well as application under Section 26 thereof, the petition under Section 25 of the 1890 Act filed by the respondent-wife is liable to be stayed by invoking section 10 CPC.

On a pointed query raised by the court, counsel for the petitioner is not in a position to advance any arguments as to if an order passed under Section 26 HMA can constitute res judicata in the

proceedings initiated under Section 25 of the 1890 Act. In this view of the matter, I do not find any error much less illegality in the impugned order warranting interference.

For the foregoing reasons, petition fails and is accordingly dismissed.

(Rekha Mittal)
Judge

11.8.2017

PARAMJIT

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No