

GAHC010160252023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/228/2023

POONAM MAHANTA SARMA
W/O SRI KALYAN SARMA, R/O SONAPUR NEAR SBI, P.O.-SONAPUR, P.S.-
SONAPUR, DIST- KAMRUP (M), ASSAM

VERSUS

KALYAN SARMA
S/O MRIGEN SARMA, R/O BELTOLA TINIALI, HOUSE NO. 18, BISHNU
RABHA PATH, P.S.-BASISTHA, DIST-KAMRUP (M), ASSAM

Advocate for the Petitioner : MS. B BHUYAN

Advocate for the Respondent : MR. P K ROYCHOUDHURY

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 04.01.2024

Heard Mr. A. Bhuyan, learned counsel for the petitioner and Mr. P.K. Roychoudhury, learned counsel for the respondent.

2) By this application filed under section 115 read with section 151 CPC and Article 227 of the Constitution of India, the petitioner has assailed the

order dated 09.06.2023, 06.07.2023 and 20.06.2023, passed by the learned Principal Judge, Family Court-I, Kamrup (M), Guwahati in F.C.(G) Case No. 101/2018.

3) It may be mentioned that the learned counsel for the respondent had that an affidavit-in- opposition had been filed. However, the same is not tagged with the record. Nonetheless, the learned counsel for the respondent had submitted that the reference to the stand taken in the affidavit-in-opposition has been referred to in the affidavit-in-reply filed by the petitioner, which is available in the record and he has expressed that the matter be heard on whatever material is available on record. Accordingly, with the consent of the learned counsel for both the parties, the matter has been heard.

4) At the outset it may be mentioned that in this order, the names of the parties and their minor son is not disclosed. Similarly, the name of a particular school, whose Principal is sought to be examined by the petitioner as witness is also not disclosed in this order. Those names are not disclosed to mask the identity of the said persons.

Facts leading to this application:

5) The petitioner, who is the estranged wife of the respondent, has instituted proceedings under section 7 of the Guardians and Wards Act, 1890, with a prayer to give the minor son of the parties to the petitioner. The said case was registered as F.C.(G) Case No. 101/2018.

6) The respondent had contested the said case by filing written statement and counter-claim, with prayer to give custody of their minor son aged 7 years to the respondent, cost, etc. The petitioner had contested the counter-claim of the respondent by filing written statement.

7) In course of trial of the guardianship case, the petitioner had examined herself as PW-1. The name of one other person was cited as PW-2. However, by filing petition no. 905/23 dated 03.06.2023, the petitioner had averred that the PW-2 could not adduce evidence in the case and therefore, a prayer was made to allow her to examine her younger brother as PW-3. The said prayer made in petition no. 905/2023 was allowed vide order dated 03.06.2023. From the order dated 09.06.2023, which is annexed to this petition, it appears that the PW-3 was examined, cross-examined and discharged.

8) On 09.06.2023, the learned counsel for the petitioner had submitted that petition no. 905/23 dated 03.06.2023 was pending. However, the learned Trial Court had observed in the order dated 09.06.2023 that the said had been disposed of. However, in respect of statement made in para-3 of the said petition no. 905/23, the learned Trial Court had held to the effect that upon perusal of the materials on record, there was no averment that the respondent was maintaining illicit relationship with another lady, named therein, and moreover, as the prayer was confined to accept the evidence of PW-3. It was also held that two prayers in single stamped petition cannot be entertained. Accordingly, the learned Trial Court had expressed its view that the prayer for directing the Principal of a particular school named therein to prove the record as PW-4 has been rejected. Thus, as two PWs had been examined and discharged, and considering that the respondent had declined to give evidence, the case was fixed for hearing argument on 23.06.2023.

9) Thereafter, on 23.06.2023, the petitioner had filed two petitions, as follows:-

- a. By filing petition no. 1020/23 under the provisions of Order XVI, Rule 3 CPC, the petitioner had prayed to allow for calling of the

Principal of the particular school as unlisted witness.

