

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CR No.5740 of 2015(O&M)
Date of Decision: 29.05.2018**

Lalit Ahuja

.....Petitioner

Vs

Shikha Malhotra

.....Respondent

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Vaibhav Sehgal, Advocate
for the petitioner.

Mr. Neeraj Malhotra, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this revision petition against the order dated 14.08.2015 passed by Guardian Judge, Ludhiana, whereby application filed by the petitioner for dismissal of the petition was dismissed.

[2]. Brief facts of the case are that the petitioner was married with the respondent on 26.02.2009 at Ludhiana according to Hindu rites and ceremonies. Out of the wedlock, a daughter namely Shreya Ahuja took birth on 16.01.2010. Parties could not pull on their matrimonial ties. With the intervention of

the respectables, both the sides entered into written compromise on 13.05.2012. A joint petition under Section 13-B of the Hindu Marriage Act was filed. District Judge, Jalandhar vide judgment and decree dated 14.05.2013 was pleased to grant divorce under Section 13-B of the Hindu Marriage Act. A joint statement was made by the parties that the minor child namely Shreya Ahuja who is in custody of the petitioner will remain with him and respondent will be having no concern with the minor whatsoever. Petitioner would be responsible for all the education, maintenance, upbringing and marriage of the minor Shreya Ahuja. All the claims regarding past, present and future maintenance and permanent alimony have been paid to the respondent. Joint statement of the parties before the District Judge, Ludhiana on 14.05.2013 was to the following effect:-

“Our joint statement was recorded on 12.11.2012. We are Hindu by religion. Our marriage was solemnized on 26.02.2009 at Ludhiana as per Hindu rites and ceremonies. We lived together, but soon we discovered that we are not made for each other. From the wedlock, one female child namely Shreya was born on 16.01.2010 who is living with the petitioner No.2. The petitioner No.1 will not claim the custody of the minor Shreya from the petitioner No.2, in future. The petitioner No.1 has no concern with the minor child from any corner whatsoever. On the other hand, the petitioner No.2 is fully responsible for all the

education, maintenance, upbringing and marriage of the minor Shreya. All the claims regarding past, present and future maintenance and permanent alimony of the petitioner No.1 have been settled. The petitioner No.1 has received each and everything from the petitioner No.2. Now, no dispute is left between us. The petitioner No.1 will not claim any maintenance from the petitioner No.2, in future. Some of the gold ornaments belonging to the petitioner No.1 were lying with the petitioner No.2. Similarly, some of the gold ornaments belonging to the petitioner No.2 were lying with the petitioner No.1. Now, as per settlement between us, we had entrusted the gold ornaments with Mr. Sunil Kapoor son of Sh. Subhash Kapoor, Mediator resident of Ram Gali Madhopuri, Ludhiana, who is a common friend of us. We have taken the gold ornaments from Sh. Sunil Kapoor. The petitioner No.1 has already received all her dowry articles and istridhan etc. from the petitioner No.2. Now, nothing remains due towards each other. On account of our contrasting nature, we could not live together. Hence we have been living separately since 16.07.2011. We have failed to persuade ourselves to live as husband and wife. We shall be bound by the terms and conditions as enshrined in the petition. Hence, we have resolved to part ways and seek a decree of divorce. Our marriage may be dissolved and a decree of divorce may be granted.”

[3]. After dissolution of marriage, petitioner has been taking due care of the minor. Petitioner has also re-married with Ashima Ahuja on 25.07.2015 after disclosing of his first

marriage and custody of minor daughter. Ashima Ahuja has accepted minor Shreya Ahuja as her daughter. She has left her job for taking care of minor. Minor Shreya Ahuja is studying in one of the best schools in Ludhiana i.e. Saint Mary's Kindergarten, B.R.S Nagar, Ludhiana. Petitioner has been taking due care in respect of welfare of the minor. Minor Shreya Ahuja has been made nominee in the insurance policies of the petitioner. The first motion was recorded on 12.11.2012 by the District Judge, Ludhiana, which was duly signed by both the parties and witnesses. Joint statement of the parties on second motion was recorded on 14.05.2013 and thereafter, decree of divorce under Section 13-B of the Hindu Marriage Act was passed. Respondent has also re-married with one Prashant Rajanna.

