

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of hearing and order: 23rd March 2015.

+ MAT.APP.(F.C.) 98/2014

KIRTIKA MUKESH BURA Appellant

Through: Appellant in person.

versus

JAGJIT SINGH Respondent

Through: Mr. Sunil Kumar Mittal, Mr. Aman
Usman, Advocates

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE I.S.MEHTA

ORDER

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KAILASH GAMBHIR, J. (ORAL)

The appellant has filed an appeal under Section 19 of the Family Courts Act, 1984 to challenge the order dated 21st May 2014 passed by the Principal Judge, Family Court, South East, Saket, New Delhi, whereby the learned Family Court has dismissed the application of the appellant filed under Order 7 Rule 11 of the CPC.

Assailing the legality and correctness of the impugned order dated 21st May 2014, the appellant who argued the case herself, submits that the learned Principal Judge has not appreciated the true scope and meaning of Rule 1 of Order XXIII of the CPC which is in clear contravention with the principles attracting Section 11 of the CPC. Differentiating the two

provisions, the appellant submits that in the case of abandonment or withdrawal of the suit in term of Order 23 Rule 1, there is no proper adjudication of a suit or issue involved and without seeking leave of the Court, the respondent is precluded from instituting any fresh suit in respect of the same subject matter while under Section 11 of the CPC, fresh suit will be hit by the principles of *res judicata* if the suit or an issue has been heard and finally decided by the Court of competent jurisdiction, in a former suit between the same parties. Appellant further submits that the earlier petition preferred by the respondent was unconditionally withdrawn by him and no leave was sought or taken by the respondent for filing a fresh petition and therefore such an unconditional withdrawal by the respondent precluded him from filing a fresh petition in respect of the same subject matter of the suit i.e. custody of the minor child before the Principal Judge, Family Court, South East, Saket, New Delhi. In support of her arguments, the appellant placed reliance on the judgment of the Apex Court in the case of ***Sarguja Transport Service vs. State Transport Appellate tribunal, M.P., Gwalior, and others, (1987) 1 SCC 5.***

Present appeal is strongly opposed by the counsel for the respondent Mr. Sunil Mittal. The learned counsel for the respondent submits that the respondent had filed a fresh petition before the learned

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Family Court, Saket, New Delhi based on the fresh cause of action, which arose due to shifting of child from Hissar to Delhi and also due to increase in the age of the child from three years to more than five years. Contention raised by the learned counsel for the respondent is that so far as the second custody petition is concerned, the respondent was well within its right to file the same based on the fresh cause of action even though no leave was obtained by him at the time of withdrawal of his first petition from the Court of District Judge, Family Court, Hissar.

We have heard the submissions made by the learned counsel for the parties and given our conscious consideration to the arguments advanced by them.

The marriage of the appellant with the respondent had taken place on 20th April 2006 and out of this wedlock a daughter namely Khyati was born on 5th March 2008. The respondent had earlier also filed a petition seeking custody of the child and for appointing him as her guardian under the provisions of Guardians and Wards Act, 1890 before the Court of District Judge, Family Court, Hissar. The said petition was withdrawn by him and the same was accordingly dismissed as withdrawn by the District Judge, Family Court vide order dated 5th May 2012. Perusal of the order dated 5th May 2012 passed by the District Judge, Family Court,

manifestly shows that it was an unconditional withdrawal on the part of the respondent and no leave was sought or obtained by him to file a fresh suit/petition in respect of the same subject matter of the suit. The respondent had again preferred a petition under Section 7 of the Guardianship and Wards Act read with Sections 6 and 13 of the Hindu Minority and Guardianship Act for the custody of the minor child before the Court of District Judge, Family Court, New Delhi in July 2013.

To challenge the maintainability of the aforesaid petition, appellant filed an application under Order VII Rule 11 of the CPC and Order XXIII Rule 1(4) of the CPC, before the learned Family Court seeking rejection of the said petition. This application of the appellant was dismissed by the learned Family Court, New Delhi vide its order dated 21.05.2014, which is under challenge in the present appeal.

It is correct that principle embodied under Order XXIII rule 1(3) is founded on public policy to prevent the multiplicity of proceedings and it is not the same as a rule of res judicata. If the liberty to file a fresh suit is not sought at the time of withdrawal of the suit, the petitioner is precluded from filing a fresh suit on same cause of action under Rule 1(4) of Order XXIII. However, this bar does not apply where the cause of action is recurring one or a fresh suit is filed based on a fresh cause of action. It is

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a settled legal position that the order of custody of a minor child from its very nature are considered to be temporary orders made in existing circumstances. From time to time as the circumstances change, the court may amend or modify these orders either *suo moto* or on application since under section 13 of Hindu Minority and Guardianship Act in the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

In the matter of ***Rosy Jacob vs Jacob A. Chakramakkal reported in 1973 AIR 2090***, it has been held by the Hon'ble Supreme Court as follows:

“All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and Circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based, on consent decrees. cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation.”

In the present case, the respondent – father had filed a fresh petition introducing a fresh cause of action due to change in circumstances, which includes shifting the place of child from Hissar to Delhi and also increase in the age of the child from three years to more than five years.

With the introduction of these new facts, in the second petition, preferred by the respondent, the respondent has every right to maintain the second petition and such a petition in our view can neither be rejected under Order VII Rule 11 of the CPC on the ground of non disclosure of cause of action nor under Order XXIII Rule 1(4) of the CPC on the ground of not seeking leave to file a fresh suit on same cause of action. The contentions raised by the appellant are not sustainable in the eyes of law.

In view of the aforesaid discussion, finding no merit in the present appeal, the impugned order dated 21.05.2014 passed by learned Family Court, South East, Saket, New Delhi is upheld and the appeal filed by the appellant is hereby dismissed with no order as to costs.

KAILASH GAMBHIR, J

I.S. MEHTA, J

MARCH 23, 2015

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