

S/L 23
28.02.2024
Court. No. 3
Sourav/
Suvayan

CO 1247 of 2021

**Smt. Aindrila Dey
Vs.
Sri Avijit Das & Ors.**

*Mr. Tapash Kumar Bhattacharya
Mr. Aviroop Bhattacharya*

...for the petitioner.

1. The petitioner is represented by her learned advocate.
2. The affidavit-of-service as filed on behalf of the petitioner today be taken on record.
3. None appears on behalf of the opposite party no. 1, despite service.
4. In view of such, this Court proposes to dispose of the instant revisional application in absence of the opposite party no. 1.
5. In this revisional application as filed under Article 227 of the Constitution of India, the order nos. 10, 11, 12, 13 dated 30.11.2019, 06.03.2020, 16.10.2020 and 11.02.2021 respectively as passed by the learned Additional District Judge, First Track Court No. 4, Barasat, North 24 Parganas in Misc. Case no. 102 of 2018 as filed under Section 38 of the Special Marriage Act, 1954 hereinafter referred to as the 'said Act' have been impugned.
6. In support of the instant revisional application, Mr. Bhattacharya, learned advocate for the petitioner at the very outset submits before this Court that originally the petitioner and the opposite party no. 1

filed a suit for mutual divorce under Section 28 of the said Act before the learned Trial Court and the same was registered as MAT Suit no. 1764 of 2017. Drawing attention to Annexure 'C' of the instant revisional application, it is submitted by Mr. Bhattacharya that by an order dated 17.08.2019 as passed in the said MAT Suit, the said petition for mutual divorce was, however, dismissed by the learned Trial Court holding that the same is barred by law.

7. It is further contended by Mr. Bhattacharya that during the pendency of MAT Suit No. 1764 of 2017 the opposite party no. 1 who is the husband of the present revisionist has filed an application under Section 38 of the said Act praying for custody of the child of the present revisionist and the same was registered as Misc. Case No. 102 of 2018 by the learned Trial Court. Drawing attention to the certified copy of the impugned orders, it is contended by Mr. Bhattacharya that since an application under Section 38 is an interim application which has been filed in a suit for mutual divorce under Section 28 of the said Act, under no stretch of imagination, it can be construed that the said application under Section 38 of the said Act is an independent application and since the original suit being MAT Suit No. 1764 of 2017 stood dismissed as on 17.08.2019, learned Trial Court is not justified to proceed with Misc. Case No. 102 of 2018.

8. It is thus contended that by passing the impugned orders as referred to above, a serious miscarriage of justice has occurred which is required to be rectified by this Court in exercise of its plenary power under Article 227 of the Constitution of India.
9. From the materials as placed before this Court and after hearing the learned advocate for the petitioner, it reveals that Section 28 of the said Act has been placed in Chapter VI of the said Act and the legislatures on their own wisdom has incorporated the provision of Section 38 of the said Act to enable the Court to pass appropriate interim orders regarding custody of a child in order to avoid multiplicity of suits and proceedings.
10. As rightly pointed out by Mr. Bhattacharya, since an application under Section 38 of the said Act flows out of a proceeding either under Chapter V or Chapter VI of the said Act, under no stretch of imagination it can be said that an application under Section 38 of the said Act is an independent proceeding.
11. In view of the discussion made hereinabove, this Court considers that the learned Trial Court is not at all justified in proceeding with Misc. Case No. 102 of 2018 as filed under Section 38 of the said Act especially when the original MAT Suit No. 1764 of 2017 as filed under Section 28 of the said Act has been dismissed by the said Court being barred by law.

12. As a result, the instant revisional application succeeds.
13. The impugned order nos. 10, 11, 12, 13 dated 30.11.2019, 06.03.2020, 16.10.2020 and 11.02.2021 respectively as passed by the learned Additional District Judge, First Track Court No. 4, Barasat, North 24 Parganas in Misc. Case no. 102 of 2018 are hereby set aside. Consequently, Misc. Case No. 102 of 2018 cannot be proceeded further and the same is also dismissed.
14. Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Partha Sarathi Sen, J.)