[4]. During course of arguments, it was revealed that the respondent has been blessed with a child from her second husband. Respondent filed a petition under Guardians and Wards Act, 1890 for custody of minor Shreya Ahuja, aged 5 years. Respondent has alleged that trauma of the marriage and harassment of the respondent at the hands of the petitioner and his family members was such an extent that the respondent wanted to get out of the marriage in all possibility and was swayed away by the insistence of the petitioner to keep the

custody of the minor. Respondent agreed to the same at the time of settling the terms of the divorce. The need of the respondent at that time was to buy peace of mind and she separated herself from the petitioner. She claimed that her second husband is highly educated person being a qualified engineer and is working as a Director, India Office in a Multinational Aircraft Company namely Pilatus Aircraft Ltd. with a salary package of Rs.50,70,000/- per year. Respondent is also working in the same company as an Executive Secretary and is drawing salary package of Rs.12,00,000/- per year. She pleaded herself to be financial sound and comfortable. She being natural mother, claimed custody of the minor as the petitioner is living in joint family. Young brother of the petitioner is still unmarried. His second brother is also having his family comprising of his wife and two sons aged 10 years and 5 years. Respondent alleged that the minor is not properly looked after.

[5]. Petitioner contested the claim of the respondent. He has filed an application for dismissal of the petition on the ground that after decree of divorce under Section 13-B of the Hindu Marriage Act, terms and conditions of the divorce and custody of the minor were settled with the concurrence of the parties. The welfare of the minor lies with the petitioner only. At the time of divorce, minor was only one year and six months of

age and now she has grown up to the age of more than five years. She is now studying in one of the good school i.e. Sat Paul Mittal School, Ludhiana and is performing extremely well in her studies. Minor Shreya Ahuja has been nominated as nominee in the insurance policies of the petitioner. Minor Shreya Ahuja has been participating in other extra curricular activities as well.

[6]. Learned counsel for the petitioner relied upon **Gaytri Bajaj Vs. Jiten Bhalla, 2012(3) Apex Court Judgments 617 (SC)** and **Pushpa Devi Bhagat (D) through LR. Smt. Sadhna Rai Vs. Rajinder Singh and others, 2006(3) Civil Court cases 540 (SC)** and submitted that the welfare of the minor is to be seen and the same is of paramount consideration. The welfare of the child is crucial and ultimate consideration for the Courts. It is not the better right of either of the parties that would require adjudication while deciding their entitlement qua custody of the minor. In **Gaytri Bajaj's case (supra)**, the Hon'ble Apex Court had given the custody of the minor to the father with no visitation right to the mother keeping in view the welfare of the child. In **Pushpa Devi Bhagar (D) through LR. Smt. Sadhna Rai's case (supra)**, the Hon'ble Apex Court held that consenting order is not amenable to appeal. No independent suit can be filed for setting aside a compromise decree on the ground that

the compromise was not lawful in view of the bar contained in Rule 3A of Order 23 CPC. A consent decree operates as an estoppel and is valid and binding unless the same is set aside by the competent Court. The only course available to the aggrieved party is to approach the same Court by way of moving an application.

[7]. I have considered the submissions made by learned counsel for the parties.

[8]. Evidently, no such course has been adopted by the respondent. In the impugned order dated 14.08.2015, Guardian Judge, Ludhiana has observed that the parameters in terms of Section 13-B of the Hindu Marriage Act and custody issue under the Guardians and Wards Act are distinct and the wife has come forward by showing change in circumstance for taking custody of the minor.

[9]. At the time of dissolution of marriage, minor Shreya Ahuja was one year and six months of age. Now she has attained age of more than 8 years and is studying in Sat Paul Mittal School, Ludhiana which is a reputed school. The child is doing extremely well in terms of education and extra curricular activities which can be appreciated from the progress report card of the minor for the year 2016, 2017 and certificates of participation in National Handwriting Competition and other

extra curricular activities in which minor has participated. The welfare of the minor in the facts and circumstances of the case is only by living with the father. At the same time, filing of the petition under Guardians and Wards Act is not maintainable inasmuch as that under Order 23 Rule 3A CPC, the consenting order is not amenable to appeal or independent suit. The only remedy available to the respondent is to file an application in the same case. A consent decree operates as an estoppel and is valid and binding unless the same is set aside by the Court which passed the consent decree, by an order on an application under proviso to Rule 3 of Order 23 CPC. Having not done so, in my considered opinion, petition filed by the respondent under Guardians and Wards Act for taking custody of the minor is not maintainable and the impugned order dated 14.08.2015 passed by Guardian Judge, Ludhiana deserves to be set aside on the parameters as laid down in **Gaytri Bajaj's case (supra)** and **Pushpa Devi Bhagar (D) through LR. Smt. Sadhna Rai's case (supra)**. There is no change in circumstance except re-marriage of the respondent from whom she has also blessed with a child.

[10]. For the reasons recorded hereinabove, impugned order dated 14.08.2015 passed by Guardian Judge, Ludhiana is hereby set aside. Revision petition is accordingly allowed,

thereby allowing the dismissal of the petition under Guardians and Wards Act filed by the respondent for taking custody of minor Shreya Ahuja.

May 29, 2018

Prince

Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No