

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CIVIL REVISION APPLICATION NO. 14 OF 2019

Krushnakumar S/o Chhotelal Verma and others
vs.
Lekha W/o Krushnakumar Verma and others

Office Notes, Office Memorandum of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri. Madhur Deo, counsel for applicants.
Shri. S. K. Sable, counsel for respondents.

CORAM : MANISH PITALE J.

DATED : 20/02/2020

CIVIL APPLICATION (C) NO. 19/2020

This is an application filed on behalf of the revision applicants seeking correction of the name of applicant No.8 in the cause title. It appears that due to inadvertence the name of applicant No.7 has been repeated as applicant No.8.

2. For the reasons stated in the application, the same is allowed and the revision applicants are permitted to correct the name of the applicant No.8 in the cause title. The amendment be carried out forthwith.

3. Application disposed of.

CIVIL REVISION APPLICATION NO. 14 OF 2019

By this revision application, the applicants have challenged order dated 27/11/2018 passed by the Court of Principal District and Sessions Judge, Gondia, whereby an application under Order 7 Rule 11 of the Civil Procedure Code, 1908 (CPC) (Exh.17) has not been decided and instead the Court below has directed that the points raised in the application be kept open and if they are pressed at the time of final hearing of the main petition, they can be decided along with main petition.

2. The main petition in the present case has been filed by respondent No.1 seeking custody of minor girl child from the applicant No.1 herein. There is no dispute about the fact that the applicant No.1 and the respondent No.1 were married and they had two issues from the marriage. The younger child, being a male, has been in the custody of respondent No.1 and the elder child i.e. the girl child has continued in custody of the applicant herein.

3. In the said petition filed on behalf of respondent No.1 it is claimed that although the said respondent had filed an earlier application seeking custody of the girl child from the revision applicant No.1 herein, since there was a compromise between the parties, wherein they decided to reside together, the said application was unconditionally withdrawn by the respondent No.1 before the Lok Adalat. It is further

pleaded that a fraud has been committed by the applicants herein, due to which the respondent No.1 is constrained to approach the Court again seeking custody of the girl child. The facts regarding filing of the earlier application and the order passed before the Lok Adalat have been specifically stated on behalf of respondent No.1 and yet relief in the aforesaid nature has been sought.

4. In the said application, the revision applicants moved an application under Order 7 Rule 11 of the CPC (Exh.17) claiming that this subsequent application was barred by the principle of *res judicata* and that therefore, the subsequent application filed by the respondent No.1 deserved to be rejected at the threshold. It is in this application at Exh.17, that the Court below has passed the impugned order holding that the application at Exh.17 deserves to be filed with the observation that the points raised in the application are kept open to be considered along with the main petition at the time of final hearing.

5. Taking exception to the impugned order passed by the Court below, the learned counsel appearing for the applicants relied upon the judgment of the Hon'ble Supreme Court in the case of **R. K. Roja vs. U. S. Rayudu and another, (2016) 14 SCC 275**, to contend that an application under Order 7 Rule 11 of the CPC cannot be kept pending and the parties cannot be directed to go to trial while keeping such an application

pending. It is submitted that therefore, the impugned order deserved to be set aside and the application at Exh.17 needs to be decided before the main petition filed by the respondent No.1 can be taken up for consideration..

6. On the other hand, the learned counsel appearing for the respondent No.1 has invited attention of this Court to the pleadings in the subsequent application for custody of the girl child filed by the respondent No.1, particularly paragraph 9 thereof to contend that it is precisely the case of the respondent No.1 that fraud was committed by the revision applicants herein when the order was passed in the Lok Adalat for unconditional withdrawal of the application. On this basis, it was submitted that no interference was warranted in the impugned order.

7. Heard learned counsel for the rival parties and perused the material on record. A perusal of the judgment of the Hon'ble Supreme Court in the case of **R.K.Roja vs. U.S. Rayudu and anr.** (supra), does show that position of law has been clarified by the Hon'ble Supreme Court to lay down that an application under Order 7 Rule 11 of the CPC cannot be kept pending and parties cannot be directed to proceed with the trial. It is observed by the Hon'ble Supreme Court that once such an application under Order 7 Rule 11 of the CPC is filed, the Court is supposed to dispose of the same before proceeding with the trial. As regards the position of law,

there can be no quarrel about the same and the submission raised on behalf of the revision applicants in that regard cannot be refuted.

8. But, in the facts and circumstances of the present case, instead of setting aside the impugned order and remanding the matter back to the Court below for consideration of the application under Order 7 Rule 11 of the CPC, this Court found it fit to examine the veracity of the contentions raised on behalf of the revision applicants in the application filed under Order 7 Rule 11 of the CPC. This is particularly so because the litigation in the present case concerns the prayer made by a mother seeking custody of girl child.

9. A perusal of the application under Order 7 Rule 11 of the CPC filed on behalf of the revision applicants shows that according to them, the application for custody of the girl child filed by the respondent No.1 is barred by the principle of *res judicata*, in view of the award passed in Lok Adalat on 12/11/2016, which has attained finality, under which the respondent No.1 had unconditionally agreed to withdraw a similar application seeking custody of the girl child. But, a perusal of the said subsequent application for custody of girl child filed by the respondent No.1, which is pending before the Court below, shows that the proceedings before the Lok Adalat were not only divulged in paragraph 9 of the said application, but a specific plea was raised that fraud was committed by the revision applicants herein, particularly

revision applicant No.1 while obtaining such an Award from Lok Adalat. Therefore, merely because an Award was earlier passed by the Lok Adalat would not be a ground for throwing out the subsequent application at the threshold, in the facts and circumstances of the case. The question as to whether the respondent No.1 is justified in claiming fraud against the revision applicants goes to the root of the matter and also the basis of the contention raised on behalf of the revision applicants while applying the principle of *res judicata*. Therefore, this Court is of the opinion that such an application filed under Order 7 Rule 11 of the CPC on behalf of the revision applicants is without any merits and that it cannot be accepted.

10. As noted above, this Court could have set aside the impugned order on the basis of the position of law laid down by the Hon'ble Supreme Court in the above mentioned judgment and the matter could have been remanded to the Court below for deciding the application under Order 7 Rule 11 of the CPC before sending the parties to trial. But, in the interest of justice, this Court has considered the contentions raised in the application under Order 7 Rule 11 filed on behalf of the revision applicants and having found that there is no substance therein, it is held that no interference is warranted in the impugned order passed by the Court below.

11. It is made clear that the revision applicants herein would obviously be entitled to raise the question of *res judicata* before the Court below when the application for custody of the girl child filed by the respondent No.1 is taken up on merits. The Court below shall decide the said issue along with the entitlement of the respondent No.1 to claim custody of the girl child on merits by giving sufficient opportunity to the rival parties to lead evidence.

12. Revision application is dismissed in above terms. No order as to costs.

JUDGE