

10.06.2021
TN

CO No.644 of 2021

(Via video conference)

Nucleus Paul
Vs.
Mridula Barman

Mr. Bratin Kumar Dey

.... for the petitioner

The petitioner-husband has challenged an order dated December 9, 2020 passed by the Additional District Judge, 12th Court at Alipore (in charge of 15th ADJ, Alipore), whereby the opposite party-wife was permitted to withdraw her suit for divorce with liberty to file afresh.

Learned counsel for the petitioner submits that the petitioner had taken out an application for visitation rights to the child of the parties which, being refused, the petitioner-husband moved a revisional application bearing CO No.1121 of 2020. By referring to an order dated June 5, 2020 passed by a co-ordinate Bench in connection with the said revision, learned counsel points out that an interim arrangement of visitation by the petitioner

regarding the child was granted by this court. By withdrawing the suit with liberty to sue afresh, the opposite party is trying to curtail such accrued right of the petitioner by virtue of the said order.

That apart, it is argued that the suit was permitted to be withdrawn without notice to the petitioner, upon a put-up petition being filed by the opposite party-wife, and the impugned order was passed behind the back of the petitioner.

Learned counsel further submits, by placing reliance on a judgment of the Andhra Pradesh High Court reported at *AIR 2009 AP 12*, that satisfaction of the court regarding the ingredients of Order XXIII Rule 1(3) of the Code of Civil Procedure has to be recorded in the order. A suit cannot be permitted to be withdrawn, it is submitted, merely for the asking, without ascertaining whether there was any actual defect in the plaint and/or there was sufficient reason to grant liberty to sue afresh.

However, it appears from the impugned order that the courts specifically recorded the submission of learned counsel for the opposite party-wife to the effect that there were certain typographical errors and mistakes in the application under Section 27(1)(d) of the Special Marriage Act filed by the opposite party-wife and, upon hearing counsel, was

pleased to allow such prayer. Detailed recording of such satisfaction as contemplated under Order XXIII Rule 1(3) of the Code is not integral to such an order. Moreover, no case has been decided by the impugned order.

That apart, no prejudice is suffered by the petitioner-husband due to such withdrawal with liberty to file afresh, since the trial court had refused his prayer for interim visitation, against which a revisional application is pending. Such refusal by the trial court and the *ad hoc* arrangement made in the revisional application for visitation cannot be construed to have conferred an accrued 'right' to the petitioner sufficient to vitiate the impugned order.

Moreover, the recording of the submissions of learned counsel for the opposite party-wife by the trial court and subsequent allowing of the prayer pre-supposes the satisfaction of the trial court on the ingredients of Order XXIII Rule 1(3) of the Code. Non-recording of detailed reasons in an order of such nature does not, *ipso facto*, vitiate such an order.

That apart, the *ad hoc* arrangement made by virtue of the interim order dated June 5, 2020 passed in CO No.1121 of 2020 is not directly

affected by the withdrawal of the suit, unless the revisional application is dismissed as infructuous formally by the court.

Neither the interim order of refusal of the visitation right to the petitioner passed by the trial court, nor the *ad hoc* arrangement made by virtue of the order of the co-ordinate Bench are of a final nature but were both tentative in nature and do not curtail/confer permanently any right of the petitioner-husband regarding visitation of the child.

Hence, there is no scope of interference with the impugned order. Accordingly, CO No.644 of 2021 is dismissed.

However, it is made clear that the withdrawal of Matrimonial Suit No.2437 of 2019 by the opposite party shall not prejudice the rights otherwise available to the petitioner in law to make a fresh prayer for visitation in the new suit filed by the opposite party and/or the suit for restitution of conjugal rights already pending at the behest of the petitioner-husband, as submitted by learned counsel.

That apart, neither this order nor the order impugned herein shall operate to cancel the *ad hoc* arrangement made in the order dated June 5, 2020 till disposal of the said revisional application, that

is, CO No.1121 of 2020, and shall be subject to any final order passed therein.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)