

10 08.08.2022
SB Ct. No. 8

F.M.A. 445 of 2021
with
CAN 1 of 2021
+
CAN 2 of 2022

In the matter of : Ananya Nandy

Mr. Debjit Mukherjee
Ms. Susmita Chatterjee
Mr. Koustav Bhattacharyya
... for the appellant

Mr. Sukumar Bhattacharyya
Mr. Piyai Show
Ms. Oindrila Chatterjee
... for respondent

By consent of the parties the appeal and the connected application are taken up together and disposed of by this common order.

The appellant filed an application being CAN 2 of 2012 for recalling and / or vacating of orders dated 28.1.2021 and 22.12.2021.

The learned counsel appearing on behalf of the respondent / applicant has submitted that the LCR was called for without admitting the appeal under Order 41 Rule 11 of the Code of Civil Procedure, and absence of LCR has caused impediment in proceeding with the MAT. Suit 242 of 2019 filed by the appellant / wife.

It is submitted that the order impugned has arisen out of a proceeding initiated under Section 38 of the Special Marriage Act, 1954 read with Order 39 Rules 1 and 2 of the Code of Civil Procedure. In deciding the application under Section 38 of the Special Marriage Act which concerns custody of children there is no requirement for the LCR of MAT Suit 242 of 2019 to be brought before this Court.

By reason of arrival of LCR prejudice is caused to the respondent.

We find from the record that LCR was called for at the instance of the respondent / applicant upon depositing the special messenger cost by the respondent.

The application is not on the merits of the orders passed on the respective dates. The matter was heard at length and thereafter the earlier order dated 28.01.2021 was confirmed with certain modifications.

In view thereof, we do not find any reason to recall the impugned order save and except that the LCR arrived shall be returned forthwith to the Court of the learned District Judge, Hooghly, Chinsurah within a period of fortnight by the department concerned.

The learned counsel for the respondent has fairly submitted that the arrangement with regard to the custody of the child with the mother can continue till the disposal of the application filed by the husband under the Guardians and Wards Act.

In the order dated December 22, 2021 the co-ordinate Bench has adequately protected the interest of the applicant in the pending proceeding. At this stage, we do not want to disturb the interim custody of the child subject to the final decision in the pending proceeding.

We make it clear that denial of the modification prayed for to the extent alleging visitation right of his son at a regular interval, i.e., Saturday and Sunday at this stage should not operate as *res judicata* in the pending proceeding. The learned Judge shall decide the custody matter taking into consideration

the best interest and welfare of the child.

The appeal and connected applications are disposed of without any order as to costs.

(Siddhartha Roy Chowdhury, J.)

(Soumen Sen, J.)