- b. By filing petition no. 1024/23, prayer was made by the petitioner to transfer the said guardianship proceeding to another Court on two grounds, viz., (i) order dated 09.06.2023 was passed without giving opportunity to the petitioner to adduce further evidence; and (ii) that the said learned Court had expressed that it intended to conclude the proceeding within 31.07.2023.

10) By order dated 23.06.2023, copies of the said petitions were ordered to be furnished to the respondent and the next date was fixed for objection, if any. Thereafter, the case was fixed on 06.07.2023 for passing necessary orders. By order dated 06.07.2023, the prayer made in petition no. 1020/23 was rejected on the ground that the order dated 09.06.2023, by which prayer to call the Principal of the particular school as witness was rejected, was not challenged as well on the ground that revisiting the said prayer would amount to review of earlier order. By the said common order, petition no. 1024/23 filed by the petitioner was also rejected on the ground that the other two Family Courts had co-ordinate jurisdiction and that those two Courts were not subordinate to the said learned Trial Court and therefore, it was held that transfer cannot be ordered by the said learned Court.

11) Thereafter, by filing petition no. 1203/23 dated 20.07.2023, the petitioner had filed a review petition before the learned Trial Court under Order XLVII, Rule 1 read with section 151 CPC to review the order dated 09.06.2023 and to allow the petitioner to examine the Principal of the particular school as her witness. The said petition was dismissed by the learned Trial Court by order dated 20.07.2023.

Non-tagging of affidavit-in-opposition on record:

12) It is reiterated at the cost of repetition that the respondent is stated to have filed an affidavit-in- opposition, which is not tagged with the record. However, the petitioner has filed her affidavit-in-reply, which is available in the record.

Submission of the learned counsel for the petitioner:

13) The learned counsel for the petitioner had submitted that the learned Trial Court had committed jurisdictional error by non-perusal of the averment made by the petitioner in her written statement to the counter-claim, where it was averred that the respondent was maintaining illicit relationship with a woman named therein. It was also submitted that in para-9 of her evidence-on-affidavit, the petitioner had mentioned the name of 2 (two) illegitimate sons of the respondent with a lady named therein who were reading in two particular classes of the said school, which were not at all considered by the learned Trial Court. Hence, it was submitted that the impugned orders were vitiated by perversity. It was also submitted that the intention of the Trial Court should be to arrive at a truth and to determine the litigation between the parties. Therefore, as the petitioner has come to know that the respondent had two illegitimate children, he would become disentitled to get guardianship over the minor daughter of the petitioner.

14) In support of his submissions, the learned counsel for the petitioner had cited the following cases, viz., (i) *Raj Shri Agarwal @ Ram Shri Agarwal & Anr. v. Sudheer Mohan & Ors.*, 2022 LiveLaw (SC) 864, (ii) *Surya Dev Rai v. Ram Chander Rai & Ors.*, (2003) 6 SCC 675, (iii) *Contemporary Target Pvt. Ltd. & Ors. v. M.B. Enterprises & Ors.*, (1994) 1 GLR 259: (1993) Supreme(Gau) 103.

Submission of the learned counsel for the respondent:

15) Per contra, the learned counsel for the respondent had submitted that in none of the pleadings of the petitioner, i.e. guardianship petition and the written statement to counter-claim, no statement has been made about existence of two alleged illegitimate sons of the respondent or that they were studying in any particular school. It was also submitted that he also assails a maintainability of this present application because it contains a composite challenge to (i) the order dated 09.06.2023, regarding closure of evidence; (ii) order dated 06.07.2023 regarding rejecting of prayer to transfer the case; and (iii) order dated 20.07.2023, rejecting the review application. It was also submitted that the learned counsel for the petitioner has cited the overruled case of *Surya Dev Rai (supra)*.

