

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.516 OF 2016

Mr. Nitin Vasudev Kulkarni.] ... Petitioner

Versus

Mrs. Vaishali Kulkarni.] ... Respondent

Mr. Abhijit D. Sarwate for Petitioner.

CORAM :- M. S. SONAK, J.
DATE :- JANUARY 22, 2016

P. C. :-

1. The challenge in this petition is to the order dated 09/09/2015 by which the petitioner's application at Exh.27 under Order 7 Rule 11 of Code of Civil Procedure, 1908 ('CPC') urging rejection of the plaint, has itself been rejected.

2. Mr. Sarwate, learned Counsel for petitioner, after adverting to the brief history of the matter, submitted that the respondent, after giving up unconditionally her rights to claim access to the children, has not made an volte-false and instituted suit for claiming the access. He submits that if the entire plaint is perused, there is no case made out for any change in circumstances. He submits that without prejudice in the matter of this nature, the change

of circumstances has to be qua the children and in the matters of this nature, the welfare of the children is the paramount consideration. He submits that the very institution of the suit by the respondent constitutes an abuse of the process of the Court and harm will occasion to the children, in case the suit of this nature is even permitted to proceed. Mr. Sarwate made reference to affidavit dated 27/08/2013 made by the respondent, in which, she has virtually admitted certain acts, on basis of which ultimately, the petitioner obtained a decree of divorce and the respondent relinquished her rights, if any, to secure access to the children. For all these reasons, Mr. Sarwate submitted that the impugned order is liable to be set aside and the petitioner's application under Order 7 Rule 11 of CPC is liable to be allowed.

3. Having considered the contentions raised by the learned Counsel for petitioner, perused the record as also the impugned order, in my judgment, no case is made out to interfere with the impugned order. The scope of provisions under Order 7 Rule 11 of CPC is quite limited. At that stage, it is permissible to take notice of the averments in the plaint as they stand and on the said basis, decide whether the suit as instituted, is barred under the law. In this case, no such case has been made out by the petitioner. The issue as to whether the averments made in the plaint constitutes change in circumstances or variance in circumstances, is a matter which will have to be ultimately decided after the parties have had opportunity of leading evidence on on the basis of such evidence. Besides, it is almost settled that in

matters of maintenance, custody, access, there is never any statutory finality as such. Depending upon the facts and circumstances, including in particular depending upon the variation in the circumstances, such order can always be varied. The stage of deciding an application under Order 7 Rule 11 of CPC is hardly the stage to enter into the disputed question of facts or to decide about the implications of certain affidavit which may have been filed by the respondent before the institution of the suit. Ultimately, it is to be borne in mind that even admissions are capable of being explained in judicial proceedings. This is also not a case of approbation or reprobation. In any case, no provision of law is pointed out on basis of which it can be said that the plaint itself is required to be rejected. There is obviously a difference between dismissal of a suit on merits and the rejection of the plaint at the very outset. The impugned order has been conscious to this difference.

4. Accordingly, there is no jurisdictional error in the making of the impugned order. This petition is dismissed. There shall be no order as to costs.

5. However, it is made clear that this Court has not adverted to the merits of the matter and the observations made in this order are only in the limited context of deciding whether the plaint warranted rejection under Order 7 Rule 11 of the CPC. Therefore, all contentions of all parties are left open and the Family Court need not be influenced by any observations, either in the order dated

05/11/2015 or this order in the matter of disposal of the suit on its own merits and in accordance with law.

6. All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)