

IN THE HIGH COURT OF JUDICATURE AT PATNA

CIVIL MISCELLANEOUS JURISDICTION No.207 of 2019

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Smt. Priyanka Srivastava (Female) aged about 40 years wife of Bipin Bihari Lal Daughter of Sachindra Nath Srivastava Resident of Mohalla- Nirala Nagar, Garwar Road, Main Post Office- Balia, P.S.- Balia, District- Balia (U.P.). At present- Awadhesh Abha Niwas, Behind C.M.C. Kali Asthan, Sasaram, P.S. Sasaram, District- Rohtas.

... .. Petitioner

Versus

Bipin Bihari Lal age 45 years Male son of Late Ujagir Prasad Resident of Mohalla- Mishra Bazar (Behind Rai Saheb Hotel), Gajipur, P.S. Gajipur, District- Gajipur (U.P.).

... .. Respondent

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Appearance :

For the Petitioner : Mr.Arun Kumar Singh, Advocate
For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT

Date : 11-04-2019

Heard learned counsel for the petitioner.

2. This application under Article 227 of the Constitution of India has been filed by the petitioner for setting aside the order dated 13.02.2018 passed by the learned Principal Judge, Family Court, Rohtas in Guardianship Case No.01 of 2014 whereby he has rejected the petition dated 07.10.2015 filed under



Order 7 Rule 11 and Section 11 of the Code of Civil Procedure (for short 'CPC').

3. Learned counsel for the petitioner has submitted that the order impugned is perverse. The court below failed to appreciate that the guardianship case filed by the respondent was barred under Section 11 of the CPC. Having regard to Section 11 of the CPC, the court below ought to have rejected the plaint at the threshold, as the matter had already been decided in a proceeding by the Hon'ble Allahabad High Court. He has contended that the respondent ought not to have been allowed to re-agitate the matter again and again by abusing the process of law.

4. At this stage, it would be apt to take brief note of the facts of the case. The petitioner was married to respondent in December, 2003. From the said wedlock, a male child was born on 30.11.2004. Subsequently, since there was matrimonial discord and incompatibility, the petitioner filed a case, *inter alia*, under Section 498 A of the Indian Penal Code against the respondent. She also filed Maintenance Case No. 25 of 2009 under Section 125 of the Code of Criminal Procedure at Sasaram. The respondent filed a Writ Petition No.14722 of 2010 before the Allahabad High Court. The said writ petition was dismissed vide order dated



22.03.2010. The operative part of the order dated 22.03.2010 is extracted hereinbelow:-

“The petitioner no.2, corpus, aged about 5 years, son of the petitioner no.1 is in the custody of the respondent no.4, who is mother of the child and it cannot be said that child is under illegal detention.

Accordingly, the petition lacks merit and is dismissed.

However, it is open for the petitioner no. 1 to approach forum for the relief as claimed in this petition, if so advised.”

Thereafter, the respondent filed Guardianship Case No. 1 of 2014 in the court of Principal Judge, Family Court, Rohtas at Sasaram seeking custody of the minor Yash Shrivastava. The petitioner filed an application under Order 7 Rule 11 and Section 11 of the CPC and prayed to reject the plaint of Guardianship Case No. 1 of 2014 on the ground that the suit is hit by the principle of *res judicata*. Having heard learned counsel for the parties, the learned Principal Judge Family Court, vide impugned order dated 13.02.2018, rejected the application filed by the petitioner.

5. Being aggrieved by the aforesaid order dated 13.02.2018, the instant civil miscellaneous case has been filed before this Court.



6. Section 11 of the CPC reads as under:-

“11. **Res judicata.**—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

7. In order to constitute *res judicata*, the following ingredients are essential; (i) there must be two suits-one former suit and the other subsequent suit; (ii) the matter directly and substantially in issue must be the same either actually or constructively in both the suits; (iii) the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit; (iv) the parties to the suits or the parties under whom they or any of them claim must be the same in both the suits; and (v) the Court which decided the former suit must be competent to try the subsequent suit.



8. If these requisites are fulfilled, only then it can be said that the subsequent suit is barred by the principal of *res judicata*.

9. The object behind the doctrine of *res judicata* is that once matter has been determined in a former proceeding, it should not be open to the parties to re-agitate the matter again and again.

10. In the instant case, as seen from the pleading of the petitioner as well as the order passed by the Allahabad High Court in Writ Petition No.14722 of 2010, it would be manifest that there is no similarity between the case filed before the Allahabad High Court and the suit brought before the Principal Judge, Family Court, Rohtas. The suit before the Allahabad High Court was for production of the corpus claimed to be in illegal detention. Having considered that the child aged about 5 years is in custody of mother, the Allahabad High Court dismissed the writ petition filed by respondent giving liberty to the respondent to approach the appropriate forum for the custody of the child.

11. The suit filed before the Principal Judge, Family Court, Rohtas is under Section 25 of the Guardians and Wards Act, 1890. Said Section 25 provides that if a ward leaves or is removed from the custody of a guardian of his person, the Court,



if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

12. The word 'guardian' has been defined under Section 4(2) of the Guardians and Wards Act, 1890 as under:-

“4(2) “guardian” means a person having the care of the person of a minor or his property, or of both his person and property.”

13. Section 4(3) of the said provision defines 'ward'. It states that 'ward' means a minor for whose person or property, or both, there is a guardian.

14. The father claiming himself to be guardian of a minor child has a right to file a suit under Section 25 of the Guardians and Wards Act, 1890.

15. Having regard to the facts and circumstances of the case, it is quite clear that there is neither existence of two suits nor the proceeding before the Principal Judge covers the matter involved in the writ petition nor the issues raised by the respondent before the Principal Judge has ever been decided by the writ court. Hence, the suit in question is neither barred by the



principle of *res judicata* nor the same requires to be rejected at the threshold.

16. In that view of the matter, the order passed by the court below is neither without jurisdiction nor perverse.

17. Having found no error with the order impugned, I see no merit in this application. It is dismissed, accordingly.

(Ashwani Kumar Singh, J)

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AFR/NAFR	NAFR
CAV DATE	NA
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