16) In support of his submissions, the learned counsel for the respondent has cited the following cases, viz., (i) *Union of India v. M/s. Orient Engg. & Commercial Co. Ltd. & Anr.*, (1978) 1 SCC 10, and (ii) *Lalitha J. Rai v. Aithappa Rai*, (1995) 4 SCC 244.

Nature of prayer made in petition no. 905/23:

17) As already referred to hereinbefore, it is seen that in the petition no. 905/23 dated 03.06.2023, the only prayer was to allow the petitioner to examine her younger brother as PW-3. The said prayer made in petition no. 905/2023 was allowed vide order dated 03.06.2023.

18) Although a statement was made in para-3 of the said petition that the respondent had 2 (two) illegitimate sons with a lady named therein, but the said petition no. 905/23 did not contain any further prayer to call for the Principal of the concerned school.

Whether pleadings of the petitioner contain allegations relating to existence of 2 (two) illegitimate sons of the respondent:

19) Pleadings is defined in Order VI, Rule 1 CPC, which lays down that “pleadings” shall mean plaint and written statement.

20) Although in the guardianship petition there is a statement regarding alleged illicit relationship between the respondent and a lady named therein, but the learned counsel for the petitioner has not been able to show any statement in the guardianship petition relating to alleged existence of 2 (two) illegitimate sons of the respondent with a lady alleged to have relationship with the respondent. Similarly, the learned counsel for the petitioner has not been able to show any statement in the written statement of the petitioner against the counter-claim of the respondent regarding alleged existence of 2 (two) illegitimate sons of the respondent with a lady alleged to have relationship with the respondent.

21) The cases of *Raj Shri Agarwal @ Ram Shri Agarwal & Anr. (supra)*, *Surya Dev Rai (supra)*, and (iii) *Contemporary Target Pvt. Ltd. & Ors.*, cited by the learned counsel for the petitioner have been considered and the said cases are not found to be authority on the point that a party to a case should be allowed to lead evidence on matters which are not a part of pleadings.

Challenge to the order dated 09.06.2023:

22) The sole prayer made in petition no. 905/23 dated 03.06.2023 was allowed. As mentioned herein before, there was no prayer in petition no. 905/23 to call for the Principal of a particular school as witness, as such, there was no requirement for the learned Trial Court to take up para-3 of the disposed of petition no. 905/23 on 09.06.2023. In the considered opinion of the Court, on

09.06.2023, the learned Trial Court could not have revisited petition no. 905/2023 dated 03.06.2023, after it was disposed of by order dated 03.06.2023 unless petition no. 905/23 is restored to file. Moreover, the statement made in para-3 of petition no. 905/23 is not found to have any connection with the prayer made in the said petition.

23) In this case, the petitioner has, for reasons best known to her, has not annexed the order dated 03.06.2023. Only from the contents of the order dated 09.06.2023, it is revealed that the prayer made in petition no. 905/23 was allowed by order dated 09.06.2023. Thus, there is no escape from the reality that the order dated 03.06.2023, had attained finality without any challenge thereto.

24) Therefore, as petition no. 905/23 was already allowed by order dated 03.06.2023, on behalf of the petitioner, prayer could not have made before the learned Trial Court on 09.06.2023 to pass an order to call for the Principal of the particular school, merely because there was a statement in para-3 of petition no. 905/23. Hence, the Court is inclined to hold that the learned Trial Court had rightly rejected the prayer made by the learned counsel for the petitioner on 09.06.2023 in connection with petition no. 905/23 and no perversity is found in the order dated 09.06.2023, by which the learned Trial Court had held that petition no. 905/23 was already disposed of. Thus, the consequential rejection of the prayer to call for the Principal of the particular school is also not found to be vitiated by any perversity whatsoever. Thus, challenge to the order dated 09.06.2023, passed by the learned Trial Court in Misc. (G) Case No. 101/2018 miserably fails.

