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ns Ct.04

F.A.T. 332 of 2019
With
I.A. No.CAN 1 of 2019 (Old CAN 7884 of 2019)
With
I.A. No.CAN 2 of 2019 (Old CAN 7885 of 2019)

Smt. Rumpa Gupta (Nee Bose).
Vs.
Sri Avishek Gupta.

Mr. Dhiraj Trivedi,
Mr. Partha Pratim Dutt for appellant.

Mr. Sabir Ahmed,
Mr. A. Saha ... for respondent.

Mr. Trivedi, learned advocate appears on behalf of appellant/wife. On 15th January, 2021, he had made submissions on his client being aggrieved by impugned order dated 14th June, 2019, rejecting her application dated 17th April, 2018 under section 26 of Hindu Marriage Act, 1955. Respondent went unrepresented that day but is now represented.

We had posed following queries to Mr. Trivedi
by order dated 15th January, 2021.

“Appellant is on notice that there are two questions to be answered at the outset. First is whether period provided in sub-section (4) of section 28 in Hindu Marriage Act, 1955, of 90 days for preferring appeal, can be superseded by rules of this Court in fixing the period for filing appeal at 30 days. Second,

whether the appeal is maintainable per sub-section (2) in section 28.”

Mr. Trivedi relies on a full Bench decision of Bombay High Court in **Shivram Dodanna Shetty vs. Sou Sharmila Shivram Shetty** reported in **AIR 2017 Bombay 1**, paragraph 29, reproduced below:-

“29. For the reasons stated above, we hold that for an appeal filed under sub-section(1) of Section 19 of the Family Courts Act, 1984, period of limitation prescribed under sub-section (4) of Section 28 of the Hindu Marriage Act, 1955 shall apply.”

He submits, as such there is no delay. He submits further, it appears from face of impugned order that it is not an interim order but a rejection, covered by sub-section (2) in section 28.

It is to be noted that the appeal was not reported to be defective on delay. As such no order is required to be made on IA no.CAN1 of 2019 (old CAN 7884 of 2019). It is disposed of.

On consent of parties, we take up the appeal for hearing on dispensing with formalities including service of notice of appeal.

Mr. Trivedi submits, technicalities weighed with learned Court below, of two prayers made in the petition, for custody and visitation.

He relies on judgment of Supreme Court in **Ruchi Majoo vs. Sanjeev Majoo** reported in **(2011) 6 SCC**

479, particularly, paragraphs 68 and 72 to 74. He submits, his client cannot be denied, at least, visitation right. He wants impugned order be reversed.

Mr. Ahmed, learned advocate appearing for respondent husband draws attention to impugned order and submits, learned trial judge went on paramount consideration, as would be evident from extract below:-

“It would not be wise to allow the petition for visitation right of the mother/petitioner when the daughter aged about 11 years is vehemently refused to meet with her. It is not the matter of force and if force applied on her, when it would cause mental disturbance. Paramount consideration is the welfare and well-being of the child in the matter of custody and visitation. Wish of the child should be given value in the matter of visitation. In such situation, I think that the prayer made by the petitioner cannot be allowed.”

We allow for discretion exercised by learned Court below on interaction with the child. However, the exercise was not discussed in context of the law regarding a parent wanting custody or visitation right. The two prayers can also be seen as a main prayer and an alternative one. Prayer for custody would be by a parent contending for the whole and in the alternative might settle for visitation. The lesser relief of visitation, when is denied ought to be on some discussion regarding the law of entitlement to

visitation by a parent. In **Ruchi Majoo** (supra) Supreme Court considered the situation where the parent having custody may be a negative influence regarding the child's impression of the other parent. We are not saying that is the case here but impugned order does not reveal any enquiry made regarding why the child refuses to see the mother. Trial Court did not obtain satisfaction on law that visitation right can be denied to a parent.

In view of what we have said above, we reverse impugned order and remand the petition made by appellant under section 26, to be reheard.

The appeal and connected application [IA no. CAN 2 of 2019 (old CAN 7885 of 2019)] are disposed of.

(Arindam Sinha, J.)

(Suvra Ghosh, J.)