

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.14134 OF 2021

VASUDHA HEMRAJ KHADKE
VERSUS
NILESH AMRUT NEMADE

...

Mr. Vijay B. Patil, Advocate for the Petitioner.

Mr. Rohit Dhongade (appointed), Advocate for Respondent.

...

**CORAM : SANDEEP V. MARNE, J.
DATED : 06th DECEMBER, 2022.**

PER COURT:-

1. By the present petition petitioner challenges order dated 12.11.2021 passed by the District Court-4, Jalgaon rejecting petitioner's application at Exhibit-6 for grant of visitation rights once in 15 days in respect of the daughter of the couple. The interim application below Exhibit-6 was filed by petitioner-Mother in Miscellaneous Civil Application No.13/2021 filed under the provisions of Section 25 of the Guardians and Wards Act, 1890 for custody of the daughter.

2. The marriage between petitioner and respondent has been dissolved by a decree of divorce on 15.10.2020 on the basis of the joint application filed before the Court of Civil Judge, Senior Division, Bhusawal. The condition no.6 of the joint application filed by the parties stipulate that the custody of daughter shall remain solely with the husband, who would be responsible for taking care of all expenditure towards education, maintenance, medicine, marriage etc. It was expressly agreed that the petitioner-wife shall not claim custody of the daughter in future nor initiate any proceedings against husband for such custody.

3. After agreeing to the above terms, petitioner-wife took a *volte face* and filed proceedings under Section 25 of the Guardians and Wards Act, 1890 for custody of the daughter on 01.02.2021. In those proceedings, an interim application was filed at Exhibit-6 seeking visitation rights in respect of the daughter once in 15 days. It appears that the District Judge interacted with the daughter in presence of the parents and has recorded observations of such interaction. The District Judge has proceeded to reject the interim application by order dated 12.11.2021.

4. Mr. Patil, the learned counsel appearing for petitioner would contend that even if petitioner had agreed for custody of the daughter being given to respondent-husband, the same cannot be a bar to seek custody under the provisions of Guardians and Wards Act, 1890. He would further submit that its mother's inherent right to meet her daughter and therefore the conditions agreed under pressure in petition for divorce by mutual consent cannot come in her way of seeking such custody. That during pendency of the custody proceedings, it is necessary to grant visitation rights with a view to ensure continual love and affection between daughter and the mother.

5. Per contra, Mr. Dhongade, the learned counsel appearing for respondent-husband submits that the proceedings filed by petitioner for custody of the daughter are not maintainable as the same violate the terms and conditions of the divorce by mutual consent. He would submit that since the proceedings are compromised there was no question of entertaining any application for visitation rights. Inviting my attention to the observations made by the District Court relating to interaction with the daughter in presence of both the parents,

Mr. Dhongade would submit that grant of such visitation rights are otherwise not in the interest of the child. Mr. Dhongade relies on the judgment of the Supreme Court in **Dr. Amit Kumar Vs. Dr. Sonila and Others, (2019) 12 SCC 711** in support of his contention.

6. After hearing the learned counsels for the parties, the first issue that arises for consideration is whether District Judge could have entertained the application for grant of visitation rights which *prima facie* the prayers in which appear to be in direct contravention of the terms and conditions agreed by the parties while dissolution of their marriage by decree of divorce by mutual consent. In the joint application filed under the provisions of Section 13-B of the Hindu Marriage Act, petitioner-wife specifically agreed not to claim custody of the daughter which is to be remain with respondent-husband. However, now petitioner-wife has turned around and sought custody by filing proceedings under the provisions of Guardians and Wards Act, 1890. Those proceedings are still pending. It is too premature to comment on the maintainability of those proceedings at this stage.

7. I am at present concerned with the correctness of the order passed by the District Judge rejecting the application for visitation rights. Mr. Dhongade has relied upon the judgment of the Apex Court in **Dr. Amit Kumar Vs. Dr. Sonila and Others** (supra). In that case, marriage between the couple was dissolved by decree of divorce and one relevant terms and conditions of the decree of divorce was that the custody of both the children was to remain with husband and the wife was to only contribute towards the expenditure of one child. However, the wife subsequently failed to provide for expenses for that child and the husband

demanded the same by issuance of notice. The wife thereafter filed proceedings seeking custody of children. In that factual backdrop, the Hon'ble Supreme Court has observed in paragraph nos.16 and 17 of its judgment as under:

“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. ”

8. The Hon'ble Supreme Court has upheld the order of the Family Court rejecting the application of the wife seeking custody of children, but making provision for visitation rights. In

paragraph no.22 of the judgment it is held by the Apex Court as under:

“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.”

9. From the order passed by the Apex Court *prima facie* it appears that, even if the parties agree to a particular term of the custody of the child while seeking decree by mutual consent, it is possible for the Court to later consider application for visitation rights running contrary to such a term. Therefore, it cannot be stated that a degree of certainty that the application filed by petitioner seeking visitation rights was not maintainable at all.

10. However, at the same time it must be borne in mind that daughter of the couple at the time of divorce was in the tender age of 22 months. Petitioner-wife agreed to hand over the custody of daughter exclusively to respondent-husband, without any provision for visitation rights. Far from seeking custody of such young daughter requiring care mother, she apparently did not feel any urge to even visit the daughter. Though she now wants to contend that the agreement to terms was under

pressure, this is something that can be decided at the time of final decision of the custody proceedings. At this juncture, while deciding the issue of visitation rights during pendency of custody proceedings, *prima facie* Petitioner-wife would be bound by the terms and conditions agreed in application for divorce.

11. The District Judge has interacted with the daughter in presence of both the parents and has observed that after the daughter was handed over to petitioner-wife, she started crying profusely and was required to be returned to the husband immediately. This aspect is also taken into consideration by the District Judge while rejecting the application of petitioner.

12. I am therefore of the view that the District Judge has not committed any error in rejecting the application for visitation rights atleast at this stage. The proceedings seeking custody are already pending and would take its own course. I am not expressing any opinion about the maintainability of those proceedings. However considering the fact that the mother is now expressing desire to meet the daughter, the hearing of the Miscellaneous Civil Application No.13/2021 before the District Judge, Jalgaon is expedited. With the above observations, writ petition is dismissed without any orders as to cost.

13. Mr. Dhongade was appointed to assist this Court by order dated 22.08.2022 at the State expenses. The High Court Legal Services Sub-Committee, Aurangabad to pay fees of Mr. Dhongade quantified at Rs.10,000/-.

(SANDEEP V. MARNE)
JUDGE