Challenge to the order dated 06.07.2023:

25) Now the legality of the order dated 06.07.2023 is being examined. By the said order, the learned Trial Court had (i) allowed the prayer made by the respondent showing cause for his personal non-appearance in Court, which is not under challenge; (ii) rejected the prayer of the petitioner made vide petition no. 1020/23 to call for the Principal of a particular school; and (iii) rejected the prayer of the petitioner made vide petition no. 1024/23 to transfer the proceeding of guardianship case to any other Court.

26) Insofar as the rejection of prayer made by the petitioner vide petition no. 1020/23 is concerned, the prayer being a repetitive prayer to call for a particular witness, the Court is of the considered opinion that the said petition was rightly rejected because of the application of the doctrine of issue estoppel. The cases cited by the learned counsel for the petitioner are not found to be authority on the point that if a prayer was rejected, a Court may still entertain another petition in the said proceeding containing same prayer. Therefore, the order dated 06.07.2023, rejecting petition no. 1020/23 cannot be held to be vitiated by any perversity or jurisdictional error whatsoever. Thus, challenge to the said order dated 06.07.2023, passed by the learned Trial Court in Misc. (G) Case No. 101/2018 also miserably fails.

Challenge to the order dated 20.07.2023:

27) Coming to the challenge to the order dated 20.07.2023, rejecting the review application is concerned, it is seen from the contents of the said order that the learned Trial Court had dealt with the allegation that the order dated 09.06.2023 was passed without giving opportunity to the petitioner to adduce further evidence. The Court does not find any fault with the said impugned order because once the prayer of the petitioner had been rejected, the learned Trial Court had rightly passed an appropriate order to take the

proceedings to the next stage, which is hearing of argument stage.

28) The learned counsel for the petitioner had mentioned that the learned Trial Court had stated in open Court that it was targeting the case to be concluded by 31.07.2023. Therefore, merely because the learned Trial Court had informed the parties and their learned counsel present that it was setting a target to conclude trial of the guardianship case in a time bound manner, cannot be accepted as a ground to seek transfer of the proceeding.

29) We would rather put on record our appreciation of the learned Principal Judge, Family Court-I, Kamrup (M), Guwahati to inform the parties and their learned lawyers that it was fixing a time bound target date of 31.07.2023 for disposal of a guardianship suit that had been instituted in the year 2018, which is in the best interest of the petitioner, who had instituted the suit. The Court expresses hope that the said learned Court shall, if required, take up day-to-day hearing in the matter, in case its Board so permits or expeditiously hear the matter by curtailing unnecessary adjournments.

30) Moreover, the said learned Court had also referred to the provisions of section 24 CPC and had held that the other two Family Court nos. II and III were having co-ordinate jurisdiction and they were not subordinate Courts to the Court of Principal Judge, Family Court-I, Kamrup (M), Guwahati. The said reason is found to be totally justified.

31) Moreover, the Courts cannot allow itself to be brow-beaten by an emerging class of litigants, who have a tendency of making allegations against the Courts on a drop of a hat and thereby creating extraneous pressure on the Presiding Officers of Courts to recuse from a case. Such a practice of litigating parties is required to be strongly deprecated. If such an allegation becomes the

foundation to transfer a case, it would bring anarchy in the judicial process and an unscrupulous litigant will indulge themselves in "Court/ Bench hunting".

32) There is a long list of cases on the issue of recusal of a Judge from a case. In this regard, we may refer to few of such cases, viz., (i) *Indore Development Authority v. Manohar Lal & Ors.*, AIR 2019 SC 5482: (2019) 0 Supreme(SC) 1186, (ii) *Subrata Roy Sahara v. Union of India & Ors.*, (2014) 8 SCC 470, (iii) *P.D. Dinakaran (I) v. Judges Inquiry Committee*, (2011) 8 SCC 380, (iv) *R.K. Anand v. Delhi High Court*, (2009) 8 SCC 106.

33) Accordingly, the Court is of the considered opinion that the cases cited by the learned counsel for the petitioner are not found to be authority on the point that if any adverse order is passed by a Court in course of a proceeding, then the proceeding has to be transferred to another Court.

