

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

Tr.C.M.P.No.77 of 2018

ORDER

This petition under Section 24 of C.P.C., is filed to withdraw E.P.No.10 of 2017 in O.P.No.217 of 2013 pending on the file of Additional Family Court, Visakhapatnam, and transfer the same to the Court of Additional Family Court, City Civil Court, Hyderabad, to decide simultaneously along with F.C.O.P.No.1003 of 2017 pending on the file of Additional Family Court, City Civil Court, Hyderabad.

2. It is alleged that the respondent and petitioner filed O.P.No.217 of 2013 under Section 13-B of Hindu Marriage Act (for short 'the Act), for dissolution of marriage by mutual consent and it was decreed by order dated 28.11.2013, where-under clause No.2 was incorporated with regard to visitation rights of the minor daughter, by name Samyusri, by the respondent herein. The respondent filed E.P.No.10 of 2017 under Order 21 Rule 32 of CPC, to enforce the direction contained in clause No.2 of the decree.

3. The respondent also filed a petition under Sections 7, 10 and 25 of the Guardian and Wards Act, to declare him as natural guardian and for custody of the minor daughter to him, on various grounds and is pending before the Judge, Family Court, City Civil Court, Hyderabad. The parties in both the E.P., pending on the file of Judge, Additional Family Court, Visakhapatnam and FCOP pending on the file of the Judge, Family Court at Hyderabad, are one and the same. The dispute in E.P.No.10 of 2017 is with regard to the

visitation rights, whereas the dispute in FCOP No.1003 of 2017 is for custody of minor daughter.

4. The main contention of petitioner is that the Presiding Officer of the Family Court, Visakhapatnam, is insisting for production of the minor daughter in terms of the decree passed in O.P.No.217 of 2013 and personal appearance of the petitioner also. The execution petition was filed under Order 21 Rule 32 of CPC, which deals with enforcement of decree for restitution of conjugal rights and for injunction, where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of property or, in the case of a decree for specific performance of contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both. But the Court below, while granting decree under Section 13-B of the Act, i.e., dissolution of marriage by mutual consent, conferred visitation rights to the respondent, but the petitioner is not willing, as submitted by the respondent's counsel, and that the minor child was produced before the Court once and she expresses her disinclination of visitation by her father for different reasons, which she explained to the Presiding Officer, but the statement of the minor was not reduced into writing by the Presiding Officer.

5. In any view of the matter, the very maintainability of the execution petition under Order 21 Rule 32 of CPC., is doubtful, since

it is not a decree for restitution of conjugal rights or injunction or for specific performance, as its application is limited to those decrees, but not to a decree for dissolution of marriage by mutual consent under Section 13-B of the Act.

6. Since the maintainability of execution petition itself is doubtful, the Judge, Additional Family Court, Visakhapatnam, is directed to decide the maintainability of E.P., without insisting the personal appearance of the petitioner and production of the minor child, within three months from the date of receipt of a copy of this order.

7. When FCOP is filed under Sections 7,10 and 25 of Guardian and Wards Act, for declaration that the respondent is a natural guardian and for custody of the minor daughter, is pending and the rights of the respondent have to be decided by the Court after necessary enquiry, but based on the decree passed in O.P.No.217 of 2013, the respondent cannot be granted absolute custody of the child. However, those two matters cannot be enquired into by the Court below. Hence, I find no ground to withdraw E.P.No.10 of 2017 in O.P.No.217 of 2013 pending on the file of the Judge, Additional Family Court, Visakhapatnam.

8. In view of my foregoing discussion, the Judge, Family Court, Visakhapatnam, is directed to decide the maintainability of E.P.No.10 of 2017 filed under Order 21 Rule 32 of CPC, to enforce the decree passed by the Court under Section 13-B of the Act, without insisting upon the production of minor child and personal appearance of the petitioner, in accordance with law, within three

months from the date of receipt of a copy of this order, after affording opportunity to the petitioner and the respondent.

9. With the above direction, the Tr.C.M.P. is disposed of. No order as to costs. Miscellaneous petitions, if any, pending in this petition shall stand closed.

M. SATYANARAYANA MURTHY, J

14th February, 2018

sj

