

25/05/2021
Item No.6.
Court No.19.
AB

Through Video Conference

C. O. 894 of 2021

Dr. Suchi Karmakar nee Acharya

Vs

Dr. Arnab Karmakar

Mr. Sakya Sen,
Mr. Arindam Paul ...for the Petitioner.

Mr. Partha Pratim Roy,
Mr. Aniruddha Chatterjee,
Mr. Dyutiman Banerjee,
Mr. Chiranjib Sinha ...for the Opp. Party.

The mother of a child, at present aged about 5 & ½ years, has challenged an order no.13 dated March 23, 2021 passed by the learned Additional District Judge, 6th Court at Alipore in Act VIII Case No.37 of 2020.

By the order impugned, the learned Additional District Judge allowed the petition dated July 6, 2020 filed by the father/opposite party herein on consent permitting the father to virtual visitation with the minor son through WhatsApp video call from his registered mobile number once in a week on every Sunday in the evening for half an hour from 6 p.m. to 6.30 p.m. until further order.

Mr. Roy, the learned Advocate appearing for the father/opposite party herein raised a preliminary objection with regard to the maintainability of the instant application under Article 227 of the Constitution of India since the order impugned is a consent order.

Mr. Sen, the learned Advocate appearing for the petitioner, submits that the impugned order contains an erroneous recording of the alleged consent on the part of the mother.

He further contends that the petitioner herein filed a demurrer application challenging the maintainability of the ACT VIII case pending before the learned Court below. He further submits that on March 23, 2021, when the matter was heard by the learned Presiding Officer, the petitioner herein prayed for hearing of demurrer application first, but such submission was also not recorded in the order impugned.

Mr. Sen further submits that alleging erroneous recording of the alleged consent as well as non-recording of certain submissions advanced by the petitioner herein before the learned Court below, the petitioner has taken out an application under Order 47 Rule 3 read with Rule 5 of the Code of Civil Procedure, inter alia, praying that the orders dated March 8, 2021 and March 23, 2021 be recalled.

Mr. Sen further submits that the petitioner herein also made attempts to move the said review application by filing a put-up petition, but the same was also not entertained by the learned Judge of the Court below.

By referring to various medical documents annexed to the supplementary affidavit filed before this Court, Mr. Sen contends that the mode of communication between the father and the child as directed by the order impugned will have an adverse effect on the health of the child. Mr. Sen further submits that the welfare of the child demands that the father should not insist for compliance of the impugned order till further order/orders is/are being passed by the learned Court below on the application for review and the demurrer application filed by the petitioner before the learned Court below. As such, he submits that the present status quo as prevailing immediately after passing of the order dated April 12, 2021 by this Court shall be allowed to continue till the matter is decided by the learned Court below.

He also submits that the mother has no objection in the event the father visits the residence of the mother physically and exercises his visitation rights over the child.

In reply, Mr. Roy, the learned Advocate for the opposite party, assisted by Mr. Chatterjee, learned

Advocate, disputes the contention of Mr. Sen with regard to the physical condition of the child and also with regard to the effect of the communication between the father and the child on the health of the child.

I have heard the learned Advocates for the parties and have considered the materials on record.

After going through the impugned order, it appears to this Court that the said order was passed as per the terms and conditions mutually agreed between the parties.

The principal dispute in the instant civil revisional application revolves around recording of consent by the learned Judge of the Court below. Such dispute cannot be decided by this Court as it is well-settled that the statement of the Judges recorded in their judgment as to what transpired in the Court below is sacrosanct. In this regard, it would be profitable to refer to a decision of the Hon'ble Supreme Court of India in the case of ***State of Maharashtra Vs Ramdas Shrinivas Nayak & Anr.*** reported at ***(1982) Vol.2 SCC 463***. The Hon'ble Supreme Court held thus –

“para 4.....We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that

something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice ; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. *In R v. Mellor Martin, B. was reported to have said: "We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity."*
6. *In King Emperor v. Barendra Kumar Ghose Page, J. said: ".....these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive : It is not to be criticized or circumvented ; much less is it to be exposed to animadversion."*
7. *In Sarat Chandra Maiti v. Bibhabati Devi Sir Asutosh Mookerjee explained what had to be done :*

“.....It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment....”

8. So the Judges’ record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else.”

Thus, the issue as to whether any consent was given by the petitioner herein before the learned Court below for passing the order dated March 23, 2021 cannot be decided by this Court. Records reveal that the petitioner has already filed an application under Order 47 of the Code before the learned Court below and the same is still pending before the learned Court below. Accordingly, this Court is of the view that justice would be sub-served if the learned Presiding Officer, who passed the order dated March 23, 2021, is directed to hear out the said application for review expeditiously.

With regard to the argument and counter argument of the parties insofar as the effect of the communication between the father and the child on the health of the child is concerned, this Court does not deem fit, at this stage, to make any observation on that aspect as it does not appear from the impugned order that such aspect of the matter was at all raised

before the learned Judge of the Court below when the matter was heard on March 23, 2021.

Whether the petitioner herein prayed for hearing of the demurer application before the learned Judge on March 23, 2021 is also a matter to be considered by the learned Court below while deciding the application for review as a specific ground has been taken in this regard in the said application for review.

With regard to the other contentions of Mr. Sen that the status quo immediately after passing of the order dated April 12, 2021 by this Court is to be continued till the matter is heard by the learned Court below, cannot be accepted by this Court as this Court is not inclined to interfere with the order impugned in the instant civil order for the reasons as aforesaid. The legality and/or foundation of such order is the subject matter of the review application, which is to be decided by the learned Judge of the Court below.

Since the matter relates to visitation right of a father over his child and the nature of the allegations made in the review application are such that the same is required to be decided at the earliest as observed by the Hon'ble Supreme Court of India in Ramdas (supra), I request the learned District Judge, 24 Parganas (South) at Alipore to place the application for review filed by the petitioner herein in connection with

ACT VIII Case No. 37 of 2020 before the learned Presiding Officer, who passed the impugned order dated March 23, 2021, at the earliest.

Upon the matter being placed before the learned Presiding Officer, the learned Presiding Officer shall make endeavour to take up the hearing of the said application and dispose of the application for review expeditiously and without granting any unnecessary adjournment to either of the parties.

This Court, however, makes it clear that this Court has not gone into the merits of the review application and the learned Judge of the Court below will be free to decide the same in accordance with law.

The parties will be at liberty to approach the learned Court below by making necessary application for appropriate reliefs.

With the aforesaid directions, C. O. No.894 of 2021 is disposed of without, however, any order as to costs.

Registry is directed to communicate this order to the learned District Judge, 24 Parganas (South) at Alipore forthwith.

The parties will also be at liberty to communicate this order to the learned District Judge, 24 Parganas (South) at Alipore and the learned Judge of the Court below.

Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Hiranmay Bhattacharyya, J.)