34) Therefore, the challenge to the order dated 20.07.2023 also miserably fails.

Citing of an over-ruled case:

35) The learned counsel for the respondent had pointed out that the learned counsel for the petitioner had cited an overruled case. We are inclined to agree with the learned counsel for the respondent as the case of *Surya Dev Rai (supra)* has been overruled in the decision of a larger Bench of the Supreme Court of India in the case of *Radhey Shyam & Anr. v. Chhabi Nath & Ors.*, (2015) 5 SCC 423.

Whether challenge to the impugned orders is maintainable under section 115 CPC read with section 151 CPC:

36) The orders impugned in this application, even if allowed, would not dispose of the proceeding. Moreover, none of the cases cited by the learned

counsel for the petitioner is an authority on the point that inherent powers can be invoked by a High Court under section 151 CPC to set aside an order that was passed by the learned Trial Court in due exercise of its jurisdiction. Therefore, against the orders impugned in this application, the Court is inclined to hold that the present challenge to the orders impugned herein is not maintainable under sections 115 as the order, if passed in favour of the petitioner, would not lead to disposal of the guardianship case. The issue is decided accordingly.

Decision of the Court and consequential orders:

37) In light of the discussions above, the Court is inclined to hold that the orders dated 09.06.2023, 06.07.2023 and 20.07.2023, passed by the learned Principal Judge, Family Court-I, Kamrup (M), Guwahati in F.C.(G) Case No. 101/2023, which are impugned herein are not found to suffer from any jurisdictional error or perversity.

38) The Supreme Court of India, in the case of *Ouseph Mathai v. M. Abdul Khadir*, (2002) 1 SCC 319, had held to the effect that the petitioner cannot invoke jurisdiction under Article 227 of the Constitution of India as a matter of right. It was also held to the effect that a petition under Article 227 of the Constitution of India cannot be treated as an extension of statutory appeal or revision. Moreover, referring to the scope of Article 227 of the Constitution of India, it was further held to the effect that a mere wrong decision is not a ground to exercise jurisdiction under Article 227 and that High Court may intervene under Article 227 only where it is established that lower court or tribunal has been guilty of grave dereliction of duty and flagrant abuse of power, which has resulted in grave injustice to any party.

39) The Court is of the considered opinion that under Article 227 of the Constitution of India, the High Court would not ordinarily interfere with an order that is passed in a suit when the order is not found to be vitiated by any jurisdictional error or perversity.

40) In this case, the learned Trial Court is found to have exercised due diligence in conducting trial of the case and had refused to grant an opportunity to the petitioner to set up a case during evidence, which was not her pleaded case.

41) Therefore, the Court is inclined to pass the following

O R D E R

- a. In light of discussions above, on all counts, this application fails and accordingly, this application stands dismissed.
- b. Under the circumstances, the parties are left to bear their own cost.

42) The following consequential orders are also passed:-

- a. Let a copy of this order be send to the concerned Judicial Officer as the Court has put on record its appreciation.
- b. As the case is of the year 2018, we have expressed our hope that the learned Trial Court shall, if required, take up day-to-day hearing in the matter, in case its Board so permits or expeditiously hear the matter by curtailing unnecessary adjournments.
- c. Before parting with the records, it is clarified that none of the observations made in this order is intended to prejudice the parties when the guardianship case is being finally heard by the learned Trial Court on merit, which shall be decided without being influenced by this order.

43) Both the parties are represented herein by their respective learned counsel. Therefore, both the parties are directed to appear before the learned Principal Judge, Family Court-I, Kamrup (M), Guwahati in F.C.(G) Case No. 101/2018 on 22.01.2024 and seek further directions from the said learned Court. There would be no necessity for the said learned Trial Court to issue fresh notice to the parties to appear in the proceeding.

44) The Registry shall track the affidavit-in-opposition filed by the respondent and tag the same with the record.

JUDGE

Comparing Assistant